NORTH CAROLINA LAW REVIEW

Volume 26 | Number 1 Article 10

12-1-1947

Courts -- Federal Jurisdiction -- Application of Res Judicata and Erie v. Tompkins to Achieve Uniformity of Law Within a State

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Amendment, one of the most essential safeguards in our Bill of Rights, depends in large part upon what limitations the courts define and maintain with respect to the right of search without warrant incidental to lawful arrest. A misunderstanding of the *Harris* case may lead to such an extension of these limitations as to necessitate a sharp reversal of policy if the constitutional guarantee is not to be lost.

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Courts—Federal Jurisdiction—Application of Res Judicata and Erie v. Tompkins to Achieve Uniformity of Law Within a State

In 1940, Angel, a citizen of North Carolina, purchased of Bullington, a citizen of Virginia, land situated in Virginia and gave in payment thereof a series of notes secured by a purchase money deed of trust. The contract was made in Virginia, and the notes were payable in Virginia. Angel defaulted, and Bullington, acting upon an acceleration clause, caused the trustees to sell tne land. A deficiency resulted. Bullington sued Angel in a North Carolina superior court to recover the deficiency. Angel demurred to the cause of action on the basis of the following statute:

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust, or obligation secured by the same."[1]

The demurrer was overruled and Angel appealed. Bullington challenged the constitutionality of the statute. The North Carolina Supreme Court reversed,[2] holding that the statute precluded the recovery of a deficiency judgment arising out of purchase money deed of trust. It said,[3] "It will be noted that the limitation created by the statute is upon the jurisdiction of the court. . . . This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the state, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself." It further said, in substance, that the legislature

[1] N. C. GEN. STAT. (1943) §45-36.
[2] Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941).
[3] *Id.* at 20, 16 S. E. 2d at 412.

had, *within constitutional limitations,* fixed the jurisdiction of the courts of the state.

Bullington accepted the North Carolina decision at face value, and went into the federal district court where he obtained his deficiency judgment.[4] Upon appeal to the Circuit Court of Appeals the decision was affirmed[5] on the ground that the state court's interpretation of the statute was binding on the federal courts, and since the statute was construed as procedural only, the federal court was not bound to apply it.

Angel appealed to the Supreme Court, contending that under *Erie Railroad Co. v. Tompkins*[6] the federal court erred in not applying the statute. Bullington again questioned the constitutionality of the statute. The court held,[7] (1) the issue of constitutionality was necessarily decided by the North Carolina court and was therefore *res judicata,* (2) under the *Erie* doctrine the courts below erred in not following the statute and dismissing the action.

Erie Railroad v. Tompkins in overruling *Swift v. Tyson*[8] announced the doctrine that in diversity of citizenship cases, federal courts must follow the rules of substantive law of the states in which they sit whether that law is found in state statutes or the decisions of state courts. More important than the actual doctrine of the *Erie* case is the policy which dictated it, i.e., uniformity of result within a particular state regardless of the forum, state or federal, in which suit is brought.[9] Since the *Erie* mandate relates to substantive law as opposed to procedural law,[10] it is obvious that the distinction between substance and procedure has become increasingly important.[11] The policy of uniformity has undermined the traditional distinctions. Whether a state law will be considered substantive or procedural for purposes of the *Erie* rule no longer depends upon what it traditionally has been called nor upon what a state court calls it, but upon what effect it will have on the outcome of litigation.[12] Regardless of which characterization has been placed upon them in the past, it is now settled that state rules as to

[4] Bullington v. Angel, 56 F. Supp. 372 (W. D. N. C. 1944).

[5] Angel v. Bullington, 150 F. 2d 697 (C. C. A. 4th 1945); Notes, 24 N. C. L. REV. 267 (1946), 13 U. OF CHI. L. REV. 195 (1946), 21 IND. L. J. 228 (1946).

[6] 304 U. S. 64 (1938).

[7] Angel v. Bullington, —— U. S. ——, 67 Sup. Ct. 657, 91 L. Ed. 557 (1947).

[8] 16 Pet. 1 (U. S. 1842).

[9] Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945); Erie Railroad Co. v. Tompkins, 304 U. S. 64, 75 (1938).

[10] Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938) (federal courts must search out the entire body of state substantive law).

