UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 27 | Number 1 Article 20

12-1-1948

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dictum.[50] Due to the logical and verbal difficulty of granting the wife separation and alimony if the marriage relation still existed, the case was interpreted by many as holding that the foreign divorce was good for no purpose.[51] But this difficulty is obviated by recognizing the marital status as being composed of separate elements.

In 1943, Professor Holt made a prediction that seems to have come true: "Yet the bones of *Haddock v. Haddock* remain—unbleached and unpulverized . . . courts in states that do not favor free and easy termination of marriage may still find in the osseous remains of *Haddock v. Haddock* material to fashion some puzzles for the Supreme Court of the United States to solve. . . ."[52]

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Courts—Federal Jurisdiction—State Court to Be Followed in Diversity Cases under the Erie Rule

Prior to *Erie Railroad Co. v. Tompkins*[1] federal courts in diversity of citizenship cases were bound to follow statutes of a state in determining the state law under the doctrine of *Swift v. Tyson*.[2] The *Erie* case, interpreting the Rules of Decision Act,[3] held that federal courts must also follow the case law of the state as announced by its highest court. "The Erie R. Co. case left open, however, the more difficult question of the effect to be given to decisions by the lower state courts on points never passed on by the highest state court."[4] The Supreme Court of the United States has, since the *Erie* case, held that a federal court is not free to disregard the law of the state merely because it has not been announced by the highest court of the state, but that, in the absence of more persuasive data of what the state law is, they must follow the decision of an intermediate state court.[5]

[50] Cook, *Is Haddock v. Haddock Overruled?*, 18 IND. L. J. 165 (1942); Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930 (1945).
[51] *See e.g.*, BEALE, CONFLICTS OF LAWS §§113.10-113.12.
[52] Holt, *The Bones of Haddock v. Haddock*, 41 MICH. L. REV. 1013, 1036 (1943).

[1] 304 U. S. 64 (1938).
[2] 16 Pet. 1 (U. S. 1842).
[3] Judiciary Act of (Sept. 24) 1789, §34, REV. STAT. §721, 28 U.S.C. §725 (1946).
[4] King v. Order of United Commercial Travelers of America, 68 Sup. Ct. 488, 491 (1948).
[5] Six Companies of Calif. v. Joint Hy. Dist., 311 U. S. 180 (1940); West v. American T. & T. Co., 311 U. S. 223 (1940); Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940). Accordingly, federal courts have followed decisions of intermediate courts in the following states:
California—Six Companies of Calif. v. Joint Hy. Dist., 311 U. S. 180 (1940).
Delaware—United Automatic Rifles Corp. v. Johnson, 41 F. Supp. 86 (D. Mass. 1941.
Illinois—Pullman Std. Can Mfg. Co. v. Local Union U.S.W., 152 F. 2d 493 (C.C.A. 7th 1945).
Missouri—Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940).

Should federal courts, in the absence of a decision by the highest court or an intermediate court of the state, be required to follow a decision of a state court of first instance? When this question was first brought before the United States Supreme Court in *Fidelity Union Trust Co. v. Field*,[6] it was held that a federal court in applying the law of New Jersey must follow the decision of the New Jersey Court of Chancery.[7] The Court of Chancery, however, was not the usual nisi prius court in that: it had statewide jurisdiction; its decisions were recorded and printed in available form and were ordinarily binding in later cases in the Chancery; and its standing on the equity side was comparable to that of the New Jersey intermediate appellate courts of law. Since that decision, the question has been before a number of the lower federal courts, the majority of which distinguished the *Fidelity* case, and held that they were not bound to follow the state courts of first instance. The distinction is based mainly on the fact that the jurisdiction and organization of these state courts are quite different from the New Jersey Court of Chancery.[8]

Recently this question was again before the Supreme Court in *King v. Order of United Commercial Travelers of America*.[9] The case arose in a South Carolina District Court,[10] which, in the absence of any South Carolina decision on the question, applied the general principals of South Carolina law[11] and found for the plaintiff. The defendant ap-

New York—Preferred Acc. Ins. Co. v. Clark, 144 F. 2d 165 (C.C.A. 10th 1944).
Ohio—West v. American T. & T. Co., 311 U. S. 223 (1940).
Oregon—Mallatt v. Ostrander Ry. & Timber Co., 46 F. Supp. 250 (D. Oregon 1942).
Texas—Wells Fargo Bank & T. Co. v. Titus, 41 F. Supp. 171 (S.D. Texas 1941), *rev'd on other grounds*, 134 F. 2d 223 (C.C.A. 5th 1943).

[6] 311 U. S. 169 (1940).

[7] The Court of Chancery, as a separate court, was abolished by the New Jersey Constitution adopted November 4, 1947.

