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Federal Courts--Standards of Domicile in Diversity

William A. Tantlinger
West Virginia University College of Law

James M. Brown
West Virginia University College of Law

in the record of which he seeks inspection and the inspection must be for a legitimate purpose . . . ."[24] In *Daily Gazette* the court based its determination that the petitioner sought to inspect the certificate for an improper purpose upon petitioner's admitted purpose that it sought to publish the certificate in order to dissuade other voters from signing the certificate. The court reasoned that it is inherent in a free society that its members be able to nominate a candidate of their choice for political office, irrespective of who he is or what his philosophies are, without fear of embarrassment or intimidation from anyone, provided they do so in compliance with the law.[25]

This case establishes the certificate of nomination as a valuable method whereby citizens of West Virginia can nominate candidates of their choice without relying exclusively on political parties. One can expect to see this method used more frequently in the future because of the emergence of new minority groups who wish to express their political views. This case is significant in setting a precedent which can be relied upon by persons seeking to employ the certificate of nomination to nominate candidates.

Ray Allen Byrd
Danny Lee Stickler

Federal Courts—Standard of Domicile in Diversity Cases

Infant plaintiff brought an action by next friend to surcharge the guardian of the infant's estate for mismanagement. The United States District Court for the Eastern District of North Carolina dismissed the action for want of diversity jurisdiction, and plaintiff appealed. *Held,* reversed and remanded. The question of the domicile of an infant plaintiff in a diversity action is determinable by federal common law rather than by the law of either of the states wherein the parties reside; and for purposes of determining diversity jurisdiction, infant plaintiff, who was born and raised in North Carolina, who lived in North Carolina in custody of the father after parent's divorce until father's death, and who thereafter lived in New Jersey with his mother and stepfather, who were domiciled there,

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[24] *Id.* at 254, 43 S.E.2d at 218.
[25] State *ex rel.* Daily Gazette Co. v. Bailey, 164 S.E.2d 414, 419 (W. Va. 1968).

acquired domicile of his mother and was a citizen of New Jersey. *Ziady v. Curley,* 396 F.2d 873 (4th Cir. 1968).

This case was brought under the authority of 28 U.S.C. section 1332 which provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between (1) citizens of different states. . . ." One of the principle purposes of this statute is to give a citizen of one state access to an unbiased court to protect him from parochialism if he should be forced into litigation in another state in which he is a stranger and of which his opponent is a citizen. For this purpose to be accomplished, citizens must have access to federal district courts without interference from a tangled webb of state procedural and jurisdictional rules. This case represents the position that in infant domicile cases, federal courts should determine diversity of citizenship by a uniform federal standard. Implicit in this approach is the idea that federal courts can use their own rules to determine diversity in federal cases.

Since Justice Brandeis overruled *Swift v. Tyson*[1] in the now famous decision of *Erie R. R. v. Thompkins,*[2] federal courts have been required to follow the law of the state of the forum as to substantive matters when trying diversity of citizenship actions.[3] Under the law of North Carolina an unemancipated infant cannot of his own volition select, acquire, or change his domicile,[4] and, upon the death of the father, the child's domicile is that which the father held at death.[5] However, the law of North Carolina also

[1] 41 U.S. (16 Pet.) 1, 19 (1842). Under the rule of *Swift v. Tyson* federal courts were not bound by state court decisions in matters of general law or commercial law. The Court said, "Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority by which our own judgments are to be bound up and governed."

[2] Erie R. R. v. Thompkins, 304 U.S. 64, 79 (1938). Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine . . . we merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

[3] Williams v. Green Bay & W. Ry., 326 U.S. 549 (1946); Klaxton Co. v. Sentor Electric Mfg. Co., 313 U.S. 487 (1941); O'Brien v. Willys Motors Inc., 385 F.2d 163 (6th Cir. 1967). 600 California Corp. v. Harjean Co., 284 F. Supp. 843 (N.D. Tex. 1968).

[4] Allman v. Register, 233 N.C. 531, 64 S.E.2d 861 1951); Duke v. Johnton, 211 N.C. 171, 189 S.E. 504 (1937).

[5] *In re* Hall's Guardianship, 235 N.C. 697, 71 S.E.2d 140 (1952).

provides that a guardian by nature may change the domicile of an unemancipated child.[6] It would appear, therefore, that the mother, as the child's guardian by nature,[7] could change the domicile of her son. Thus, the result of the instant case could have been the same had North Carolina law been applied.

