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Federal Jurisdiction -- Erie Doctrine -- Federal Rules of Civil Procedure

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has not hesitated to reexamine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."[50] *Pointer* and *Douglas* represent continuance of this reexamination by a majority of the Court. As the Court moves away from the "concept of ordered liberty," Mr. Justice Goldberg's comment is representative: "[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual."[51]

Confrontation, under these decisions becomes a *right,* applicable in every case, not solely in those cases where it seems "fair" to a majority of the Court. The uniformity alone achieved by the application of the confrontation clause to the states seems to justify the Court's shift in constitutional theory in this area.

PHILIP L. KELLOGG

Federal Jurisdiction—Erie Doctrine—Federal Rules of Civil Procedure

Hanna v. Plumer[1] involved personal injury claims arising out of an automobile accident which was allegedly caused by the negligence of a deceased Massachusetts citizen. The petitioner, a citizen of Ohio, instituted the suit against the decedent's executor, also a Massachusetts citizen, in the District Court for the District of Massachusetts on the ground of diversity of citizenship. Process was served by leaving copies of the summons and complaint with the respondent's wife at his home. This form of service was sufficient to comply with rule 4(d)(1) of the Federal Rules of Civil Procedure;[2] however, a special Massachusetts statute required com-

[50] *Id.* at 5.
[51] 380 U.S. at 414.

[1] 380 U.S. 460 (1965).
[2] FED. R. CIV. P. 4(d) (1). This rule provides that service shall be made in the following manner:

> Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .

mencement of the action and *service in hand* within one year after an executor or administrator posted bond.[3] Petitioner's complaint was filed, and service was made less than a month before the expiration of this period. Since the limitation period had lapsed when the action came before the district court,[4] litigation could continue only if the federal rule prevailed; if the state rule was applied, the respondent would succeed because of the insufficiency of service within the time limited. The district court, in considering respondent's motion for summary judgment, applied the state rule on the basis of *Ragan v. Merchants Transfer & Warehouse Co.*[5] and *Guaranty Trust Co. v. York.*[6] The Court of Appeals for the First Circuit found that the conflict between the federal and the state rules involved a substantive matter and affirmed.[7] The Supreme Court granted certiorari[8] "because of the threat to the goal of uniformity of federal procedure posed by the decisions below . . . ."[9]

Mr. Chief Justice Warren, writing for the Court, stated the issue as follows:

> The question to be decided is whether, in a civil action where jurisdiction of the United States District Court is based upon diversity of citizenship between the parties, service of process shall be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) of the Federal Rules of Civil Procedure.[10]

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[3] MASS. ANN. LAWS ch. 197, § 9 (1958). This section provides that

> Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator. . . .

[4] Respondent posted bond on March 1, 1962. The complaint was filed on February 6, 1963, and the service was made two days later. The answer was filed on February 26, 1963. 331 F.2d 157, 159 (1st Cir. 1964). The court of appeals stated that "at the time the answer was filed it was in fact still possible to comply with the statute. However, plaintiff took no further action." *Ibid.*

[5] 337 U.S. 530 (1949).

[6] 326 U.S. 99 (1945).

[7] Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964).

[8] Hanna v. Plumer, 379 U.S. 813 (1964).

[9] Hanna v. Plumer, 380 U.S. 460, 463 (1965). See, *e.g.*, Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960); Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959).

[10] 380 U.S. 460, 461 (1965).

In response to this issue the Court said:

> We conclude that the adoption of Rule 4(d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of service. Accordingly, we reverse the decision of the Court of Appeals.[11]

The issue raised by this case had its genesis in section 34 of the Judiciary Act of 1789, which provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."[12] In the monumental decision of *Swift v. Tyson*,[13] decided in 1842, the Supreme Court held the term "laws" to mean state statutes and their construction, local usages, and decisions as to real estate. The result was that in diversity cases not involving one of these three categories, the federal courts could apply a federal "common law."[14] The Conformity Act of 1872[15] required the federal district courts to follow the procedure regulating similar actions in the forum state.[16] Thus, in summary, "prior to 1938 the pattern in federal courts had been conformity to state law on matters of procedure, under the Conformity Act, but substantial uniformity among the federal courts on substantive law under the aegis of Swift v. Tyson."[17]

In 1938, two events occurred which in effect reversed the situation described above. First, the Federal Rules of Civil Procedure were promulgated by the Supreme Court pursuant to the Rules

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[11] *Id.* at 463-64. In a footnote to the opinion, the Court noted that "there are a number of state service requirements which would not necessarily be satisfied by compliance with Rule 4(d)(1)." North Carolina was listed as falling in this category. *Id.* at 463 n.2. See N.C. GEN. STAT. § 1-94 (1953).

