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Charles H. Gibbs

HOW DOES THE FEDERAL JUDGE DETERMINE WHAT IS THE LAW OF THE STATE?

CHARLES H. GIBBS*

These gentlemen from Harvard with whom I find myself thrown on this panel have preempted all the mysterious and difficult areas of the subject and left me with a relatively simple one—that is, how does the federal judge determine what is the law of the state which he must apply? This, of course, pre-supposes that all other matters have been resolved and that the federal judge must apply the law of a particular state, whatever that law is. In *Erie R.R. v. Tompkins*[1] Mr. Justice Brandeis said that the state law to be applied by the federal court was the state law *either declared by its legislature in a statute or by its highest court.*[2]

A couple of years following the *Erie* decision, however, in *Fidelity Union Trust Co. v. Field*,[3] the Erie Railroad ran off the track: The Supreme Court held that the federal courts must follow and be governed by decisions of a vice chancellor of the Court of Chancery of New Jersey. This court is one of original jurisdiction with statewide standing. Its decisions would not have been binding on the higher appellate courts of New Jersey nor even on other vice chancellors, nor indeed upon the vice chancellors themselves who had made the decision if someone could persuade them in a subsequent case to change their minds. However, they were binding on the federal courts. This decision gave rise to Judge Jerome Frank's remark that the federal judges were now required to play the role of ventriloquists' dummies to the courts of some particular state.[4] As late as 1946 the Sixth Circuit felt obliged to follow an unreported decision of an intermediate Ohio court even in the face of an Ohio statute providing that such decisions were not entitled to recognition nor the official sanction of any court within that state.[5]

* Sinkler, Gibbs & Simons, Charleston, South Carolina.

1. 304 U.S. 64 (1938).
2. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
3. 311 U.S. 169 (1940).
4. Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942).
5. Gustin v. Sun Life Assur. Co., 154 F.2d 961 (6th Cir. 1946), *cert. denied*, 328 U.S. 866 (1946).

Mr. Chief Justice Hughes said in the *Fidelity Union* case: "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."[6] Upon reflection it is easy to see that the twin aims of the *Erie* rule as pronounced in *Hanna v. Plumer*[7] (decided by the Supreme Court in April of 1965), which are: (1) discouragement of forum shopping and (2) avoidance of inequitable administration of the laws, are defeated by *Fidelity Union* and other similar cases. If *A* sues in the New Jersey chancery court and finds that the only relevant state precedent was a previous adverse ruling from another chancery court of equal standing, that decision would not conclude his chance of relief. As a matter of fact, even if *A* brought his suit in the very court which rendered the earlier adverse ruling he might still be able to persuade the vice chancellor to change his mind. If he should lose, he could appeal and obtain a ruling from a higher court, and he would not be finally lost until the highest court of the state had ruled against him. On the other hand, however, if *B* made the mistake of bringing his suit in the federal court or having it removed to the federal court, he could under these cases find the vice chancellor's decision an insuperable barrier which he could not refute by argument or citation of authority from elsewhere because he would be bound by the vice chancellor's adverse decision. In a third situation litigant *C* might select the federal forum purely for the reason that it would be obligated to apply rules of law which would not stand up under the attack and re-examination which they might suffer in a state court. Obviously, a situation such as this gives rise to forum shopping and defeats the policy of uniformity which *Erie* is believed to have required.

In 1948 the Supreme Court relaxed to a great extent the rigidity of the *Fidelity Union* decision in an opinion rendered in *King v. Order of United Commercial Travelers*.[8] This was a South Carolina case in which Mrs. King's husband, a resident of South Carolina, was the insured under an accidental death policy which contained a clause exempting the insurance company from liability if death resulted from participation in aviation. The deceased King was a flight observer in a Civil Air

6. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 180 (1940).
7. 85 Sup. Ct. 1136, 1142 (1965).
8. 333 U.S. 153 (1948).