An interesting question is present, however, as to the jurisdiction of the court in the light of Rule 17(b) of the Federal Rules of Civil Procedure. Rule 17(b) provides that "[t]he capacity of an individual. . .to sue or be sued shall be determined by the law of his domicile. . ."[8] But domicile is the issue in this case, and no answer is given as to whether state or federal law should apply to that question.

The court in *ziady v. Curley* saw the issue of domicile in the diversity of citizenship case as uniquely the province of the federal courts.[9] There would seem to be three possible bases for this determination. The court may have believed that the issue was prerequisite to deciding substantive matters and therefore was by nature procedural.[10] Viewing domicile as a procedural matter makes a critical difference, for while federal courts in diversity cases are bound to follow the substantive law of the state in which they sit,[11] they are not bound by procedural law of such state.[12] There is also authority that federal courts are not bound by the state court's characterization of a matter as substantive or procedural in determining whether state law is binding in diversity cases.[13]

It is also possible that the court may have seen the issue as neither substantive nor procedural. It is established that when federal procedure varies from state procedure, federal courts

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[6] *Id.*

[7] "A guardian by nature is the father, and on his death, the mother of a child. . . ." BLACK'S LAW DICTIONARY 834 (4th ed. 1951).

[8] FED. R. CIV. P. 17(b).

[9] Ziady v. Curley, 396 F.2d 873, 874 (4th Cir. 1968). "We have no doubt that it is to the federal common law to which we should look. The question of domicile can arise in regard to the diversity clause of Article III, § 2 of the Federal Constitution and under 28 U.S.C. § 1332, only in federal court."

[10] *Id.*

[11] Erie R. R. v. Thompkins, 304 U.S. 64 (1938).

[12] Dunn v. Beech Aircraft Corp., 271 F. Supp. 662, 664 (Del. 1967). "Under the 'substance/procedure' dichotomy of Erie R.R. v. Thompkins, 304 U.S. 64 (1938) . . . a federal court sitting in a diversity case is only bound to follow the substantive law of the state in which it sits."

[13] Aetna Ins. Co. v. Newton, 274 F. Supp. 566, 571 (D. Del. 1967). "This court, of course, is not necessarily bound by the State Court's characterization of a matter as substantive or procedural in determining whether state law is binding upon it under the *Erie* doctrine."

exercising diversity jurisdiction are not bound by the characterization of legal rules as substantive or procedural in other contexts, but by the principle that the outcome of the case should be substantially the same as it would have been had the case been tried in a state court.[14] This principle has been applied to require federal courts to follow state law as to presumptions,[15] burdens of proof,[16] and the probative force of evidence.[17] Apparently, however, it has not been used to settle jurisdictional questions.

It seems likely, however, that the court felt that there was simply no doubt that federal common law should be used to determine the domicile of the parties in diversity cases. Indeed this seems to be the logical conclusion from a study of the cases. Although it would appear that such a principle has never been precisely stated, it has been said that state law cannot limit or otherwise affect the jurisdiction conferred on federal courts by the Constitution and laws of the United States.[18] Also, it has been held that federal district courts are bound only by federal laws in jurisdictional matters,[19] and the seventh circuit has stated that when an action is brought in a federal district court, questions relating to jurisdiction are governed by federal law.[20] Thus, the court could easily have assumed it to be "obvious" that federal common law would apply, notwithstanding, the absence of cases precisely in point.

Whatever route the court chose to take, once it reached the point of deciding that domicile was to be determined by federal common law,[21] it then had to decide what that federal common law was to be. The court had to decide whether any federal common law existed as to domicile in diversity cases, and if not, where to look for authority to establish the federal common law of domicile in diversity.

The court could find no federal cases in point other than *Lamar v. Micou*,[22] the only case relied upon by the district court,

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[14] Guaranty Trust Co. v. York, 326 U.S. 99 (1945), *rehearing denied*, 326 U.S. 806 (1945).

[15] Dick v. New York Life Ins. Co., 359 U.S. 437 (1959).

[16] *Id.*

[17] Sheptur v. Proctor and Gamble Distributing Co., 261 F.2d 221 (6th Cir. 1958).

[18] Penn. General Casualty Co. v. Pennsylvania *ex rel.* Schnader, 294 U.S. 189 (1935).

[19] Berlanti Const. Co. v. Republic of Cuba, 190 F. Supp. 126 (S.D.N.Y. 1960).

[20] Franklin Life Ins. Co. v. Falkingham, 229 F.2d 300 (7th Cir. 1956).

