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One Hundred Years Of Influence On National Jurisprudence: Second Circuit Court of Appeals Decisions Reviewed By The United States Supreme Court

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AGENDA

**Tenth Annual History Lecture and
Opening of COLLEAGUES FOR JUSTICE**

October 28, 1991
4:00 P.M. Courtroom #1703
Foley Square Courthouse

- I. Chief Judge James L. Oakes
 - welcoming remarks
 - introduces Judge Richard Owen's original composition
- II. Judge Owen, Lynn Owen and musicians
 - perform composition
- III. Judge Oakes
 - thanks Judge Owen
 - opens exhibit
 - introduces Judge Roger J. Miner
- IV. Judge Miner
 - delivers history lecture
- V. Judge Oakes
 - thanks Judge Miner
 - introduces Lynn Owen who will sing "America the Beautiful" before guests proceed to lobby for reception.
- VI. Singing of America the Beautiful
 - Lynn Owen

Speech as
given by
RJM

ONE HUNDRED YEARS OF INFLUENCE ON NATIONAL JURISPRUDENCE:
SECOND CIRCUIT COURT OF APPEALS DECISIONS
REVIEWED BY THE UNITED STATES SUPREME COURT

Foley Square Courthouse
Courtroom 1703
October 28, 1991
4:00 P.M.

1891 was a year of notable events in New York City. Carnegie Hall, built with a gift from steel magnate Andrew Carnegie, began its existence with a concert conducted by Tchaikovsky. ^{* In 1891} Dean Theodore Dwight and several professors resigned their positions at Columbia Law School in a dispute over teaching methods and founded New York Law School, my alma mater. The beautiful New York Botanical Gardens opened in the Bronx. Oscar Wilde's play, "The Duchess of Padua" had its premiere at the Broadway Theater. American Express issued its first Travelers Cheques. George Batten established the first full service advertising agency, later to be known as Batten, Barton, Durstine & Osborn, and we have been battered and bothered by pervasive advertising ever since.

The notable New York Event of 1891 that we celebrate today is the establishment of the United States Court of Appeals for the Second Circuit, then known as the United States Circuit Court of Appeals for the Second Circuit. The Court was created by the Act of March 3, 1891,¹ popularly known as the Evarts Act after its principal sponsor, Senator William M. Evarts of New York. A distinguished lawyer, William Evarts served from 1870 to 1879 as the first President of the Association of the Bar of the City of

* You all know of Tchaikovsky. He was the Dick
Evens of his day.

New York.² The Evarts Act was passed by Congress in response to the enormous caseloads facing the federal courts in general and the Supreme Court in particular.³ At the time of its passage, more than 42,000 cases were pending in the federal courts of the nation, approximately 22,000 in the courts within the Second Circuit alone.⁴ Legislation enacted in 1875 conferring general federal question jurisdiction upon the federal courts and expanding diversity jurisdiction⁵ contributed in great measure to this volume.

The old Circuit Courts, which had exercised both trial and appellate jurisdiction since the creation of the federal courts in 1789, had no judges of their own until 1869, originally being composed of a District Court Judge and two Supreme Court Justices "riding circuit."⁶ In 1869, Congress created a Circuit Judgeship for each of the nine judicial circuits into which the nation then was divided and provided that the Circuit Court could be held by the Circuit Justice, Circuit Judge or District Judge, either alone or in combination.⁷ However, the Justices found it difficult to sit in the Circuits even once every two years as required, the Circuit Judges could not keep up with their caseloads and, by the late 1880s, District Judges sitting alone disposed of most of the Circuit Court litigation.⁸ Despite the addition of another Circuit Court Judgeship in 1887,⁹ the courts of the Second Circuit were awash in cases at the time of the adoption of the Evarts Act.

