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Ted G. West

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transportation. The complexity of the economic factors involved in the tolerance problem calls for solution by the expert body.

Since tolerance regulations seem to be reasonable measures for adjusting losses caused by commodities which are by their nature inevitably damaged in transportation, it may be desirable to make express provisions for such regulations. The obvious solution is to amend § 20(11) of the Interstate Commerce Act so as to give the Commission the power either (1) to construe the meaning of "inherent vice" so that it will have uniform application in the courts in suits for loss or damage, or (2) as suggested by one writer,<sup>62</sup> to amend the act so as to allow the "Commission to provide tolerances when reasonably justified." The latter would seem to be the better solution as it would best cover the complex economic factors involved and allow the Commission greater discretion in striking a balance between the interests of the shippers and carriers.

HARRIET D. HOLT.

### Appellate Jurisdiction of the United States Supreme Court over State Courts

In the recent case of *Naim v. Naim*,<sup>1</sup> the United States Supreme Court dismissed an appeal from the Supreme Court of Virginia because the federal question was not presented in "clean-cut and concrete form."<sup>2</sup>

The facts of the case were not in dispute. Suit was brought by appellee, a white woman duly domiciled in Virginia. The appellant was a non-resident Chinese. The parties left Virginia, married in North Carolina, and returned immediately to Virginia. There they cohabited as man and wife in direct contravention of the Virginia miscegenation law which forbade their marriage.<sup>3</sup> Both conceded that they left Virginia to marry for the purpose of evading this law. At the instigation of the wife, the marriage was annulled by the Circuit Court of the City of Portsmouth, and an appeal to the Supreme Court of Virginia was based on the sole ground that the Virginia miscegenation statute was unconstitutional because it contravened the due process and equal protection clause of the Fourteenth Amendment. The Supreme Court of Virginia affirmed the decision of the lower court, expressly holding that the Virginia statute in question was not repugnant to the federal constitution.<sup>4</sup> On appeal to the Supreme Court of the United States, the

<sup>62</sup> 103 PENN. L. REV. 113, 115 (1954).

<sup>1</sup> 197 Va. 80, 90 S. E. 2d 749 (1956); *vacated and remanded* 350 U. S. 891 (1956); *reaff'd* 197 Va. 734, 90 S. E. 2d 849 (1956); *appeal dismissed* 350 U. S. 985 (1956).

<sup>2</sup> *Naim v. Naim*, 350 U. S. 891 (1956).

<sup>3</sup> VA. CODE § 20-54 (1950). The Virginia miscegenation statute declares a marriage between a white person and a person of any other race a nullity.

<sup>4</sup> *Naim v. Naim*, 197 Va. 80, 90 S. E. 2d 749 (1956).

judgment of the Virginia Supreme Court was vacated and the case remanded to the Virginia Supreme Court to be returned to the Circuit Court of the City of Portsmouth in order for the latter court to make further findings of fact so that the case might present a constitutional issue in "clean-cut and concrete form."<sup>5</sup> On remand, the Virginia Supreme Court rendered a further opinion<sup>6</sup> in which it declared that there was no procedure for sending a cause back to the circuit court with directions to rehear the case, gather additional evidence, and render a new decision. It declared that the issues presented had been decided and that the previous judgment annulling the marriage was again affirmed. In a second appeal to the United States Supreme Court,<sup>7</sup> it ruled that the decision of the Supreme Court of Virginia in response to its original order left the case devoid of a properly presented federal question and consequently the case was dismissed. Apparently, therefore, the initial decision of the Virginia Supreme Court constitutes a valid and binding adjudication of the issues of *this case*.

Appellate jurisdiction of the United States Supreme Court over state courts is derived from the United States Constitution, Art. III, §§1, 2; which provides: "The judicial Power shall extend to all Cases and Controversies arising under the Constitution, the Laws of the United States, and the Treaties made . . . under their authority. . . . In all other Cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added.) This provision has been the basis for much controversy because it does not expressly provide *from what courts* the Supreme Court may exercise appellate jurisdiction. From 1815 to 1859, the Commonwealth of Virginia in two cases—*Martin v. Hunter's Lessee*,<sup>8</sup> *Cohens v. Virginia*<sup>9</sup>—and the State of Wisconsin in one case—*Ableman v. Boothe*<sup>10</sup>—directly challenged the authority of the Supreme Court to review their decisions. With the opinion of Chief Justice Marshall in the *Hunter* case as the keystone, these cases apparently settled the matter by holding that "the appellate power of the United States does extend to cases pending in the state courts; and the . . . judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, . . . is supported by the letter and spirit of the Constitution."<sup>11</sup> Today the problem is not whether the Supreme Court of the United States has appellate jurisdiction over state

<sup>5</sup> *Naim v. Naim*, *supra* note 2.

