FEDERAL PRACTICE—CERTIFICATION OF QUESTIONS—EQUALLY DIVIDED COURT.—The United States Circuit Court of Appeals for the Sixth Circuit certified three questions to the Supreme Court for determination, (U. S. C., Tit. 28, sec. 346), in a suit involving the constitutionality of a Federal transfer tax upon gifts *inter vivos* and not in contemplation of death, as applied to a gift completely executed before the law went into effect. Two of the questions were deemed by the court to be non-essential, and consequently were disregarded. As to question No. 2, the eight Justices who heard the case were equally divided. Neither the opinion of Mr. Justice McReynolds, concurred in by three of his colleagues, nor that of Mr. Justice Holmes, concurred in by three other members of the Court, was truly the opinion of the Court. Yet, through some inadvertence, in the first publication of these opinions, 48 Sup. Ct., adv., 105, that of Mr. Justice McReynolds was labeled the opinion of the Court and it was concluded with the cryptic phrase, "The question is so answered." Since this was a most patent error, the Justices on Feb. 20, 1928, made a *per curiam* order modifying the original "opinion of the Court." The division of opinion among the Justices, it was stated, made a categorical answer to the question impossible. Consequently, the cause was remanded to the Circuit Court of Appeals, with the remark that the statements of views by the Justices were sufficient to enable the inferior appellate court readily to reach a proper decision. *Blodgett v. Holden,* 48 S. Ct., adv., xxxi, to appear as 48 S. Ct. 105.

The disposition of this case by the Supreme Court is, of course, the only logical and reasonable result that could have been reached in the existent situation. The case is here commented upon merely as presenting a rather rare phase of federal judicial practice. The only cases that the writer has been able to find, wherein the Court was confronted with a similar equal division in certificate cases, were all decided over half a century ago. In *Richey v. Williams,* 20 L. Ed. 238; in *Hannauer v. Woodruff,* 10 Wall. 482, 19 L. Ed. 991; and in *Silliman v Hudson River Bridge Co.,* 1 Black 582, 17 L. Ed. 81, questions were remanded unanswered and the lower courts left to decide the cases, because the Supreme Court was equally divided in opinion upon questions certified up. These three cases arose long before the establishment of the Circuit Courts of Appeals, and the certificates issued from Circuit Courts of the United States because of divisions of opinion among the judges, but the principle involved in these cases is the same as that in the principal case.

The Court's statement, in remanding the principal case because of division of opinion, that the views contained in the opinions of the Justices were enough to enable the Circuit Court of Appeals to reach a correct conclusion, is also quite unusual, but it is not altogether without precedent. In *United States v. Ginsberg,* 243 U. S. 472, 61 L. Ed. 853, 37 Sup. Ct. 422, the Court declined to answer some of the questions which were certified, and said: "Considering the accompanying statement of facts and our views in respect of the law, answers to the first and fourth will enable the circuit court of appeals properly to determine the issues involved." In the principal case, there was no disagreement among the eight Justices as to plaintiff's right to recover the tax paid under protest, and the Court is quite correct in stating that the Circuit Court of Appeals will be able correctly to decide the case on the basis of the respective expressions of opinion. The division occurred upon the question of whether the Act of Congress should be held unconstitutional or so construed as to eliminate the question of constitutionality from the case.

The cases are legion which hold that when an appellate court is equally divided in opinion upon a case coming up in one of the ordinary ways, the decision of the trial court will be affirmed. *Morgan v. Town of Beloit,* 19 L. Ed. 508; *U. S.*

*v. Reeside,* 8 Wall. 302, 19 L. Ed. 391; *Etting v. U. S. Bank,* 11 Wheat. 59, 6 L. Ed. 419; and other cases cited *infra.* Such decree of affirmance by a divided court is as effectual as if all judges concurred; that is, an affirmance by an equally divided court is conclusive upon the rights of the parties in that case. *Washington Bridge Co. v. Stewart,* 3 How. 413, 11 L. Ed. 658; *Durant v. Essex Co.,* 7 Wall. 107, 19 L. Ed. 154, 101 U. S. 555, 25 L. Ed. 961. But according to the great weight of authority such an affirmance has no value as a precedent and is not to be regarded in the decision of future cases as in any way decisive of the legal questions involved. *Westhus v. Union Trust Co. of St. Louis,* 168 F. 617, 94 C. C. A. 95; *Kalamazoo v. Crawford,* 154 Mich. 58, 117 N. W. 572, 16 Ann. Cas. 110; *Hanifen v. Armitage,* 117 F. 845; *State v. McClung,* 47 Fla. 224, 37 So. 51; *Williams v. New York, P. & N. R. Co.,* 11 F. (2nd) 363, and many other cases. But see *contra, City of Florence v. Berry,* 62 S. C. 469, 40 S. E. 871, and *American Mortg. Co. v. Woodward,* 83 S. C. 521, 65 S. E. 739.

R. L. A., '28.

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LIMITATION OF ACTIONS—WHAT LAW GOVERNS.—Where an action arising in Quebec on a notarial deed of sale and *hypothec* executed in Quebec was not barred by limitation there but was barred by limitation in New York, action thereon could not be brought against a resident of New York, under Civil Practice Act, secs. 13, 55. *Duggan v. Lubbin,* 226 N. Y. S. 238 (1927).

In an action in New York by an heir to recover a remainder in personalty alleged to have been wrongfully transferred by executors and testamentary trustees of New Jersey decedent, New Jersey law of limitations is controlling under Civil Practice Act, sec. 13, cause of action having apparently arisen in New Jersey, defendants residing in New York, and plaintiff's residence not being shown. *Squier v. Houghton,* 226 N. Y. S. 162 (1927).

Statutes of limitation are viewed in English and American law as pertaining to the remedy. *McElmoyle v. Cohen,* 13 Pet. 312; *Townsend v. Jemison,* 9 How. 407; *Bank of United States v. Donnally,* 8 Pet. 361. Since such statutes affect only the remedy, the law of the forum applies. *Townsend v. Jemison, supra.* Accordingly an action could be brought any time before the remedy would be barred by the statute of limitations of the forum even though the action was barred in the state where the cause of action arose. This is equally true in contract and tort actions. *Townsend v. Jemison, supra.* There is one notable exception to the *lex fori* rule, and that is that where the statute of the state where the cause of action arose extinguishes not only the remedy but the cause of action itself, the *lex loci* applies. *Hudson v. Bishop,* 35 Fed. 820; *Capps v. Atlantic Coast Line R. Co.,* 111 S. E. 533. The two instant cases do not come within this exception. If the common law rule were to be applied to the instant cases, then the statutes of limitations of New York would undoubtedly govern in both cases.

The common law rule has been modified to some extent by statutes in various states which make the law of the state where the cause of action arises apply if it is shorter than that provided by the law of the forum. New York has such a statute in Civil Practice Act, Sec. 13.

This section does not incorporate the foreign statute of limitations into the New York law, but merely enables the defendant to choose either the statute of the state where the cause of action arose or the New York statute. *Isenburg v. Rainer,* 145 App. Div. 256, 258, 13 N. Y. S. 27, 28. This is the leading New York case on the subject, and is followed in the instant case of *Duggan v. Lubbin. Dalrymple v. Schwartz,* 177 App. Div. 650, 164 N. Y. S. 496 is to the same effect. The statute does not extend the period of limitation. *Dodge v. Holbrook,* 107 Misc. Rep. 259, 176 N. Y. S. 562.