[11] Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins,* 34 ILL. L. REV. 271 (1939-40).

[12] Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945) ("... does it [statute of limitations] significantly affect the result of a litigation . . .?").

burden of proof,[13] conflicts of laws,[14] public policy,[15] statutes of limitation,[16] and the admission of parol evidence[17] must be followed by the federal courts.[18]

The majority in the instant case said,[19] "For purposes of diversity jurisdiction a federal court is, 'in effect,' only another court of the state." Under *Swift v. Tyson,* this was true insofar as the application of state statutes bearing upon substantive rights and decisions relating to regulation of local property was concerned.[20] Under *Erie Railroad v. Tompkins* a federal court is "in effect" a state court insofar as the application of all state law, statutory and decisional, of a substantive character is concerned. Thus, the rule was not changed by the *Erie* case; it merely extended it to cases where state decisional law was in issue rather than where state statutory law was involved. *Guaranty Trust Co. v. York*[21] held specifically that state statutes of limitation, although traditionally regarded as affecting the remedy but not the right, must be followed by the federal courts because they significantly affect the outcome of litigation. The *Bullington* case holds specifically that state statutes which deprive the state courts of jurisdiction, if constitutional,[22] must be followed by the federal courts. Neither the *York* case nor the *Bullington* case announced a new rule when it was said that in diversity cases federal courts are courts of the state in which they sit. They represent an extension of the rule so that today federal courts are courts of the state in which they sit so far as the application of state laws which significantly affect the outcome of litigation is concerned, regardless of the traditional characterization of those laws.

It has been settled law that a state court's interpretation of state statutes is binding upon the federal courts. What effect does the

[13] Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939).
[14] Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941).
[15] Griffin v. McCoach, 313 U. S. 498 (1941).
[16] Guaranty Trust Co. v. York, 326 U. S. 99 (1945).
[17] Long v. Morris, 128 F. 2d 653 (C. C. A. 3d 1942).
[18] Also included are state rule as to proving contributory negligence, Palmer v. Hoffman, 318 U. S. 109 (1943); state statute making statutes of limitations applicable to both law and equity, Kithcart v. Met. Life Ins. Co., 150 F. 2d 997 (C. C. A. 8th 1945); state rule as to *forum non conveniens,* Weiss v. Routh, 149 F. 2d 193 (C. C. A. 2d 1945). *But cf.* Williams v. Green Bay & W. R. Co., 326 U. S. 549 (1945) (*forum non conveniens* question left open).
[19] —— U. S. ——, 67 Sup. Ct. 657, 659, 91 L. Ed. 557, 559 (1947).
[20] Neirbo Co. v. Bethlehem Corp., 308 U. S. 165, 171 (1929); Bucher v. Cheshire R. R. Co., 125 U. S. 555 (1887); *Ex parte* Schollenberger, 96 U. S. 369 (1877) (federal courts are courts of the state to the extent that a state statute plus consent of parties may create circumstances which will authorize a federal court to take jurisdiction).
[21] 326 U. S. 99 (1945).
[22] See discussion of constitutionality of statute in Note, 24 N. C. L. Rev. 267 (1946).
[23] Dorchy v. Kansas, 272 U. S. 306 (1926); Kansas City Steel Co. v. Arkansas, 269 U. S. 148 (1925); Knights of Pythias v. Meyer, 265 U. S. 30 (1923); Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445 (1920); Old Colony Trust Co.

principal case have upon that rule? To be binding upon federal courts, the interpretation placed by a state court upon its statutes must comport with the constitution.[24] In the *Bullington* case, the constitutionality of the statute was attacked and necessarily decided by the state court.[25] If the statute were unconstitutional, the North Carolina court was not at liberty to apply it, and the federal court not at liberty to follow it.[26] A state cannot escape its constitutional obligations by withholding jurisdiction from its courts.[27] But, legislative acts are presumed to be constitutional until constitutionality is determined.[28]

Since the issue of constitutionality was necessarily decided below and is *res judicata* unless appealed, and a presumption of constitutionality obtains until a decision on the merits is rendered, bearing in mind the state court characterized the statute as procedural, it would seem to follow from a cursory reading of the opinion that the *Bullington* case rejects the rule that the state court's interpretation is binding. But, it must be remembered that in diversity cases federal courts must concern themselves with uniformity within the state. The court in the instant case has held *not* that the state court's interpretation is no longer binding but that the *effect* of the decision is controlling. For purposes of diversity jurisdiction, in view of the *York* case, the interpretation of state statutes by state courts is material only insofar as it effects the outcome of litigation. It would defeat the policy of the *Erie* case to hold that the literal interpretation of a state statute is binding upon the federal courts but the effect thereof is not.