[8] Wyatt v. Miami Beach, 67 F. Supp. 271 (S.D. Fla. 1946) (refused to follow the Circuit Court of Dade County, Fla.; distinguished from the *Fidelity* case mainly on the jurisdiction and organization of the two courts). *In re* Berlin, 147 F. 2d 491 (C.C.A. 3rd 1945) (refused to follow a Pennsylvania lower court, saying it was persuasive but not binding). *Contra:* Buttson v. Arnold, 4 F.R.D. 492 (E.D. Pa. 1945). *But cf.* Miller v. National City Bank of New York, 69 F. Supp. 187 (S.D. N. Y. 1946), *aff'd*, 166 F. 2d 723 (C.C.A. 2d 1948) (followed a New York court of first instance; however, the intermediate appellate court had affirmed the lower court without opinion). *But see* Kane v. Sesac Inc., 54 F. Supp. 853 (S.D. N.Y. 1943); Stinson v. Edgemoor Iron Works, 55 F. Supp. 861 (D. Del. 1944). *Contra:* Schran v. Safely Inv. Co., 39 F. Supp. 517 (E. D. Mich. 1941).

[9] 68 Sup. Ct. 448 (1948).

[10] 65 F. Supp. 740 (W.D. S.C. 1946) (Action on life insurance policy containing exemption clause for death resulting from participation in aviation. Federal jurisdiction was based on diversity of citizenship. Insured was forced down at sea, later seen alive and not seriously injured, but was dead when picked up. Medical diagnosis of drowning. Question involved was interpretation of exemption clause).

[11] Policy construed most strongly against insurer. In accordance with the holding in Meredith v. Winter Haven, 320 U. S. 228 (1943) that, in the absence of

pealed. Two months later, in a case involving a similar insurance policy brought by King against a different insurer, the Court of Common Pleas for Spartanburg County, South Carolina,[12] reached the same conclusion[13] as the District Court in the first *King* case. However, the Fourth Circuit Court of Appeals on hearing the first *King* case,[14] held that the decision of the Court of Common Pleas was not binding on it as an expression of the South Carolina law,[15] and reversed the District Court. It made the point that the Common Pleas decision was not binding on other courts of the state and that the District Court decision in this case had been partly relied on as a basis in the Common Pleas decision. In affirming,[16] the United States Supreme Court noted that though the South Carolina Courts of Common Pleas are denominated courts of record, their decisions are not published or digested in any form and would be very difficult to locate. Further, their decisions do not evidence one of the rules of decisions commonly accepted and acted upon by the bar and other inferior courts of South Carolina. This holding, though the first such limitation to be placed on the "Erie Doctrine," does not appear to be out of line with previous holdings of the Supreme Court. It is a thoroughly logical conclusion, especially when viewed in the light of *Angel v. Bullington,* decided only two years previously, where the Court said "For the purpose of diversity jurisdiction a federal court is 'in effect, only another court of the state.' "[17]

The Court in the *King* case, however, emphasized that ". . . our decision [is not] to be taken as promulgating a general rule that federal courts need never abide by the determination of state law by state trial courts."[18] It would appear then, that although federal courts may not

some recognized public policy to the contrary which would warrant its non-exercise, where the jurisdiction of the federal courts is properly invoked in diversity cases, it is the duty of the federal court to render judgment, deciding questions of state law. Merely because the questions are difficult or unsettled is no reason for the federal courts to refuse to render judgment.

[12] A court of original jurisdiction in all civil cases. S. C. CONST. Art. V, §15.

[13] Under S. C. CODE ANN. §§26, 780 (1942) the insurer had the right to appeal, but did not do so.

[14] 161 F. 2d 108 (C.C.A. 4th 1946).

[15] Under the doctrine of Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538 (1941) even though the Common Pleas decision was rendered after the district court decision, it was proper for the circuit court of appeals to consider it, since it is the duty of the federal courts to apply the then controlling decisions when the case comes before them.

[16] King v. Order of United Commercial Travelers of America, 68 Sup. Ct. 488 (1948). Shortly after the circuit court of appeals rendered its decision another South Carolina Court of Common Pleas, the one for Greenville County, handed down an opinion which rejected the reasoning of the Spartanburg court and espoused that of the circuit court of appeals. The Supreme Court pointed to this second decision and said that it was an illustration of the perils of interpreting a Common Pleas decision as a definite expression of the South Carolina law and not a controlling factor in their decision.

[17] 326 U. S. 183, 187 (1945).