The Evarts Act established Courts of Appeals within each of

the nine existing circuits, and a joint resolution of Congress required that each of the new Courts hold its first meeting on the third Tuesday in June, 1891.¹⁰ Accordingly, the United States Circuit Court of Appeals for the Second Circuit convened for the first time on June 16, 1891 at the United States Post Office Building and Courthouse, Park Row and Broadway, New York City. Present at the first session were Associate Justice Samuel Blatchford of the Supreme Court and Circuit Judges William J. Wallace and E. Henry Lacombe.¹¹ Although the other circuits were authorized only two judges, the Second Circuit was authorized three in the original legislation.¹² Judges Wallace and Lacombe came over from the old Circuit Court, and Nathaniel Shipman of Connecticut would join the new Court in March of 1892 as its third judge and the first appointed under the Evarts Act.¹³ At its initial session on June 16, the new Court appointed a Clerk, a Marshal and a Crier, adopted Rules of Court including a rule that limited oral argument to two hours per side, and adjourned until October 27, 1891, the last Tuesday in October.¹⁴ *

The June 17, 1891 edition of the New York Times (Price Two Cents; Sunday Edition Five Cents) carried a story of the Court's organizational meeting under the headline, "The New Court of Appeals; It Organized Yesterday and Adjourned for the Summer."¹⁵ ** According to the Times, "Justice Blatchford opened the proceedings by reading the act under which the new court was established by Congress, and spoke of what its duties and business would be."¹⁶ It also was reported that "[o]n behalf of

* Incidentally, those Rules of Court allowed argument of 1 hour per side on most cases 3, and specifically provided that no fee would be charged for admission to the bar of the Court.
* * With a headline like that, it is no wonder that the public thinks judges don't work very hard!

the bar Joseph H. Choate made a short address concerning the necessity of the new Court of Appeals."¹⁷ Carefully noted by the author of the dispatch was the following: "Judge Wallace sat at the right of the Supreme Court Justice, and Judge Lacombe on the left. All wore black silk robes like those worn in the Supreme Court at Washington."¹⁸

I pause here to take note of an advertisement that appeared in the New York Times in the column next to the one describing the opening session of the Court. The advertisement included the following testimonial by one George F. Jackson of Roxbury, Connecticut: "My appetite was poor, I could not sleep, had headache a great deal, pains in my back, my bowels did not move regularly. Hood's Sarsaparilla in a short time did me so much good that I feel like a new man. My pains and aches are relieved, my appetite improved."¹⁹ I wonder if George Batten had anything to do with that ad! By the way, Hood's Sarsaparilla was available at any druggist, "100 Doses One Dollar."²⁰ *

When the Court convened for business on October 27, 1891, precisely one hundred years ago yesterday, Judges Wallace and Lacombe constituted the bench. I spoke about Judge Wallace at some length in my 1984 lecture, "The United States District Court for the Northern District of New York -- Its History and Antecedents."²¹ For today, it suffices to say that Judge Wallace served as Mayor of Syracuse and Judge of the Northern District before becoming a Judge of the old Circuit Court in 1882. He served as the first Senior Circuit Judge of the Court of Appeals,

* I could use some now!

the position now designated as Chief Judge, from the formation of the Court in 1891 until his resignation in 1907.²² Following my lecture in 1984, the beloved Dan Fusaro, who served as Clerk of our Court for so many years, sent me a copy of a letter written by Judge Wallace to the Treasury Department. The date of the letter is not given, but we do know that a copy was forwarded by Learned Hand to an attorney named George Martin in 1934 with this bit of Hand doggerel verse: "Dear George. This is the letter. Here's the very note, this is what he wrote! L.H."²³

What Judge Wallace wrote was a protest against the disallowance of reimbursement for "water closet paper" purchased at his request by the Marshal. In the letter, the Judge seemingly agonized over the question of whether toilet paper should be considered an item required for official use. He wrote the following:

Water-closet paper is undoubtedly applied to private use, and is not ordinarily used officially. In former times, as appears from Campbell's Lives of the Chief Justices, (see Life of Lord Kenyon), the judges were accustomed to urinate in the court rooms, turning their backs to the spectators, and using a vessel provided for the purpose. Such a vessel would seem to be officially used when used in that way.