One important effect of the *Bullington* decision is a change in the rule that a state cannot by legislation enlarge or diminish federal jurisdiction.[29] The practical effect of the decision is without doubt a limita-

v. Omaha, 230 U. S. 100 (1912); American Land Co. v. Zeiss, 219 U. S. 47 (1910); Bucher v. Cheshire R. R. Co., 125 U. S. 555 (1887); Louisiana v. Pillsbury, 105 U. S. 278 (1881); Christy v. Pridgeon, 4 Wall. 196, 203 (U. S. 1866); Gelpke v. Dubuque, 1 Wall. 175 (1863); Commercial Bank v. Buckingham, 5 How. 317 (U. S. 1846); Elmendorf v. Taylor, 10 Wheat. 152, 159 (U. S. 1825) ("This court has uniformly professed its disposition, in cases depending upon the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government . . . is the appropriate organ for construing the legislative acts of that government. . . . The construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States.").

[24] Broderick v. Rosner, 294 U. S. 629 (1934); Bradford Elec. Co. v. Clapper, 286 U. S. 145 (1931); Elmendorf v. Taylor, 10 Wheat. 152 (U. S. 1825); Mills v. Duryee, 7 Cranch. 481 (U. S. 1813); *accord,* Home Ins. Co. v. Dick, 281 U. S. 397, 407 (1929).

[25] —— U. S. ——, 67 Sup. Ct. 657, 660, 91 L. Ed. 557, 560 (1947).

[26] See cases cited *supra* note 24.

[27] Broderick v. Rosner, 294 U. S. 629 (1934); *accord,* Home Ins. Co. v. Dick, 281 U. S. 397, 407 (1929).

[28] 11 AM. JUR., CONSTITUTIONAL LAW, §92.

[29] David Lupton's Sons v. Auto. Club of America, 225 U. S. 489 (1911); Traction Co. v. Mining Co., 196 U. S. 239 (1904); Chicot County v. Sherwood,

tion on federal diversity jurisdiction resulting from a state statute. The court recognized this fact when it termed *David Lupton's Sons v. Auto. Club of America*[30] obsolete.[31] That case held that a state statute regulating the right of foreign corporations to sue in the state courts was not binding upon federal courts within that state. The emphasis since the *Erie* case being upon the policy of uniformity of result, it would seem to follow that any state statute significantly affecting the result of litigation would be followed by the federal courts regardless of the purpose which the statute was enacted to accomplish.[32] This conclusion is strengthened by the fact that the *Lupton* case was expressly termed obsolete. The statute considered in the *Lupton* case did not bar access to the state courts under any and all circumstances; it merely prescribed conditions precedent to the privilege of using the state courts.[33] There was no inherent want of jurisdiction. The statute involved in the instant case, however, rendered it absolutely impossible to sue in the state courts for a deficiency arising out of a purchase money mortgage. There is an inherent want of jurisdiction. Thus, there is a distinction between the two types of statutes. This distinction could have been pointed out, and the *Lupton* case allowed to stand on the theory that the privilege of invoking the aid of the federal courts need not be subject to the qualifications placed on the privilege by a state. By terming the *Lupton* case obsolete, the court made it reasonably clear that it was more concerned with uniformity of result than with the reasons which motivate a state legislature in enacting such a statute.[34] If this reasoning is correct, it follows that the rule that a state cannot by legislation affect federal diversity jurisdiction is no longer law. At least as between the parties to the state litigation, the state statute has limited the power of the federal courts to grant relief.[35]

148 U. S. 529, 534 (1892); Railway Co. v. Whitton's Adm'r, 13 Wall. 270 (U. S. 1871); Union Bank v. Jolly's Adm'rs, 18 How. 503 (U. S. 1855); Suydam v. Broadnax, 14 Pet. 67 (U. S. 1840).