<sup>6</sup> *Naim v. Naim*, 197 Va. 734, 90 S. E. 2d 849 (1956).

<sup>7</sup> *Naim v. Naim*, 350 U. S. 985 (1956).

<sup>8</sup> 1 Wheat. 304 (U. S. 1815).

<sup>9</sup> 6 Wheat. 264 (U. S. 1821).

<sup>10</sup> 21 How. 506 (U. S. 1859).

<sup>11</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304, 314 (U. S. 1815).

decisions involving federal questions, but rather the extent to which this power has been limited.

There are three sources of limitations of the Supreme Court's appellate jurisdiction over federal questions arising in state courts. They are: (1) Express limitations in the Constitution—Constitutional limitations are, primarily, (a) the necessity for a case or controversy,<sup>12</sup> and (b) the case or controversy must involve the exercise of judicial power.<sup>13</sup> Thus the Court cannot decide moot,<sup>14</sup> academic,<sup>15</sup> or political questions.<sup>16</sup>

(2) Statutory limitations—Congressional regulations for the exercise of appellate jurisdiction are set out in 28 U. S. C. A. § 1257.<sup>17</sup> From this statute, the Supreme Court has formulated five well established rules: (a) There must be a final judgment or decree<sup>18</sup> (b) from the highest court of the state in which a decision could be had.<sup>19</sup> (c) There must be a federal question raised and the question must be substantial.<sup>20</sup> (d) The federal question to be reviewed must be properly raised and preserved in the state courts.<sup>21</sup> (e) There can be no review if the case can be decided on an independent state ground.<sup>22</sup>

(3) Self-imposed limitations—The Supreme Court has formulated several self-imposed limitations to control its own docket. These rules are with but one exception outlined in *Ashwander v. Tennessee Valley Authority*<sup>23</sup> and have been approved in many subsequent cases.<sup>24</sup> Briefly

<sup>12</sup> *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227 (1936).

<sup>13</sup> *Cohens v. Virginia*, *supra* note 9.

<sup>14</sup> *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U. S. 206 (1937).

<sup>15</sup> *Colgrove v. Green*, 328 U. S. 549 (1945).

<sup>16</sup> *Ex parte Peru*, 318 U. S. 578 (1942).

<sup>17</sup> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised by the United States.

<sup>18</sup> *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120 (1944); *Republic Natural Gas Co. v. Alabama*, 334 U. S. 62 (1947).

<sup>19</sup> *Pope v. United States*, 323 U. S. 1 (1944); *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U. S. 206 (1937).

<sup>20</sup> *Patterson v. Stranolind Oil and Gas Co.*, 305 U. S. 376 (1939); *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U. S. 206 (1937); *Parker v. Duffy*, 342 U. S. 33 (1951).

<sup>21</sup> *Osborne v. Clark*, 204 U. S. 565 (1906); *Flournoy v. Wiener*, 321 U. S. 253 (1943); *Rice v. Olson*, 324 U. S. 786 (1944).

<sup>22</sup> *United States v. Petrillo*, 332 U. S. 1 (1951); *Wilson v. Cook*, 327 U. S. 474 (1945).

<sup>23</sup> 297 U. S. 288, 346-48 (1935)

<sup>24</sup> For example, see *Carter v. Carter Coal Co.*, 298 U. S. 328 (1935); *Republic Natural Gas Co. v. Alabama*, 334 U. S. 62 (1947); *Rescue Army v. Municipal Court*, 331 U. S. 549 (1946).

enumerated, the rules are: The Court will not (a) pass upon the constitutionality of legislation in a friendly, non-adversary proceeding; (b) decide a constitutional question unless it is absolutely necessary to a decision of the case; (c) formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied; (d) pass upon a constitutional question presented by the record if there is another ground the case can be decided upon; (e) pass upon the validity of a statute upon complaint of one who has failed to show injury by its operation; and (f) pass upon the validity of a statute at the instance of one who has availed himself of its benefits. (g) When the validity of an act of Congress is drawn into question, and even if serious doubt of constitutionality is raised, the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. (h) *Rescue Army v. Municipal Court*<sup>25</sup> added a new self-imposed rule which is probably the key to the *Naim* case—the court may refuse to entertain jurisdiction in a constitutional case even on appeal if it considers the record inadequate for a decision of the constitutional issues. The Court has a broad discretion to determine what is “adequate.”

