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Determining State Law under the Doctrine of Erie R.R. v. Tompkins

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Under a Vermont statute¹⁵ the Vermont Supreme Court held that plaintiff could not inquire as to the juror's connection with a designated insurance company even though that company was conducting the defense.¹⁶

In most of the jurisdictions the plaintiff's counsel cannot ask a juror as to his possible connection with an insurance company for the sole purpose of informing the jury that the defendant is insured.¹⁷ Differences arise among the courts as to the necessary elements to show that the counsel's questioning is in good faith.¹⁸ Bad faith is strongly indicated if a juror is questioned in regard to an insurance company when defendant is not insured, or if the juror is questioned as to a designated company when defendant is insured by a different company. The form of the questions often shows the presence or lack of good faith on the part of counsel.¹⁹

Policy dictates that an arbitrary line should not be drawn by the courts in determining whether or not the questioning is permissible. This practice would afford equal protection to the plaintiffs whether they are pursuing lines of questioning either in good or bad faith. A twilight zone exists at the meeting of the extremes. It is at the discretion of the trial judge in the circumstances of each case to limit the extent of the questioning. He should guard closely against improperly framed questions in an effort to determine whether or not the plaintiff's counsel is acting in good faith. Plaintiff's counsel should, in good faith, exercise caution in framing the questions so that the least possible inference is carried to the jury concerning the insurance of the defendant.

DONALD N. SHERARD

DETERMINING STATE LAW UNDER THE DOCTRINE OF *ERIE R.R. v. TOMPKINS*

Plaintiff sought in a state court of South Carolina to recover as beneficiary under a policy of insurance issued by defendant. On defendant's motion the case was removed to a federal district court. The district court recognized that under *Errie RR. v. Tompkins*,¹ South Carolina law should control the issues and that according to such law ambiguities in a contract of this nature are to be construed against the insurer.² Two months later plaintiff recovered on a similar insurance contract from another company in the Court of Common Pleas for South Caro-

15. Laws of Vermont 1935, No. 47 states that a policyholder is not disqualified to sit as a juror because the insurance company is an insurer of a party to the action.

16. *Glass v. Bosworth*, 113 Vt. 303, 34 A. (2d) 113 (1943).

17. *Eldridge v. Clark & Henery Construction Company*, 75 Cal. App. 516, 243 Pac. 43 (1925); *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202 (1904); *Cameron v. Pacific Lime Company*, 73 Ore. 510, 144 Pac. 446 (1914); *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778 (1913).

18. Cases cited notes 6, 7, 8, 9, supra.

19. 56 A. L. R. 1462.

1. 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938), cert. denied, 305 U. S. 637 (1938), rehearing denied, 305 U. S. 673 (1938).

2. Plaintiff's husband, the insured, had made an emergency landing at sea. He was alive and comparatively safe when an accompanying plane left two and one-half hours after the accident. One hour later he was found dead by a rescue squad. The policy of insurance exempted the insurer from liability for "death resulting from participation . . . in aviation." Plaintiff alleged that death did not result from aviation but rather from exposure. This was the ambiguity to be construed.

lina and no appeal was taken. Plaintiff then contended, when defendant appealed the instant case, that the decision of the Common Pleas court in her other action indicated the South Carolina law and was therefore controlling on the Federal Court under the doctrine of *Erie RR. v. Tompkins*.³ The United States Court of Appeals refused to recognize the Common Pleas decision and reversed on the theory that the contract was not ambiguous.⁴ On certiorari to the United States Supreme Court *held*; affirmed for defendant, the Court reasoning that the Court of Common Pleas in South Carolina does not have such importance within that State's judicial system that decisions by it should be taken as authoritative expositions of that State's law. *King v. Order of United Commercial Travelers*, 33 U. S. 153, 68 Sup. Ct. 488, 92 L. Ed. 479 (1947),⁵ rehearing denied, 333 U. S. 878 (1947).