By analogy, water-closet paper, although not used in the Court room, may be used sub modo in the discharge of a judicial duty.²⁴

Judge Wallace went on to say that "[t]he Judges might undoubtedly use legal cap when they retire[d] to the water-closet" but opined "that such a practice would cost the

government more, annually, than the inexpensive water-closet paper."²⁵ He noted that the government purchased soap for the use of the judges and concluded with this rhetorical question: "Does it make any material difference whether the article is used to clean the judge's hands or his backsides?"²⁶ Wallace was far more generous than the federal government. His will provided for the distribution of \$160,000 and two parcels of New York City real estate for the benefit of indigent children.²⁷

Judge Lacombe, the second judge present at the creation, had served in the Union Army in the Civil War.²⁸ When he graduated from law school, he was too young to be admitted to the bar and had to wait two years to meet the age requirement.²⁹ He served in the New York City Corporation Counsel's office for some years and ultimately held the office of Corporation Counsel.³⁰ During his city service, he co-authored a book bearing the interesting title: "Table Of Cases, Involving Questions Of Law Peculiar to the City and County of New York, NY"³¹ * No great fan of the Sherman Act, Judge Lacombe found no antitrust violation in a refusal to deal situation, holding that: "[w]e have not yet reached the stage where the selection of a trader's customers is made for him by the government."³² A rumor has been in circulation for the past 100 years that Emil Lacombe twice turned down a nomination to the United States Supreme Court because he did not wish to leave New York City.³³ I reject this rumor,

having found no history of mental illness in Judge Lacombe's background. *It could not be that he feared a confirmation hearing. They didn't have any in those days!*

** We upstaters always knew that the law was different in New York City!*

At the call of the first calendar, according to the New York Times, there was "considerable confusion" in Room 122 of the Courthouse, and the Times reporter observed that "the lawyers indulged in the common practice of the State courts of lounging over the tables and carrying on conversation in audible tones."³⁴ Indeed, there was so much noise that Judge Wallace at one time asked if there were no Deputy Marshals present to preserve order.³⁵ Some things never change! One thing that has changed is the elimination of the "customary bow" given by the judges before taking their seats and noted in the Times article. I may reinstate that custom on the days when I preside.

The first argument heard was made in an admiralty case in which the trial court had awarded \$8,000 to one Edwin N. Pratt, Master of the Schooner Helen Auguste against the brig Havilah as the consequence of a collision at sea.³⁶ The defeated party argued in support of a motion to dismiss for lack of appellate jurisdiction, contending that the appeal had been filed before the Court of Appeals was organized and that the appeal should be heard by a judge of the old Circuit Court hearing appeals in admiralty. Judges Wallace and Lacombe rejected the motion in short order, holding that the appeal could properly be heard in the new Court.³⁷ We still have the Clerk's original minute book covering that first business session. The occasion apparently was so exciting to the Clerk that he noted the date as October 27, 1892, rather than 1891.³⁸ He got it right when the Court adjourned, however, noting that the session was adjourned at

11:00 A.M. to October 28, 1891.³⁹ Arguing in support of the motion in that first case was Henry Arden, Esquire. Opposed was Robert D. Benedict, Esquire. Arguing in two other admiralty cases on that first day was the redoubtable Charles C. Burlingham,⁴⁰ about whom our good history committee member Elliott Nixon tells many strange and wondrous tales. Counsel listed in the first printed docket of cases also included such familiar names as Carter & Ledyard, Coudert Brothers and Lord, Day & Lord.⁴¹

It is an historical fact that most of the cases on the Court's first calendar were admiralty matters and that such matters constituted a great part of the Court's work in its early years. New York was the world's most important port one hundred years ago, and the business of the Second Circuit reflected that fact. The paucity of admiralty cases on our present day dockets attests to the decline of New York City as a port. Indeed, the ebb and flow of one hundred years of history is reflected in the cases that come to our Court and in the cases that go from our Court to the Supreme Court of the United States.

All courts are constrained to take the cases that come to them. Judges cannot pick and choose the issues they wish to deal with nor develop programs of their own. So it is that the people and events of the times, the institutions, the conflicts, the concerns of society at the various points in history make their way into the courtroom. There can be no question that law is made as the courts work through the problems presented to them

and develop a jurisprudence that is at once predictable enough and flexible enough to accommodate the needs of the nation, keeping pace with the march of time. It came to me about a year ago that on the 100th Anniversary of the Second Circuit Court of Appeals, it might be interesting to consider the influence our Court has had upon the jurisprudence of the nation over the past century. To this end, I decided to undertake the task of examining the cases that have gone to the Supreme Court from our Court during the past one hundred years. It can of course be said that influence on national jurisprudence might be measured also by the frequency with which a court is cited as authority by its sister courts. There are other means of measurement as well. I have confined myself to Supreme Court review, and that has been a task of sufficient enormity.