[30] 225 U. S. 489 (1911).

[31] —— U. S. ——, 67 Sup. Ct. 657, 662, 91 L. Ed. 557, 562 (1947).

[32] A different attitude is expressed in Note, 56 YALE L. J. 1037, 1040 (1947).

[33] 225 U. S. 489, 495 (1911).

[34] The purpose for which the statute in the instant case was enacted is not stated by the North Carolina court. Conceivably, it could have been enacted to relieve court dockets.

[35] Could the federal court grant relief as between persons not parties to the state litigation? Assume a case brought in the federal court in the first instance which would be barred by the statute if brought in the state court. *Res judicata* would not apply, would the *Erie* rule? That question is foreclosed by the decision in the instant case. Federal courts, to effect the policy of uniformity, are obliged to follow state statutes which deprive the state courts of jurisdiction of a particular cause of action, even though the application of such statute results in a limitation of federal diversity jurisdiction. This rule, applies, however, if the state statute does not contravene the federal Constitution. (See p. 68 *infra*). A determination of the constitutionality of the state statute would be necessary. Had the state court upheld the federal constitutionality in a prior suit between different parties, such a ruling would not bind the federal courts. Federal courts are not

The court might, however, have reasoned that the Rules of Decision Act[36] has always required an application by federal courts of state statutes affecting substantive rights. Under *Guaranty Trust Co. v. York,* this statute affects substantive rights because it significantly affects the outcome of litigation. Consequently, this is not a case of a state by legislation affecting diversity jurisdiction, but is a case of Congress regulating the jurisdiction of the federal courts. This is a theoretical approach inconsistent with reality because in the absence of the state statute, federal jurisdiction in this case would be unchanged. The state statute determined whether the federal court had jurisdiction.[37]

Res judicata is a general classification which may be subdivided into two more specific classifications: estoppel by judgment and estoppel by verdict.[38] Estoppel by judgment arises where the second action is between the same parties or their privies upon the same cause of action.[39] Estoppel by verdict arises when the second suit is upon a different cause of action but involves issues which have been raised and decided in a prior suit between the same parties or their privies.[40] Estoppel by judgment concludes the parties as to all matters put in issue and all those which could have been put in issue while estoppel by verdict concludes the parties only as to matters actually decided.[41]

bound by state decisions construing the federal Constitution. Kansas City Steel Co. v. Arkansas, 269 U. S. 148 (1896); Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112 (1925); Williams v. Arlington Hotel Co., 15 F. 2d 412 (E. D. Ark. 1926); Eastern Gulf Oil Co. v. Kentucky Tax Comm., 17 F. 2d 394 (E. D. Ky. 1926); Orr v. Allen, 245 Fed. 486 (S. D. Ohio 1917). If the statute were held constitutional, the *Erie* rule would apply and uniformity would be effected. If the statute were held unconstitutional, the *Erie* rule would not apply and relief would be granted. The policy of uniformity would still be accomplished, however, since the state courts could no longer deny relief on the basis of an unconstitutional statute.

[36] REV. STAT. §721 (1875), 28 U. S. C. A. §725 (1940).

[37] Assuming the state statute is constitutional, this reasoning might be used to countervail the argument that an application of the *Erie* rule to a state statute which results in a limitation of diversity jurisdiction, is itself unconstitutional. Congress has the power to limit the jurisdiction of the lower federal courts.

[38] Cromwell v. County of Sac, 94 U. S. 351 (1876); A. B. C. Truck Lines v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 394 (1946) (*res judicata* relates only to suits on same cause of action; estoppel by judgment applies where causes are different. This is merely confusion of terminology); Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946); McKimmon v. Calk, 170 N. C. 54, 86 S. E. 809 (1915); McTeer Clothing Co. v. Hay, 163 N. C. 495, 79 S. E. 955 (1913); Weston v. Roper Lumber Co., 162 N. C. 165, 178, 77 S. E. 430 (1913); Brown v. Wheeling & L. E. R. R. Co., 77 Ohio App. 149, 65 N. E. 2d 912 (1946).