Erie RR. v. Tompkins,⁶ it will be remembered, went no further than to state that the federal courts must follow state law as declared by its *highest*⁷ court. The problem thus resolves itself to this: Just what did Mr. Justice Brandeis mean when, in giving the Court's opinion in the *Erie* case, he said: "And whether the law of the state shall be declared by its legislature in a statute or by its *highest court*⁸ in a decision is not a matter of federal concern." The natural interpretation would appear to limit the state decision to its topmost court, but further statements by Mr. Justice Brandeis in his opinion indicate that the construction might be otherwise.⁹ It might mean the highest court to which a litigant may go as a matter of right, or it might mean the highest court in which the particular problem has been determined, or it might not mean the highest court at all.¹⁰

In the ten years since the *Erie* decision the problem has subdivided into at least four distinct considerations: (1) where the highest court in the state has spoken on the precise point in issue; (2) where the highest court has given mere dicta on the point in issue; (3) where only the lower courts have spoken; and (4) where there are no state decisions at all.

The first classification appears to fit the *Erie* rule precisely and no federal court has found difficulty in applying it.¹¹

A more serious question arises when the only words from the state's highest court are obviously dicta. Should such dicta be given greater weight than a

3. Note 1 supra. The Court said: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."

4. *Order of United Comm. Travelers of America v. King*, 161 F. (2d) 108 (C. C. A. 4th 1947).

5. The Supreme Court added that it was not promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts and that other situations might call for a different rule.

6. Note 1 supra.

7. Italics inserted.

8. Italics inserted.

9. Brandeis continues: ". . . and federal courts have no power to declare rules of common law applicable in a State . . ." It would appear that since federal courts have no such power, it should not flow to them merely because the highest court of the state has not spoken.

10. An extensive analysis of the problem may be found in Dye, *Development of the Doctrine of Erie Railroad v. Tompkins*, 5 Mo. L. R. 193 (1940). The review is most comprehensive but is limited inasmuch as it was written in 1940, before many of the critical cases under the *Erie* decision arose.

11. Note 11 supra at 221.

decision by an intermediate state court? Would it be better for the federal court to guess whether the state's highest order will later resolve its dicta into a decision? One of the first cases to construe the *Erie* doctrine, *American National Insurance Co. v. Belch*,¹² held that the court would follow the rule of the Supreme Court of the United States when no Virginia Supreme Court ruling could be found in point, the case having arisen in that state. On rehearing, it was found that the Supreme Court of Virginia, in deciding a case on an allied point, had commented favorably on the rule in New York which was different from the United States Supreme Court rule. The United States Court of Appeals for the Fourth Circuit thereupon withdrew its opinion, holding that the Virginia law was the same as the New York law on authority of the comment made by the Virginia Supreme Court. Other cases have clearly suggested that in the event the highest court of the state has never actually decided the point, dicta by that group will be preferred to rulings of other jurisdictions on the same point.¹³

A further problem in determining what is state law comes when the only decisions in point are those of the lower courts. In *West v. American Telephone and Telegraph*,¹⁴ cited by the Supreme Court in its opinion on the instant case, the Supreme Court held that an announcement of state law by an intermediate appellate court must be accepted by federal courts in the absence of convincing evidence that the law of the state is otherwise.¹⁵

In a case involving the effect to be given a trial court decision the District Court for Southern New York stated that only the highest court of the state may expound the law which must be followed under the rule of *stare decisis* in the federal courts.¹⁶ The court reasoned that since *stare decisis* does not bind the higher courts to the opinions of the lower courts it should not bind the federal courts in their conclusions. In *Cooper v. American Airlines*,¹⁷ however, the same District Court for Southern New York held that the decisions of lower trial courts must be regarded unless "there is persuasive data that the highest court would decide otherwise." The United States Court of Appeals, although stating the same rule, reversed on grounds that the lower courts had not decided the precise issue, but instead the question was still open and undecided.¹⁸

The District Court for Nebraska, on the other hand, has given a rule that clearly represents the liberal side of the proposition. In *Prudential Ins. Co. v. Zimmerer*,¹⁹ that Court held that in the absence of a pronouncement by the State Supreme Court, the federal court must follow such indices of applicable state law as are available, including the opinions rendered by a court commissioner, even

12. 100 F. (2d) 48 (C. C. A. 4th 1938).

13. *Shanks v. Travelers' Insurance Co.*, 25 F. Supp. 740 (N. D. Okla. 1938).