First, a word about Supreme Court jurisdiction. Although the Evarts Act provided for the review of certain court of appeals decisions by the Supreme Court as a matter of right, only discretionary review was permitted in such important areas as diversity, patents, revenue, criminal and admiralty.⁴² Courts of Appeals were authorized to certify questions to the Supreme Court, which continued to have direct review jurisdiction over certain cases arising in the district courts or the old Circuit Courts: capital convictions, questions of constitutionality, and prize cases.⁴³ The old Circuit Courts finally were abolished in 1911, when their trial functions were transferred to the district courts.⁴⁴ The Judges' Bill of 1925 narrowed the right of direct

review, and the right was further narrowed in 1948, 1971, 1974 and 1976.⁴⁵ In 1948, the United States Circuit Courts of Appeals became the United States Courts of Appeals.⁴⁶ In 1988, Congress finally eliminated the last vestiges of the mandatory statutory jurisdiction of the Supreme Court.⁴⁷

After some false starts engendered by problems of methodology and research, I believe that I have been able to identify all the Second Circuit Court of Appeals decisions that were fully reviewed by the Supreme Court during the past 100 years. I ~~have lodged~~ ^{shall today lodge} with our Second Circuit Librarian a computer disk and a single hard copy of the research. There is listed ^{here} in chronological order each Supreme Court decision by case name, author and citation. A summary of the decision is provided, along with a citation to the Circuit Court decision reviewed, the name of the Circuit Court author, and a statement as to whether the Supreme Court is affirming or reversing the Circuit. The classification of each case entry into one of forty legal categories is noted next to the case name in the compendium.

Attached as appendices to this paper are three separate charts: Appendix 1 is a statistical breakdown by subject matter of the cases that have gone to the Supreme Court in each decade since our Court was constituted. It also indicates the total number of cases reviewed in all categories in each decade. Appendix 2 charts affirmances and reversals by categories of cases over the past 100 years, and Appendix 3 presents the record

of each Second Circuit judge in terms of affirmances and reversals by the Supreme Court. I am hopeful that scholars and others interested in the work of the Court will find the compendium and the appendices useful. This is very much a work in progress, a continuing enterprise, subject to much refinement, adjustment and expansion by those who have an interest. This project merely represents my resolve to boldly go, like the Starship Enterprise, where no one has gone before.

Between 1891 and the end of the term that concluded in June of 1991 the United States Supreme Court fully reviewed 1,041 cases decided by the Second Circuit Court of Appeals.⁴⁸ It is doubtful whether any other circuit has provided so much grist for the Supreme Court mill. It is very doubtful whether any other circuit has provided so rich a fare for the Supreme Court palate. And it is extremely doubtful whether any other circuit has provided such clearly-focused lenses for the Supreme Court to view the most important legal and constitutional issues that have confronted the nation during the past century. For it has been the ability of the Second Circuit to formulate the issues that has provided its greatest influence on the nation's highest court. The Circuit's 100 year "batting average" has not been too shabby either -- 519 affirmed, 500 reversed, and 22 affirmed in part and reversed in part.⁴⁹ That works out to 50%, 48% and 2%, and any batter who hits .500 consistently for 100 years is pretty good indeed.

More tax cases have found their way to the Supreme Court

from the Second Circuit than cases of any other category -- 144. Next has been admiralty, with 104; bankruptcy with 77; intellectual property (patent, trademark and copyright) with 71; labor and employment with 58; civil procedure with 55; and jurisdiction with 54.⁵⁰ No other single category includes more than 50 cases.⁵¹ Forty-nine judges (48 men and 1 woman) have served on the Second Circuit Court of Appeals.⁵² The judge with the most cases reviewed by the Supreme Court was Learned Hand, with 95.⁵³ Next was Martin Manton, with 78; Thomas Swan with 73; Harrie Chase with 46; and Charles Clark, with 43.⁵⁴ These heavy hitters did very well indeed in the averages. Learned Hand had 55 affirmed, 40 reversed; Manton had 42 affirmed, 35 reversed and 1 reversed in part; Swan had 41 affirmed, 32 reversed; Chase was 26-18 and 2; and Clark was 21-22.⁵⁵