Patrol plane which had to ditch thirty miles off the coast of North Carolina. The plane sank, but King was not seriously hurt and got out of the plane and put on his life jacket. Two and a half hours later he was still alive when an accompanying plane had to leave the scene; however, when he was picked up about four and a half hours after the ditching he was dead, and the medical diagnosis was drowning as the result of exposure in the water. The insurance company claimed that the death resulted from participation in aviation and refused to pay the policy benefit. Mrs. King brought suit in the state courts of South Carolina, contending that drowning was the cause of the accident rather than participation in aviation. The insurance company, being an Ohio corporation, removed the cause under the old 3,000 dollar jurisdictional amount to the federal district court. The parties agreed that South Carolina law was controlling, but no South Carolina decision was available on aviation exclusion clauses; the district court therefore fell back on what it considered to be general principles of South Carolina insurance law including construction against the insurer and found that the immediate cause of death was drowning and not avaiation and that therefore Mrs. King was entitled to recover.[9] Two months later in a case brought in the court of common pleas at Spartanburg County in South Carolina, on another policy for only 2,500 dollar and therefore non-removable to the federal district court, the court ruled in favor of Mrs. King on an almost identical aviation exclusion clause. The insurer did not appeal this second case. In the appeal from the removed case the United States Court of Appeals, Fourth Circuit reversed the district court's judgment in favor of Mrs. King, saying that it found nothing in the South Carolina Supreme Court decisions inconsistent with the view that there was no ambiguity in the aviation exclusion clause, and that King's death was clearly a result of his participation in aviation.[10] The circuit court expressed its disbelief that the South Carolina Supreme Court would have ruled in Mrs. King's favor if her case had been before it and held that the decision rendered by the court of common pleas at Spartanburg County in favor of Mrs. King on the 2,500 dollar policy was not binding on the circuit court as a final expression of the South Carolina law, particularly since

9. 65 F. Supp. 740 (W.D.S.C. 1946).

10. Order of United Commercial Travelers v. King, 161 F.2d 108 (4th Cir. 1947).

it was not binding on other South Carolina courts. Oddly enough, after certiorari was granted, another South Carolina court of common pleas, this time at Greenville County, rendered a decision which expressly rejected the reasoning of the Spartanburg common pleas court in the 2,500 dollar policy suit and espoused the reasoning of the circuit court. The United States Supreme Court went into some detail in describing the system of the Court of Common Pleas for South Carolina, emphasizing that while they are courts of record, their decisions are not published or digested in any way and are filed only in the county of trial where the sole index is by the names of the parties.[11] The defendant's attorney was astute enough to obtain from the chief justice of the South Carolina Supreme Court a certificate to the effect that under the practice in South Carolina an unappealed decision of the Court of Common Pleas for South Carolina is binding only upon the parties before the court in that particular case and would not constitute a precedent in any other case in that court or in any other court in the State of South Carolina. The United States Supreme Court stated that the circuit court probably attributed some weight to the Spartanburg 2,500 dollar decision but was justified in holding that decision not controlling and in proceeding to make its own determination of what the South Carolina Supreme Court would probably rule in a similar case.[12] An earlier case was cited to the effect that a federal court sitting in a diversity suit was in effect only another court of the state and it would therefore be incongruous to hold the federal court bound by a decision which would not be binding on any state court.[13] Some importance was also attributed to the obvious difficulty in researching decisions of the Court of Common Pleas for South Carolina. The Supreme Court in *King* was careful to point out that its decision was not to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts.[14] The second court of common pleas decision—which came down after certiorari was granted—was not relied upon by the Supreme Court but used only as an illustration of the

11. King v. Order of United Commercial Travelers, 333 U.S. 153, 159-62 (1948).
12. *Id.* at 160-61.
13. *Id.* at 161. The Court cited Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
14. *Id.* at 162.

perils of interpreting a common pleas decision as a final or definitive expression of the South Carolina law.[15]

The apparently increasing freedom available to the federal judge for deciding what is the law of the state was suggested in the 1956 case of *Bernhardt v. Polygraphic Co.*[16] One of the questions here was whether a 1910 Vermont decision holding arbitration agreements unenforcible was binding on a federal court in 1956. The Supreme Court said that the 1910 decision *was* binding, but in so holding it was careful to point out that there was no confusion in the Vermont decisions, no developing line of authorities that cast a shadow over the established ones, no dicta, nor doubts nor ambiguities in the Vermont opinions on the question involved and no legislative development that promised to undermine the judicial rule. Obviously, some freedom must be allowed the federal judge in this area because otherwise the *Erie* principle will result in the substitution of one kind of forum shopping for another. The lawyer whose case depends upon an old or shaky state court rule which has not been re-examined for many years would be foolish not to try and maneuver his case into federal court, where, on the purely mechanical administration of the *Erie* doctrine, the state decision could not be impeached. It seems to me that the very proper implication in *Bernhardt v. Polygraphic Co.*[17] is that a federal court is *not* bound by blind adherence to what is thought to be the law of the state unless the same is very clearly and recently enunciated by the highest court of that state. The *Polygraphic* case indicates that if there *is* some confusion in the state decisions and if some shadow *is* cast over the earlier decisions by developing authorities or even if there are some dicta, doubts or ambiguities in the state decisions, or some legislative development, then the federal court may re-examine the situation as it were from scratch and arrive at its own judgment as to what the state supreme court would do in a given set of circumstances. After all, this is what lawyers and inferior state judges are doing all the time; they are making some intelligent estimate as to what the state supreme court will hold in a given set of facts and circumstances. This is practising law, but when the federal judge performs the same function it is a judicial one calling for the same approach, and he should not be tied down or hidebound by