14. 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956 (1940).

15. The Court also cited *Six Companies of Calif. v. Joint Highway District 13 of Calif.*, 311 U. S. 180, 61 Sup. Ct. 186, 85 L. Ed. 114 (1940), rehearing denied, 311 U. S. 730 (1940), where it was held that the United States Court of Appeals cannot decide whether they believe a conclusion by the District Court of Calif. is incorrect. Unless there is convincing evidence that the law of the state is otherwise, the opinion given by the state court must be upheld as stating the law of that state.

16. *Kehaya v. Axton*, 32 F. Supp. 266 (S. D. N. Y. 1940).

17. 57 F. Supp. 329 (S. D. N. Y. 1944).

18. 149 F. (2d) 355, 162 A. L. R. 318 (C. C. A. 2d 1945).

19. 66 F. Supp. 492 (Nebr. 1946).

though the Supreme Court of the State would not be bound by such opinions.²⁰

In the instant case the Supreme Court gave two reasons for rejecting the decision of the trial court of South Carolina as asserting the law of that state. First, said the Court, a federal court is but another state court in a suit where jurisdiction is based on diversity of citizenship of the parties,²¹ and since other state courts are not bound by what is said regarding the law in the trial court, that same immunity should extend to the federal court acting as a state court. Second, the difficulty of locating the decisions of lower courts not of record would put a premium on the financial ability required to conduct a search of the judgment rolls or for the maintenance of private records. Such arguments do not, of course, apply to the decision of intermediate appellate courts.

A nice distinction allowed the Court in the *Fidelity case*²² to uphold a decision of a trial court as stating the law of the State of New Jersey. The case arose in a court of equity, and in upholding the latter's appraisal of the New Jersey law, the Supreme Court of the United States eliminated the more serious arguments against upholding the trial court's decision by showing that the New Jersey Chancery Court has a relatively high place in that State's judicial system.

The fourth division of the problem was considered in *New York Life Ins. Co. v. Jackson*²³ in which the United States Court of Appeals for the Seventh Circuit said: "Since it appears that the precise question presented has never been presented to the Missouri courts, we have no choice but to consider the question . . . exercising an independent judgment with respect to the issues presented." Along this same line, the United States Court of Appeals for the Second Circuit in reversing the *Cooper case*²⁴ concluded by stating that it was their belief that the case was in that zone in which federal courts must guess what the highest court would do. The "guessing" theory has been used by the First,²⁵ Eighth²⁶ and Ninth²⁷ Circuits, often being expressed more diplomatically as "exercising an independent judgment."²⁸

In the *Prudential case*,²⁹ discussed above, the District Court for Nebraska was unable to find any indices of local law and thereupon allowed a delay while

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20. Accord, *New York Life Ins. Co. v. Ruhlin*, 25 F. Supp. 65 (W. D. Pa. 1938), aff'd. 106 F. (2d) 921 (C. C. A. 3d 1939), cert. denied, 309 U. S. 655 (1939); *Buttson v. Arnold*, 4 F. R. D. 492 (E. D. Pa. 1945); *Alameda County v. U. S.*, 124 F. (2d) 611 (C. C. A. 9th 1941).
 21. It is interesting to note that Dye in his article, note 9 supra, cites an impressive array of cases to the effect that the Erie rule has been extended to cases of equity, bankruptcy, admiralty, evidence, parol contracts, and conflicts of law.
 22. *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 61 Sup. Ct. 176, 85 L. Ed. 109 (1940), rehearing denied, 311 U. S. 730 (1940); 313 U. S. 550 (1941).
 23. 98 F. (2d) 950 (C. C. A. 7th 1938), cert. denied, 305 U. S. 640 (1938).
 24. Note 19 supra.
 25. *Malloy v. New York Life Ins. Co.*, 103 F. (2d) 439 (C. C. A. 1st 1939), cert. denied, 308 U. S. 572 (1939).
 26. *Mutual Benefit Health & Accident Ass'n. v. Bowman*, 99 F. (2d) 856 (C. C. A. 8th 1938), cert. denied, 306 U. S. 637 (1938).
 27. *Hagan & Cushing Co. v. Washington Water Power Co.*, 99 F. (2d) 614 (C. C. A. 9th 1938).
 28. For examples of how other courts reach their decisions when no state decisions are in point see: *Toomey v. Toomey*, 98 F. (2d) 736 (C. C. A. 7th 1938); *Yoder v. Nu-Enamel Corp.*, 117 F. (2d) 488 (C. C. A. 8th 1941); *Traveler's Indemnity Co. v. Plymouth Box Co.*, 99 F. (2d) 218 (C. C. A. 4th 1938).
 29. Note 20 supra.