[21] Federal common law does not exist according to Justice Cardozo's opinion in Erie R.R. v. Thompkins, 304 U.S. 64, 78 (1938).

[22] Lamar v. Micou, 112 U.S. 452 (1884).

and it found that case to be distinguishable.[23] The *Lamar* case held that while a widow had the power to change the domicile of her children, she lost that power if she remarried.[24] The court observed that the primary consideration in *Lamar v. Micou* was the necessity of adopting a rule which would provide a fixed and definite standard by which the investment conduct of the guardian could be measured and which would prevent those having control over the infant's person from themselves choosing the applicable law by changing the infant's state of residence.[25] However, the court in *ziady* reasoned these considerations, are not relevant in defining domicile for the purpose of determining whether diversity jurisdiction exists.[26]

Once the court distinguished Lamar v. Micou,[27] it relied on the Restatement of the Law of Conflicts and relevant comments to support its finding as to the federal common law of domicile.[28] The Restatement provides that "if the father dies and no guardian of his minor child's person is appointed, the child has the same domicile as that of the mother"[29] and if the mother remarries, the child's domicile follows that of the mother unless she abandons the child.[30]

While there are, as the court pointed out,[31] no federal cases in point other than *Lamar v. Micou,*[32] there does exist some degree of authority for the court's decision arising out of various state court holdings. A New York case held that on the death of the father, the mother's domicile determined that of the child, notwithstanding a divorce decree which awarded custody of the child to the father.[33] Also, an Iowa case held that the courts of Iowa (the father's

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[23] "We have serious doubt, however, of the continued vitality of the *Lamar* case, and we conclude that, in any event, it is distinguishable. In the discussion of domicile, the *Lamar* case can only be understood as a then expression of the basic concept of feudal law that a married woman could have no existence apart from her husband." Ziady v. Curley, 396 F.2d 873, 876 (4th Cir. 1968).

[24] Lamar v. Micou, 112 U.S. 452 (1884).

[25] Ziady v. Curley, 396 F.2d 873, 876 (4th Cir. 1968).

[26] *Id.*

[27] *Id.*, see note 14 *supra.*

[28] *Id.*

[29] Restatement of Conflict of Laws, § 38 (1934).

[30] *Id.*

[31] Ziady v. Curley, 396 F.2d 873, 874 (4th Cir. 1968). "[W]e have not been referred to, nor have we found, any case which purports to establish the applicable federal common law."

[32] Lamar v. Micou, 112 U.S. 452 (1884).

[33] *In re* Thorne's Guardianship, 212 App. Div. 654, 209 N.Y.S. 280 (1925).

domicile) were without jurisdiction to grant guardianship over the person of an infant who survived the death of his father in whose custody he had been given by a decree of divorce. Here it appeared that the infant's mother was at the time a resident of Texas, and the domicile of the infant became, on the death of his father, identified with the domicile of his mother.[34] In neither of these cases was there a remarriage of the widow, as in the *ziady* case. They are, therefore, seemingly reconcilable with the *Lamar* decision. One Texas case, however, involved the problem of such a remarriage.[35] The Texas Supreme Court decided that a widow does not lose the power to change the domicile of her children simply by remarrying.[36] That case is not directly in point with the present case because there was no divorce involved, but it is difficult to see how that would alter the result, at least as it affects the child's domicile.

It may be questioned whether the court in *ziady* was forced to make the sweeping declaration that in determining diversity of citizenship the issue of domicile is a matter for federal common law. Nevertheless it would seemingly be desirable to have one rule, or one set of rules, to determine the jurisdiction of all federal courts in such cases. What form these might take is of course conjectural, and knowledge of this must await the cases which will create such rules.

William A Tantlinger
James M. Brown

Landlord and Tenant—Constitutional Law—Retaliatory Evictions

In March 1965, Mrs. Edwards rented housing property from Nathan Habib on a monthly basis. Shortly thereafter, she complained to the Department of Licenses and Inspections of certain violations of the sanitary code which her landlord had failed to alleviate. During the subsequent inspection, forty violations were discovered, and Habib was ordered to correct them. Habib then gave Mrs. Edwards the necessary 30-day statutory notice to vacate and when she refused, he instituted action and obtained a default judgment for possession of the premises. The tenant moved to re-

[34] *In re* Guardianship of Skinner, 230 Iowa 1016, 300 N.W. 1 (1941).
[35] Wheeler v. Hollis, 19 Tex. 522 (1857).
[36] *Id.*