15. *Ibid.*
16. 350 U.S. 198 (1956).
17. *Ibid.*

antiquated decisions or outmoded principles. Litigants in federal courts are not really obtaining a fair trial or even perhaps due process if they do not receive a full measure of the judicial function from the federal judge. Like lawyers and lower state judges, the federal judge in these situations is using his intellectual capacities to discover what the state law is or will be—not what some particular state judge may have said many years ago under quite different circumstances. As Professor Wright has pointed out, however, the federal court must keep in mind that its function is not to choose the rule which it would adopt for itself if it were free to do so, but it should choose the rule which it believes the state court is most likely in the future to adopt, and base such a choice on all that is known about the methods of the state court in reaching its decisions.[18]

As a general rule the federal judges sitting in a particular state have practiced before that state's courts and are in a better position to resolve complex questions of the law of their home state than other federal judges without this experience. For this reason some federal appellate courts have expressed reluctance to substitute their own views of the state law for that of the local federal judge, but this again, as suggested by Professor Wright, should not be carried so far as to prohibit the appellate court from reversing because it thinks the state law is otherwise.[19] This would involve perhaps treating the question of state law as if it were a question of fact, but certainly a party should be entitled to some review of the trial court's determination of the state law in the same way that he is entitled to review of other legal questions in the case. A few instances come to mind wherein a federal judge may in effect seem to be making law but wherein he would actually be finding what the state law is going to be. I have reference to recent developments in the field of the viable fetus and in the area of a wife's right to sue for loss of consortium and in the removal of tort immunity from charitable corporations. These are areas in which somewhat antiquated principles of law are gradually giving way to more practical and modern philosophy and it would not be completely shocking if, for instance, a federal judge in South Carolina were to hold that the South Carolina Supreme Court, if presented with the problem, would allow a wife to sue for loss of her husband's consortium or would allow negligence suits against charitable

18. WRIGHT, FEDERAL COURTS § 58, at 206.
19. *Ibid.*

corporations. A good argument can be made for the proposition that the law is moving in that direction and if the federal judiciary is going to perform its proper function, the judges must be intellectually free to make this prediction. In a situation where no clear-cut or even persuasive state ruling on the question is available, the federal court should exercise its judicial function upon the basis of other applicable principles of state law or by reference to general rules of law applied in its best judgment with reference to decisions in other jurisdictions and the principles of the common law.

The state of Florida has gone so far as to authorize certification of a question of state law by the federal court to the Florida Supreme Court;[20] other writers have endorsed this idea, but Professor Moore pessimistically feels that there is little basis for believing it will be adopted in the near future.[21] However, we heard at this morning's session that the American Law Institute would probably propose the addition of a new section 1371 to Title 28 of the United States Code which would be tantamount to allowing certification in some situations.

I close with a piece of wise counsel from Chief Judge Parker of the Fourth Circuit in a 1949 article in the American Bar Association Journal:[22]

> In ascertaining the applicable law of the state, we are to consider court decisions and other available sources of local law; and we are to apply court decisions in the light of the well established *stare decisis* rule and its limitations. We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of *dicta* or the chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it.[23]

20. FLA. STAT. ANN. § 25.031 (Cum. Supp. 1950).
21. 1A MOORE, FEDERAL PRACTICE ¶ 0.310, at 3332.
22. Parker, *Erie v. Tompkins in Retrospect,* 35 A.B.A.J. 19 (1949).
23. *Id.* at 83, Chief Judge Parker quoting from his opinion in New England Mut. Life Ins. Co. v. Mitchell, 118 F.2d 414, 420 (4th Cir. 1941).