[39] A. B. C. Truck Lines v. Kenemer, 247 Ala. 543, 25 So. 2d 511 (1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 349 (1946); Lovejoy v. Ashworth, 45 A. 2d 218 (N. H. 1946); Pollock v. Bowman, 139 N. J. Eq. 47 (Ct. Err. & App., 1946), 49 A. 2d 40; Milltown v. New Brunswick, 138 N. J. Eq. 552 (Ch. 1946), 49 A. 2d 234; Moore v. Harkins, 179 N. C. 167, 101 S. E. 564 (1919); Tuttle v. Harrill, 85 N. C. 456 (1881).

[40] Oklahoma *ex rel.* Comm'rs v. United States, 155 F. 2d 486 (C. C. A. 10th 1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 394 (1946); Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946); Lovejoy v. Ashworth, 45 A. 2d 218 (N. H. 1946); Coltrane v. Laughlin, 157 N. C. 282, 72 S. E. 961 (1911).

[41] Heiser v. Woodruff, 327 U. S. 726, 735 (1946); Fishgold v. Sullivan Dry-

To say that "for purposes of *res judicata,* the significance of what a court says it decides is controlled by the issues that were open for decision,"[42] is hardly more than saying that the prior suit concludes the parties as to all matters which could have been put in issue. And that is an established rule where estoppel by judgment is applied. In the instant case, the parties are identical and the cause of action is a "carbon copy" of the action in the state court.

Since estoppel by judgment concludes the parties not only with respect to the issues actually raised and decided but also as to all matters which could have been put in issue, it cannot be said that the former judgment or decision is the criterion for applying the doctrine.[43] It cannot always be ascertained from a judgment or decision just what were the questions presented for decision or raised in the case, nor what might have been raised. Accordingly, it is held that the whole record may be searched to determine what was decided.[44] Also, that parol evidence is admissible to ascertain what was decided, i.e., the scope of the judgment.[45] The *effect* of a decision may result in concluding an issue although the decision does not on its face purport to do so.[46] "The value of a plea of former adjudication is not to be determined by the reasons which the court rendering the former judgment may have given for doing so."[47] The result of the decision is material. Thus, estoppel by judgment settles all questions which were raised or those that might have been raised but it settles them in accordance with the entire record and the effect of the decision. The effect of the North Carolina court's decision was that the statute was constitutional.

The difficulty in applying *res judicata* to the *Bullington* case lies in

dock & Repair, 66 Sup. Ct. 1105, 1110 (1946); Chicot County Drainage Dist. v. Baxter Bank, 308 U. S. 371 (1939); Oklahoma *ex rel.* Comm'rs v. United States, 155 F. 2d 486 (C. C. A. 10th 1946); *In re* Mercury Engineering, Inc., 68 F. Sup. (S. D. Cal. 1946); Buchanan v. Gen. Motors, 64 F. Supp. 16 (S. D. N. Y. 1946); Drittel v. Freedman, 60 F. Supp. 999 (S. D. N. Y. 1945), *aff'd* 154 F. 2d 653 (C. C. A. 2d 1946); Jefferson County v. McAdory, 25 So. 2d 396 (Ala. 1946); Olwell v. Hopkins, 168 P. 2d 972 (Cal. 1946); Spence v. Erwin, 200 Ga. 672, 38 S. E. 2d 394 (1946); People v. Thompson, 392 Ill. 589, 65 N. E. 2d 362 (1946); Hays v. Sturgill, 302 Ky. 31, 193 S. W. 2d 648 (1946); Sou. Dist. Co. v. Carraway, 196 N. C. 58, 144 S. E. 535 (1928); Moore v. Harkins, 179 N. C. 167, 101 S. E. 564 (1919); Stelges v. Simmons, 170 N. C. 42, 86 S. E. 564 (1919); Tuttle v. Harrill, 85 N. C. 456 (1881); Lovejoy v. Ashworth, 45 A. 2d 218 (N. H. 1946); Pollock v. Bowman, 139 N. J. Eq. 47 (Ct. Err. & App. 1946) 49 A. 2d 40; Jones v. Costlow, 354 Pa. 245, 47 A. 2d 259 (1946).

[42] —— U. S. ——, 67 Sup. Ct. 657, 660, 91 L. Ed. 557, 560 (1947).