[18] 68 Sup. Ct. 488, 493 (1948).

be bound by the decision of a state court of first instance under certain circumstances, they cannot completely ignore it. In the absence of any decision in a state on a point of law in a diversity case, the federal court, in deciding the state law, would look to other states for law on the point[19] and consult the current textbooks,[20] the restatements of the law,[21] the general statements of law by the state supreme court relating to the subject,[22] and the common law of the state.[23] In addition, when a decision by a state court of first instance is found, it would seem that this also should be duly considered by the federal court, even though it may have been determined that this decision is not binding on it. A trial judge of a state court of first instance is experienced and well-versed in the law of the state, hence a decision rendered by him would be pertinent and should receive weight in the federal court's determination of the state law. Especially does this appear relevant when we consider *MacGregor v. State Mutual Life Assurance Co.*,[24] where the Supreme Court said that the interpretation placed upon purely local law by a federal district judge of long experience sitting in Michigan and three circuit court of appeals judges whose circuit includes Michigan would not be disturbed in the absence of a state decision on the point.

Comparing the *Fidelity* case with the *King* case, several factors are noted which may be useful in determining whether a decision of a state court of first instance is binding on a federal court or mere evidence of the state law which is to be used in the determination of the state law: (1) are the decisions of the court in question considered as a binding authority on other state courts; (2) are the decisions of the court in question recorded, printed, or digested in such a manner that they are accessible to the bar and other inferior courts; (3) has the court in question statewide jurisdiction? Of these three the first would appear to be the most important and unless the decision is binding on other state courts it is doubtful that it would be binding on a federal court even if the decision of the court were recorded and the court had statewide jurisdiction. However, if the decisions are not printed in such a manner as to be available, even if the decisions were binding on other courts of the state, it would be almost impossible to determine if all the decisions of the courts of first instance on the question had been presented before the federal court. It would appear, therefore, that for a decision of a state court of first instance to be binding on a federal

[19] Stentor Electric Mfg. Co. v. Klaxon Co., 122 F. 2d 820 (C.C.A. 3rd 1941).
[20] *Ibid.*
[21] *Ibid.*
[22] Verslius v. Town of Haskell, Okla., 154 F. 2d 935 (C.C.A. 10th 1946).
[23] New England Mut. Life Ins. Co. v. Mitchell, 118 F. 2d 414 (C.C.A. 4th 1941).
[24] 315 U. S. 280, 281 (1941).

court, the decision must be binding on other state courts and also must be printed in available form.

With these factors as a guide a decision of the Superior Court of North Carolina, for example, apparently would not be binding on a federal court in the determination of the law of the state in the absence of a decision on the point by the Supreme Court of North Carolina, but mere evidence of the law of the state. The status of the Superior Court of North Carolina is very similar to that of the Court of Common Pleas of South Carolina. It is denominated a court of record, but its decisions are recorded only in the local courthouse of the county and are not reprinted or digested in any way which would make them accessible to the bar or other inferior courts. Further, a decision by one Superior Court in North Carolina is not binding on another Superior Court in this state. The court does not have statewide jurisdiction within the meaning set forth in the United States Supreme Court opinions in that, while it does have jurisdiction over all the citizens of North Carolina, it has jurisdiction to try only such cases that are triable within the county in which the court is located.[25]

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Municipal Corporations—Tort Liability—Notice of Injury Requirements

More than half of the states have statutes of general application requiring that notice of tort claims against municipalities be given within certain fixed time limits to designated city officials.[1] The requirement is also frequently found in municipal charters, but no notice is necessary in the absence of legal provision so requiring.[2]

North Carolina has a statute[3] requiring that a prior demand be made upon the proper municipal authorities before suing a city, county, town, or other municipal corporation, but it expressly applies only to debts or demands arising out of contract where the damages are liquidated. Another statute[4] requires that claims against counties, cities, and towns

[25] N. C. GEN STAT. §§1-76 to 1-82 (1943).

[1] Peterson, *Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 700, 701 (1942). For a list of states see Sahm, *Tort Notice of Claim to Municipalities*, 46 DICK. L. REV. 1 n. 2 (1941).

[2] 6 MCQUILLIN, MUNICIPAL CORPORATIONS §2888 (2d ed. 1937); WHITE, NEGLIGENCE OF MUNICIPAL CORPORATIONS §665 (1920).

[3] N. C. GEN. STAT. §153-64 (1943). Judicial decisions restricted the operation of this statute to contract actions long before it was expressly limited in this regard. *E.g.*, Sugg v. Greenville, 169 N. C. 606, 86 S. E. 695 (1915); Neal v. Marion, 126 N. C. 412, 35 S. E. 812 (1900); Sheldon v. Asheville, 119 N. C. 606, 25 S. E. 781 (1896); Frisby v. Marshall, 119 N. C. 570, 26 S. E. 251 (1896); Shields v. Durham, 118 N. C. 450, 24 S. E. 794 (1896); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §389 (1929).

[4] N. C. GEN. STAT. §1-53 (1947 Supp.): "All claims against counties, cities and towns of this state shall be presented to the chairman of the board of county