The very first case to reach the Supreme Court was Northern Pacific Railway Co. v. Amato, a case decided in 1892.⁵⁶ This was the case of a railroad worker who suffered the loss of his leg in a railroad accident and recovered a judgment of \$4,000 following a jury verdict. (Interest of \$26.66 and costs in the sum of \$33.10 were added to the verdict). The Court of Appeals affirmed, and the Supreme Court affirmed in turn with an opinion by Justice Blatchford. The opinion relied on a decision of Judge Lacombe for the Circuit in approving the contributory negligence instruction given by Judge Coxe, the trial judge. Judge Coxe would later serve on the Second Circuit Court of Appeals.

The very last case in my compendium, No. 1,041, is Peretz v.

United States,⁵⁷ decided June 27, 1991. In his decision in that case, Justice Stevens agreed with the Second Circuit that there was no constitutional infirmity in delegating jury selection supervision in a felony trial to a magistrate judge where the defendant consents. The Circuit had affirmed the Eastern District judgment in that matter by summary order. The 1,039 cases passed up to the Supreme Court between Northern Pacific Railway and Peretz provide a rich panorama of American law and history. I shall provide a snapshot approach to a very few of these cases to elaborate my thesis that it was the illumination of issues, even more than the substance of decisions, that has influenced the national jurisprudence reflected in the decisions of the Supreme Court. The sweep of history is palpable in these cases. Edward Gibbon said: "History is indeed little more than the register of the crimes, follies and misfortunes of mankind."⁵⁸ The registry of which Gibbons speaks can be found in the dockets of any court. This is the story of the dockets of the Second Circuit Court of Appeals.

I turn first to admiralty, the law of the sea, for the massive panorama it provides to demonstrate my theme. As noted previously, admiralty cases no longer play the prominent role they once did in the calendars of our Court. An examination of the cases reveals that in the first two decades, 21 Circuit admiralty decisions were fully reviewed by the Supreme Court; in the last two decades, only 5 Circuit decisions received full review in the Supreme Court. The first admiralty case involved a

collision between a tug and a steamship coming into harbor and raised the issue of right of way.⁵⁹ The most recent Supreme Court decision on admiralty from the Second Circuit was in 1991, and it held that admiralty jurisdiction extends to agency contracts under certain circumstances.⁶⁰ An interesting early case, described as a "pitiful case" by the district judge who originally heard it, dealt with the issue of whether a disclaimer in a bill of lading excused from liability a panic-stricken captain who threw 126 out of 165 cattle overboard in bad weather on a voyage from New York to Liverpool. The Supreme Court, affirming Judge Shipman, said that there was no immediate peril to the ship and no apparent or reasonable necessity for the action taken.⁶¹ *Judge Shipman, what a great name for this case!*

Our admiralty cases have involved such issues as responsibility for the loss at sea of a ship chartered by the managing editor of "The Sun" to monitor hostilities between the United States and Spain;⁶² the refund of prepaid freight on cargo bound for France in 1917, where carriage was prevented by government embargo against voyages into the war zone;⁶³ dissolution of the charter of a vessel requisitioned for war use;⁶⁴ damages for failure to perform a contract in the case of a vessel forbidden to sail by the U.S. Export Administration Board;⁶⁵ and liability for war risk insurance policy losses.⁶⁶ Other important admiralty issues formulated by the Second Circuit and decided by the Supreme Court pertained to the Jones Act,⁶⁷ including the question of the Act's constitutionality;⁶⁸ the

Suits In Admiralty Act;⁶⁹ rules of the road;⁷⁰ unseaworthiness;⁷¹ maintenance and cure;⁷² statutory cargo claims;⁷³ general average;⁷⁴ and just about any other significant item that admiralty lawyers handle.

