Federal Courts—Another Chapter To Erie

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scientific authorities which he recognized as standard on the subject matter involved in order to test his knowledge and accuracy.

A few courts have adopted the liberal view which permits authoritative treatises to be used on the cross-examination of expert witnesses even though the expert does not recognize the authoritative status of the work and has not relied on treatises in his testimony. The modern tendency veers toward freedom of cross-examination of expert witnesses, but it is doubtful if many courts will become this liberal. However, in Bluebird Baking Co. v. McCarthy, 19 Ohio L. Abs. 466, 3 Ohio Op. 490, 36 N.E.2d 801 (Ct. App. 1935), there is a dictum that Ohio would permit the cross-examination of experts with publications of writers of recognized skill and ability. The leading exponent of this liberal rule is the Uniform Rules of Evidence. These rules would eliminate all prohibitions upon the use of a treatise for purposes of cross-examination except those that would apply to the use of testimony by another expert witness for the same purpose. Uniform Rules of Evidence rule 61(31), comment (1953).

A diligent research has revealed no West Virginia cases on this subject. One may ponder whether West Virginia will move to a liberal view on the use of treatises in the cross-examination of expert witnesses or adhere to the more conservative view requiring the reliance of the expert upon or recognition by the expert of learned treatises used in the cross-examination.

Menis Elbert Ketchum, II

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P averred that he was injured in the state of New York on August 18, 1961, while using road building equipment manufactured by D-1 and bought from D-2. He filed complaints in federal court against D-1 on August 20, 1962, and against D-2 on February 13, 1964. Proper service of process on D-2 was not made until October 22, 1964. The basis of federal jurisdiction was diversity of citizenship. In a motion for judgment on the pleadings, D-2 contended that the action was barred by the New York statute of limitations in that such actions must be commenced within three years. The law of New York is that such actions are commenced by service of process, but an action is commenced in federal courts merely by

Since the establishment of the *Erie* doctrine, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requiring federal courts to apply state law in diversity actions, the discrepancies in the provisions of the federal rules of civil procedure and corresponding state law have given rise to numerous difficult questions. The popularity of the *Erie* doctrine reached a zenith in the late 1940's, but more recent decisions have tended to emphasize the primacy of the federal rules over contrary local policy. *Hanna v. Plumer*, 380 U.S. 460 (1965). Although a 1948 decision of the United States Supreme Court is contrary to the district court decision in the instant case, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), the decision here follows the trend of recent decisions.

The famous case of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), held that the Rules of Decision Act 28 U.S.C. § 1652 (1958), which stated that the laws of the states shall be regarded as rules of decision in the courts of the United States, extended only to the positive statutes of the states. Then *Erie* was decided, holding that the Rules of Decision Act requires federal courts in diversity cases to follow a state's judicial interpretation of its law. The Court in *Erie* also held that federal courts are to apply state substantive law and federal procedural law.

The position of the Court was substantually redefined in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), in which the Court articulated the "outcome determinative" test. In essence, the *York* decision required the result of the litigation to be the same, whether brought in a state or federal court within the forum state. The *Erie-York* doctrine would require federal courts to apply a state rule of procedure if the result would be different depending upon whether the state or federal rule was applied.

The leading case in which a federal rule was subordinated to a conflicting state requirement is *Ragan v. Merchants Transfer & Warehouse Co.*, supra. Rule three of the Federal Rules of Civil Procedure provides that an action is commenced by filing a complaint. However, by the state statute the complaint had to be filed and served before the statute of limitations was tolled. The Supreme Court held that filing is insufficient to toll the statute of limitations in a diversity case if the state rule requires service.
In *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958), the Supreme Court first retreated from the "outcome determinative" formula of *Erie-York*. In *Byrd* the Court suggested that if a state rule merely affected the "form and mode" of enforcement of a state created right, there might be certain countervailing considerations which would compel a federal court to follow federal procedure even though the outcome of the litigation would be technically affected. The Court held that a state rule must be applied if it is an "integral part" of a state created right; otherwise a balancing of state and federal interests should determine which law controls. The advantage of the *Byrd* approach is that it does not force a federal court to follow state rules merely to achieve conformity of outcome in all cases.

Similarly, in *Hanna v. Plumer*, *supra*, the Court moved closer toward the goal of uniformity of federal procedure by holding that the service of process requirements of Federal rule four were not displaced by more stringent state standards. Thus service on the defendant, an executor, did not have to be by the "in hand" method set forth in the state statute. As stated by the Court, the purpose of the *Erie* doctrine, even as redefined in *York* and *Ragan*, was never to limit the federal courts to an "outcome determinative" test when there are affirmative countervailing (federal) considerations and when there is a congressional mandate (the rules) supported by constitutional authority. *Hanna* and *Byrd* limit the use of the "outcome determinative" test and appear to give strong support to the policies underlying the countervailing considerations concept. As a result, strong countervailing federal considerations supporting uniformity of procedure and speedy adjudication upon the merits suggest application of federal procedural law.

Instances where the courts have declared a strong federal policy to exist have not been limited to questions of federal procedure. Other areas in which the concept has been applied include judge or jury determination of a particular issue, *Byrd v. Blue Ridge Elec. Co-op.*, *supra*, and whether the public policy of a state prohibiting a declaratory judgment in certain instances or the policy expressed by Congress in the Declaratory Judgment Act should prevail. *Allstate Ins. Co. v. Charneski*, 286 F.2d 238 (7th Cir. 1960).

It seems significant that the Court in *Hanna* did not expressly repudiate the decision in *Erie*, as redefined in *York* and *Ragan*. By contrast, in *Hanna* the Court held that federal rule four was
controlling when in direct conflict with state law. However, in *Ragan* the Court held that the local state policy was controlling when in conflict with federal rule three. In the principal case, the district court upheld the spirit of the *Hanna* decision, declaring that federal rule three is controlling when in conflict with state law.

Although the decision in the principal case supplements *Hanna* and seems to be moving toward the establishment of uniformity in the federal courts in matters of procedure, the picture is still very cloudy. Since *Hanna* did not expressly overrule the decision in *Ragan*, all one can do is speculate what future decisions of the Supreme Court will be in this area. Until a final determination of this question, the prudent attorney will protect his client by meeting the requirements of both the federal and state rule.

*William Jack Stevens*

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**Federal Courts—Prosecution of Officers under the Civil Rights Acts**

*Ds*, a county attorney and his deputy, filed and prosecuted a complaint charging *P*, a sixteen year old girl, with first degree murder. Following her arrest, *P* alleged that she was confined to a drunk tank for twenty-five days without a preliminary hearing. Moreover, *P* claimed she was taken outside the county in furtherance of an unsuccessful attempt to obtain her confession. *P* also was allegedly taken to the scene of the crime where attempts were made to intimidate her into confessing. Upon being released, *P* filed a complaint charging that *Ds*, while acting under color of state law, exceeded their jurisdiction and deprived her of rights secured by the federal constitution. The United States District Court dismissed the complaint for lack of jurisdiction. The federal appellate court ruled that the real issue was whether *P* had stated a claim upon which relief could be granted. *Held*, reversed. The complaint did state a cause of action. *Ds*, as prosecuting attorneys, are entitled to a limited immunity because of their quasi-judicial roles. However, if a prosecuting attorney commits acts which are related to police activity as opposed to judicial activity, the cloak of immunity no longer protects him. Here, if *Ds* alleged acts were in the nature of police acts, they clearly were beyond the scope of judicial immunity. *Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958)* grants federal courts the jurisdiction to hear cases