a case then pending in a state district court on an allied point was decided. Other courts have expressed a desire for the delaying procedure followed in the Nebraska case. In reversing the previously discussed *Cooper* case,³⁰ the United States Court of Appeals for the Second Circuit, said: ". . . we are tempted to direct the district court to withhold decision until the New York Court of Appeals makes an authoritative pronouncement. But *Meredith v. Winter Haven*³¹ . . . instructs us to yield to no such temptation."

In concluding, it might be well to note that it was the undesirable results of the belief on the part of the federal courts that there existed a body of federal common law wholly apart from the state law which led to the decision in the *Erie* case. It is apparent that the boundaries of that decision are far from firmly established. Federal Courts have accepted the new philosophy and apply it with varying fidelity,³² especially in those areas where the local law has not been unequivocally declared. Intermediate state courts appear to command at least surface respect, and their decisions are generally accepted as propounding the law unless there is convincing evidence that the state law is otherwise.³³ The few courts that have recognized the trial court as an authority on local law apparently have done so as a last resort in their attempt to "guess" what the state's highest court would do with the problem. The instant case affirms that no greater respect need be given such decisions.

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30. Note 19 supra.

31. 320 U. S. 228, 64 Sup. Ct. 7, 88 L. Ed. 9 (1943) held: ". . . the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline a case which is properly brought to it for decision." Cf. *City of Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 62 Sup. Ct. 986, 86 L. Ed. 1355 (1942) where the court held in an equity case that ". . . it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. In this case . . . discretion calls for a remission of the parties to the state courts which alone can give a definite answer to the major questions posed." Cf. *Thompson v. Magnolia Petrol Co.*, 309 U. S. 478, 60 Sup. Ct. 628, 84 L. Ed. 876 (1940); *R.R. Commission of Texas v. Pullman Co.*, 312 U. S. 496, 61 Sup. Ct. 643, 85 L. Ed. 971 (1941).

32. "In searching for the correct legal rule to be used in reaching our answer, we are not here compelled by *Erie R. Co. v. Tompkins* . . . to play the role of ventriloquist's dummy to the courts of some particular state; as we understand it, 'federal law,' not 'local law,' is applicable." Frank, J. in *Commissioner v. Richardson*, 126 F. (2d) 562, 140 A. L. R. 705 (C. C. A. 2d 1942).

It is our colleagues in the state judiciary ". . . who furnish—or gaily and maliciously or indifferently refuse to furnish—the 'brute raw data' which we are required to 'process' . . . into the phenomenon of a 'federal decision' without making a single change." Charles E. Clark, Circuit Judge of the United States Court of Appeals for the Second Circuit, in a lecture delivered December 4, 1945, before the New York Bar Association. 55 Yale L. J. 267 at 269 (1946).

Further evidence of giving "lip service" to the *Erie* rule and then deciding as the court thought best may be found in *Paddleford v. Fidelity & Casualty Co.*, 100 F. (2d) 606 (C. C. A. 7th 1938), cert. denied 306 U. S. 664 (1938). The Court apparently ignored a decision rendered by an Illinois Appellate Court which appeared directly in point.

The court admitted the issues were within the *Erie* rule, but added: ". . . since no claim has been made that the local law is any different from the general law on the subject, . . . and both parties have relied almost entirely on federal precedents." The Court thereupon determined the issues without reference to the state law. *Kellog Co. v. National Biscuit Co.*, 305 U. S. 111, 59 Sup. Ct. 109, 83 L. Ed. 773 (1938), rehearing denied, 305 U. S. 674 (1938).

33. *Fidelity Union Trust Co. v. Field*, note 23 supra.