The creation of intellectual property is a major industry in the geographical area covered by the Second Circuit. Organizations engaged in publishing, advertising, the arts and business of all kinds litigate important intellectual property issues in the Courts of the Second Circuit. Thus do those courts acquire an expertise in dealing with such matters. The first copyright case that went from the Second Circuit to the Supreme Court was a suit by Oliver Wendell Holmes, Jr., later Justice Holmes, as executor of his father's will. Holmes, Sr. did not copyright the articles in "The Autocrat of the Breakfast Table" series as they were published in The Atlantic Monthly, but did include copyright notices when he published them in a book. The defendant sold his own book of copies of the articles originally published in the "Monthly," giving appropriate credit. Affirming the Second Circuit, the Supreme Court held that there was no infringement in the binding of the uncopyrighted articles.⁷⁵ The most recent copyright case to reach the Supreme Court from the Second Circuit was an important one indeed, dealing as it did with the issue of fair use in connection with the printing of a pirated portion of the memoirs of President Ford.⁷⁶

Other copyright issues over the past 100 years have involved scenes from a play,⁷⁷ photographs,⁷⁸ paintings,⁷⁹ player piano

rolls,⁸⁰ moving pictures,⁸¹ and cable television.⁸² The composer Victor Herbert prevailed in suit over the infringement of a copyrighted musical composition played in a hotel dining room without the payment of royalties,⁸³ and the producer Oliver Morosco was enjoined by the author of a play from extending his rights in the play to motion pictures.⁸⁴ In a notable trademark case that came to the Supreme Court in 1903, the Republic of France unsuccessfully attempted to enjoin the "Saratoga Vichy" trademark, objecting, of course, to the use of the word, "Vichy."⁸⁵ Judge Shipman was affirmed in that case, and we continued to drink Saratoga Vichy up until a year or so ago, when the plant closed. A particularly interesting trademark case involved a liqueur made by monks who were expelled from a monastery in France and moved to Spain, where they continued their activities. The French liquidator (or so he was known) of their properties was held subject to an action for infringement in the United States.⁸⁶ Although the Second Circuit no longer has jurisdiction to hear appeals in patent cases,⁸⁷ it has in the past performed the function of focusing the attention of the Supreme Court on such important patent concepts as invention,⁸⁸ improvement over prior art,⁸⁹ prior use,⁹⁰ and disclosure.⁹¹

The most important first amendment cases the Supreme Court has been constrained to confront are those in which the Second Circuit has defined the parameters of the debate: Dennis v. United States,⁹² rejecting a challenge to the Smith Act and affirming convictions for advocating the overthrow of the

government, a case that was not the finest hour for the Supreme Court or Learned Hand, who wrote the circuit opinion adopted by Justice Vinson's concurrence; Roth v. United States,⁹³ finding no first amendment violation in a criminal obscenity statute; New York Times v. United States,⁹⁴ holding that the government failed to meet its burden to show justification for prior restraint of the publication of the Pentagon papers; Doran v. Salem Inn,⁹⁵ the topless dancing case in which appears that deathless phrase, "the barest minimum of protected expression"; Herbert v. Lando,⁹⁶ allowing inquiry into the editorial process of those allegedly responsible for defamation; United States Postal Service v. Greenburgh,⁹⁷ denying the right to a non-profit organization to place unstamped matter in letter boxes; Board of Education v. Pico,⁹⁸ prohibiting the removal of library books for the ideas they contain; Ward v. Rock Against Racism,⁹⁹ allowing the City of New York to issue regulations for sound equipment for outside concerts, a concept I heartily endorse; Board of Trustees of SUNY v. Fox,¹⁰⁰ permitting universities to prohibit "Tupperware parties" in dormitories; and the still controversial and very recent Rust v. Sullivan,¹⁰¹ upholding federal regulations prohibiting federally funded family planning projects from counseling, or referring for, abortion.