[43] See Justice Rutledge's dissent, 67 Sup. Ct. 657 at 669 (1947).

[44] Drittel v. Freedman, 60 F. Supp. 999 (S. D. N. Y. 1945), *aff'd,* 154 F. 2d 653 (C. C. A. 2d 1946); Olwell v. Hopkins, 168 P. 2d 972 (Cal. 1946); 2 FREEMAN, JUDGMENTS §725 (5th ed. 1925).

[45] Cromwell v. County of Sac, 94 U. S. 351 (1876); Southerland v. A. C. L. R. R., 148 N. C. 442, 62 S. E. 517 (1908).

[46] Chicot County Drainage Dist. v. Baxter Bank, 308 U. S. 371 (1939); Olwell v. Hopkins, 168 P. 2d 972 (Cal. 1946); Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946).

[47] Elmhurst v. Kegerreis, 392 Ill. 195, 64 N. E. 2d 450 (1946).

the fact that the doctrine has no application where the former decision was not on the "merits." Is a dismissal for want of jurisdiction a decision on the "merits"? Ordinarily not. Judgments based upon technicality such as defect of pleading, matters in abatement, nonsuits, dismissals and the like are not on the merits.[48] No substantial rights are affected. But, in such cases, the effect ordinarily is not to preclude a litigant from maintaining his action altogether. There is no inherent defect of jurisdiction. The decision merely tells him he is in the wrong court of the forum and should seek his relief in another court of the forum, or cure the technical defect and start over.[49] That did not happen in the case under discussion. Bullington was told he could not maintain his action in any court of the state. There was an inherent defect of jurisdiction. The "merits" of his action were twofold—the right to maintain this action and the right to prove the deficiency. He questioned the constitutionality of the statute denying him the right to maintain his action. The North Carolina decision in effect held the statute constitutional. That which was *res judicata* was the constitutional issue, not whether the state court had jurisdiction.

The question remains, why was it necessary to apply both the *Erie* rule and *res judicata* to reach the result desired? Would not either one have accomplished that end? Assume *first* that the action arose before the *Erie* case, and *res judicata* was not applied. The result would be clear. The federal court would have granted relief because (1) the policy under *Swift v. Tyson* was uniformity within the federal court system, (2) the federal courts were not bound to follow state statutes construed by the state courts as procedural. No constitutional issue would be involved.

Assume *secondly* that the *Erie* rule is in effect; the case comes before the United States Supreme Court. It holds that the policy of *Erie* requires the federal courts in diversity cases to reach the same result that would be reached in the state courts. The lower courts are reversed. The question immediately arises, may the *Erie* rule be so applied as to require a federal court to follow a state court decision upholding the constitutionality of a state statute if in fact the statute is deemed by the federal court to violate the United States Constitution? Thus, under an application of the *Erie* rule alone, a constitutional issue[50] arises which would not arise under our first assumption above. Federal courts are not obliged to follow state court decisions construing the

[48] 2 FREEMAN, JUDGMENTS §733 (5th ed. 1925).

[49] Smith v. McNeal, 109 U. S. 426 (1883); Hughes v. United States, 4 Wall. 232, 237 (U. S. 1866); Walden v. Bodley, 14 Pet. 156, 161 (U. S. 1840); Johnson v. Whilden, 166 N. C. 104, 81 S. E. 1057 (1914); Dalton v. Webster, 82 N. C. 279 (1880).

[50] An application of the *Erie* rule by the federal courts to an unconstitutional state statute would itself be unconstitutional. See cases cited *supra* note 24.

federal Contsitution.[51] For the purpose of ruling on state statutes alleged to be in violation of the federal Constitution, the federal courts are independent of the state courts. Since the obligations imposed by the United States Constitution extend to all courts, state and federal, a state statute alleged to be in violation of the federal Constitution could not be followed by the federal courts in the absence of a ruling on its constitutionality by those courts. Thus, a disposition of the constitutional issue is necessary before the *Erie* rule can be applied.[52]