At first blush, the *Naim* case appears to be another instance of Supreme Court recognition of a state court evasion of a Supreme Court mandate.<sup>26</sup> This seems to be true particularly in view of the fact that there is no apparent defect in the record of the prerequisites enumerated above and that the Supreme Court was not without remedy in such a situation. There are at least two ways it could have contravened the decision of the Supreme Court of Virginia. First, it might have used the same device used in *Martin v. Hunter's Lessee*,<sup>27</sup> i.e., it could have by-passed the Supreme Court of Virginia and remanded the case directly to the Circuit Court of Portsmouth. This was done in the *Martin* case to avoid further friction with the Virginia Supreme Court. Second, the Supreme Court of the United States could have recalled the mandate and decided the case on the facts before it. Since it chose to do neither, the court evidently did not wish to decide the question involved at this time and refrained from doing so by apparently exercising its discretion as to what constitutes an adequate record. This it could do by applying

<sup>25</sup> 331 U. S. 549 (1946).

<sup>26</sup> State courts have at times asserted their independence by an evasion of Supreme Court mandates and the Supreme Court has recognized the legality of such evasion in certain instances. In *Davis v. Packard*, 8 Pet. 312 (U. S. 1834), the United States Supreme Court permitted its mandate to be avoided by the New York Court when the latter court declared that under state law the appellate court's jurisdiction did not permit a reversal of the trial court for a factual error not appearing on the record. See generally, note, *State Court Evasion of Supreme Court Mandates*, 56 YALE L. J. 574 (1947).

<sup>27</sup> 1 Wheat. 304 (U. S. 1815).

the well established doctrine<sup>28</sup> which permits the taking of jurisdiction in the first instance in order to determine jurisdiction. The refusal of the Virginia Court to make a further finding of fact left the Supreme Court in the position to dismiss the case for lack of a federal question since, theoretically, it never had one before it. This would be only a reaffirmance of the doctrine invoked in the *Rescue Army* case and not a recognition of an evasion of its mandate. It should be noted that such a disposition of the case would not prejudice the constitutional questions involved from being raised again in a subsequent case.

TED G. WEST.

### Bills and Notes—Holder in Due Course—Finance Companies

In an era characterized by a phenomenal upward surge of retail installment purchasing,<sup>1</sup> the comparative serenity of appellate litigation in the field of negotiable instruments has been consistently interrupted by cases arising out of financial credit arrangements. Such arrangements consist of informal agreements, usually of long standing, between dealers and finance companies whereby the latter purchases commercial paper arising out of a sale to the consumer. The finance company usually supplies the blank forms for notes and conditional sales contracts as well as supervises, to varying degrees, the terms of credit. The question is thus presented: Do such credit arrangements cause the finance company to become an active participator in the sale to the consumer so as to preclude it from being a holder in due course of the transferred paper?

Notwithstanding the fact that the Negotiable Instruments Law sets out precise standards<sup>2</sup> for the determination of this question, several jurisdictions have judicially effected other criteria which, upon application to these credit arrangements, have denied the finance company the protection afforded a holder in due course.<sup>3</sup> In a recent case of first

<sup>28</sup> "Whether the statutory requirements (for appellate review) have been met is itself a federal question." *Honeyman v. Hanan*, 300 U. S. 14, 16 (1936).

<sup>1</sup> Installment credit reached an estimated total of \$1,593,000,000 for the year ending March 31, 1955. This figure represents credit extended only for the purchase of consumer goods secured by the items purchased, title being held either by the retail outlets or financial institutions. 39 CONSUMER FINANCE NEWS no. 12, p. 31 (1955).

<sup>2</sup> N. I. L. § 52: "A holder in due course is a holder who has taken the instrument under the following conditions: . . . (3) that he took it in good faith for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

N. I. L. § 56: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

<sup>3</sup> Such results are reached on the basis that when the finance company and dealer engage in preconceived credit arrangements, the company, which is better able to bear the risk of loss than the hard pressed consumer, has become a party to the original transaction and is subject to defenses available against the dealer. See