Many other constitutional law issues formulated by the Second Circuit were resolved by the Supreme Court: whether legislative power was unconstitutionally delegated by the National Industrial Recovery Act of 1933;¹⁰² whether a United

States national should lose his nationality by deserting the Armed Forces in time of war;¹⁰³ whether failure to register as a gambler may be penalized;¹⁰⁴ whether extortion may be federally prosecuted where the loanshark's business is purely intrastate;¹⁰⁵ whether a state may prohibit a political party from allowing independents to vote in a primary election;¹⁰⁶ and whether pre-trial detention may be allowed on a showing of danger to the community.¹⁰⁷

The Second Circuit's influence on the Supreme Court has been felt in every area of the law. A Supreme Court Justice has referred to the Second Circuit as the "Mother Court" of securities law.¹⁰⁸ * Indeed, the major influence of the Second Circuit is apparent in such significant securities decisions as Jones v. SEC,¹⁰⁹ dealing with the constitutionality of the Securities Act of 1933; Piper v. Chris-Craft Industries,¹¹⁰ rejecting an implied cause of action for an unsuccessful tender offeror; Touche Ross & Co. v. Redington,¹¹¹ dealing with the liability of accountants who audit financial reports of brokerage firms; Chiarella v. United States,¹¹² reversing the conviction of a financial printer charged with the use of inside information; and Gollust v. Mendell,¹¹³ dealing with standing requirements in actions to recover for short swing profits.

Significant antitrust jurisprudence has been developed in the Supreme Court on review of Second Circuit decisions, including decisions dealing with the antitrust liability of a union,¹¹⁴ the stock exchange,¹¹⁵ and professional baseball;¹¹⁶ the

* Although the Second Circuit may be the Mother Court of Securities Law, the Southern District is not the mother of anything, as I noted from their decision 7 years ago.

blanket licensing scheme for the performance of music;¹¹⁷ and the doctrine immunizing attempts to influence government action.¹¹⁸ An interesting antitrust case decided in 1909 was American Banana Co. v. United Fruit Co.¹¹⁹ In that case, the defendant was said to have used Costa Rican troops to drive the plaintiff from Panama. The Supreme Court affirmed a circuit court decision by Judge Noyes and held that the antitrust statute did not apply to actions outside the United States. The rejection of federal common law came on the appeal of the Second Circuit case familiar to all: Erie Railroad Co. v. Tompkins.¹²⁰ A series of forfeiture cases arising out of the Second Circuit under the National Prohibition Act gave the Supreme Court an opportunity to rule on that area of law.¹²¹ Important cases raising issues of sovereign immunity,¹²² international law,¹²³ habeas corpus,¹²⁴ and search and seizure,¹²⁵ found their way from here to there during the past century. The need to interpret such statutes as the Federal Tort Claims Act,¹²⁶ Title VII of the Civil Rights Act of 1964,¹²⁷ and the Clean Water Act¹²⁸ gave rise to cases in the Second Circuit that ended up in the Supreme Court. An important case bearing on the doctrine of federalism, Pennzoil v. Texaco, Inc.,¹²⁹ came out of the Second Circuit. So did that precedent-setting case, Bivens v. Six Unknown Agents,¹³⁰ which provided the right to sue for fourth amendment violations committed by federal agents. The list goes on and on.

In the limited time available for this lecture, I am unable to do more than skim the surface of the Second Circuit decisions

that have influenced national jurisprudence in consequence of their review by the Supreme Court. I assure you, however, that the more one examines the decisions that have been afforded full review in the Supreme Court, the more one is persuaded that the Second Circuit's issue formulation and strength of reasoning has had a very strong influence indeed. In any event, I urge the full utilization of this resource I have created. It is my sincere hope that others will be motivated to continue mining this rich mother lode. Other "Miners" are welcome!

Finally, a word about this great institution, the United States Court of Appeals for the Second Circuit. Historical research convinces me that the quality of the Court most prized by the judges who have served as its members over the years is the quality of collegiality. For it is the spirit of collegiality, of working together toward a common goal, that has produced the craftsmanship associated with the Court, and influence on national jurisprudence has been the result. And that is why, in designing the Exhibit we open today, and in undertaking this Lecture, it has been my goal to pay tribute to each and every judge who has served on this Court. For this is not the court of Learned Hand or Henry Friendly alone. It is the court of all the judges who have ever served during the past 100 years. Each judge has made important contributions to the work of the Court, regardless of length of service or reputation. It was especially interesting to me to find that even Martin Manton, who left the Court in disgrace, wrote a number of important

4)

decisions before his troubles began. Each judge has contributed, and has done so as part of a collegial team. In our Court, the whole is always greater than the sum of its parts. I salute my colleagues, past and present -- colleagues for justice, all.