Assume *thirdly* that the United States Supreme Court had decided the case solely on the basis of *res judicata* and did not invoke the *Erie* doctrine. The lower federal courts would have been affirmed for the following reasons: (1) The constitutionality of the statute being *res judicata* it could not be attacked in the *federal court;* (2) the decision of the North Carolina Supreme Court that the statute was purely procedural and did not affect the substantive rights of the parties likewise was *res judicata,* and hence any claim that the statute was other than procedural could not be raised in the federal court; and finally, (3) since the constitutionality of the statute could not be attacked and since as between the parties to the litigation it must be deemed to have no effect on their substantive rights, the federal court must now pass upon those rights without hindrance of the state statute which has already been held merely to bar the state courts from giving the relief sought. Bullington, therefore, had *res judicata* alone been applied, would have obtained in the federal court what he was denied in the state court. The result would have been the same as under *Swift v. Tyson.* The policy of uniformity within the boundaries of the state would have been defeated.[53]

And so we see that without the use of either *res judicata* or the *Erie* doctrine the federal court could have granted relief denied by the state court. We also see that the use of the *Erie* doctrine alone does not require the federal court to follow a state court ruling upholding the constitutionality of a state statute if in fact it contravenes the federal Constitution. And lastly we see that an application of *res judicata* alone

[51] "Where the questions involved arise under the state constitution and laws, the decisions of its highest tribunal are accepted as controlling. Where the Constitution or laws of the United States are drawn into question, the courts of the United State must determine the controversy for themselves." Fuller, C. J., *In re* Tyler, 149 U. S. 164 (1892). See discussion and cases cited *supra* note 35.

[52] Furthermore, had the *Erie* rule alone been applied, it is possible that the decision would have been accepted as an inferential determination of the constitutionality of the North Carolina statute. Indeed, that is the very manner in which the United States Supreme Court regarded the North Carolina decision.

[53] Guaranty Trust Co. v. York, 326 U. S. 99 (1945) ("The nub of the policy that underlies *Erie Railroad Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away, should not lead to a substantially different result.").

would have required the federal court to grant relief on the substantive issue not determined in the state court.

Now let us do as Justice Frankfurter did and combine *res judicata* and the *Erie* doctrine. What is the result? By the use of *res judicata* the constitutionality of the state statute as between the parties is settled. It cannot be attacked in the federal court. By the use of the *Erie* doctrine the state policy of denying relief is to be followed if the state statute establishing such policy is constitutional. But the constitutionality question having been determined by the application of *res judicata* there is now no problem. The state policy enunciated by a "constitutional" statute is now applied in the federal court.

Hence, we see that the desired end of not allowing Bullington a recovery in a federal court when he was denied the same in a state court is attained only by utilizing *both* the doctrines of the *Erie* case and *res judicata.*

CLAUDE F. SEILA.

Declaratory Judgment—Trustees' Request for Instructions

The Elders of the First Presbyterian Church of Salisbury as the trustees under a will probated in 1849, devising a certain plot of land in Salisbury together with the sum of twenty thousand dollars ($20,000) in trust for the church, came into the Superior Court of Rowan County under the declaratory judgment act,[1] asking for a declaration that they had the power "to sell, mortgage, and/or lease" the property in view of changed conditions. The trust instrument specifically withheld the power of sale, and provided that if the trustees should fail or neglect to execute the trust, then the property should go to Davidson College. The trustees were to keep the property so improved that the rent would provide a revenue for the church. Plaintiffs alleged the property was on the edge of the business district in Salisbury and very much in demand by commercial interests, but that they were financially unable to develop and maintain it adequately. Trial court granted the relief requested. *Held:* Reversed and case dismissed. Declaratory judgment inappropriate: (1) plaintiff should have brought trustees' bill in equity for instructions, (2) apparently the court felt that the request for the power of sale would have invoked a forfeiture of the estate.[2]

It is surprising to find the court refusing a declaratory judgment on the first ground, for the declaratory action is an outgrowth and extension of the trustees' bill in equity for instructions.[3] Thus the court indicates

[1] N. C. GEN. STAT. (1943) §§1-253 *et seq.*

[2] Brandis *et al.* v. Trustees of Davidson College *et al.*, *227* N. C. *329*, 41 S. E. 2d 833 (1947).

[3] Little v. Thorne, 93 N. C. 69 (1885) (under the equity jurisdiction of the court, by a trustee's request for instructions, an executor or trustee may apply to