[12] 1 STAT. 92 (1789) (now 28 U.S.C. § 1652 (1958)).

[13] 41 U.S. (16 Pet.) 1 (1842).

[14] WRIGHT, FEDERAL COURTS § 54, at 188 (1963) [hereinafter cited as WRIGHT].

[15] Act of June 1, 1872, ch. 255, 17 STAT. 197.

[16] This state of affairs proved to be impracticable because some states were far ahead of others in procedural reform. See Smith, *Blue-Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

[17] WRIGHT § 59, at 209.

Enabling Act.[18] The purpose of the federal rules was to establish uniformity of procedure in the federal courts.[19] Second, the Supreme Court, in *Erie R.R. v. Tompkins*,[20] overruled *Swift v. Tyson*. In his opinion for the Court, Mr. Justice Brandeis wrote:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[21]

The policy underlying the *Erie* decision was the desire for intrastate uniformity in result regardless of whether the action was brought in state or federal court.[22] Since this uniformity pertained to substantive law, the distinction between substance and procedure became a central issue. *Guaranty Trust Co. v. York*[23] demonstrated that the traditional distinctions between substance and procedure had been encroached upon by the policy of uniformity.[24] There, a group of noteholders brought a class action against Guaranty Trust Co., the trustee under the indenture. The issue was whether a state statute of limitations that would have barred the action in a state forum also functioned as a limitation in the federal court. The Court held that the state statute of limitations significantly affected the outcome of the litigation and therefore must be applied. An "outcome-determinative" test was set forth, the essence of which was that if the determination of an issue would have a decisive influence on the outcome of the case, then that issue was one of "substance."[25]

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[18] 28 U.S.C. § 2072 (1958). This act provides that "the Supreme Court shall have the power to prescribe, by general rules . . . the practice and procedure of the district courts of the United States . . . in civil actions. Such rules shall not abridge, enlarge or modify any substantive right . . . ."

[19] See, Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Smith, *supra* note 16.

[20] 304 U.S. 64 (1938). This decision was handed down five months before the federal rules were to become effective.

[21] *Id.* at 78.

[22] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[23] *Ibid.*

[24] See 26 N.C.L. REV. 60 (1947).

[25] See 1 BARRON & HOLTZOFF § 138 (Wright ed. 1960); 28 U. CINC. L. REV. 390 (1959).

Although the outcome-determinative test was heavily criticized, it was applied by the Court until 1958.[26] The major criticism was that there was no apparent stopping place.[27] Professor Charles A. Wright asserts that three of the cases[28] in which the test was applied "showed the deference to state law which was to be required in matters which, for other purposes, are clearly procedural."[29]

In *Byrd v. Blue Ridge Rural Elec. Co-op.*,[30] decided in 1958, the "outcome-determinative" test was modified. The case involved a state rule providing that a court rather than a jury should determine whether a corporation was a statutory employer for purposes of the South Carolina Workmen's Compensation Act. The federal policy was that the jury should decide the issue.[31] The Court laid down a twofold rule for determining whether a state rule should be applied in a diversity case: If the rights and obligations of the parties are defined by state law, then the state law is applicable, but where the significance of the state law lies in "form and mode,"[32] an investigation of the policies supporting the state and federal rules is appropriate. The stronger policy should control even though there may be a question of variance in outcome.[33] Thus, the second part of the rule involves a balancing process.

In applying the rule to the facts of the case, the Court first decided that the state rule involved only "form and mode." It then applied the balancing process to the respective rules and concluded that the federal policy of having a jury determine the question was

[26] Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Angel v. Bullington, 330 U.S. 183 (1947).

[27] Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEXAS L. REV. 211 (1961).

[28] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

[29] WRIGHT, § 59, at 208.

[30] 356 U.S. 525 (1958).

[31] The Court used the term "policy" in stating the issue:

> Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

Id. at 538.

[32] *Id.* at 536.

[33] Smith, *supra* note 16.

the most cogent because of the seventh amendment. The result was that a federal policy supported by the seventh amendment prevailed over a simple "outcome-determinative" test. It would seem that the Court, in applying the second aspect of the rule, does not preclude the possibility that a state rule might prevail even in the area of procedure.[34]

In *Hanna*[35] the respondent contended that *Erie* and *York* made it mandatory for the federal court to apply state law governing service of process rather than rule 4(d)(1). However, the Court held that where there is a federal rule and a state rule which are in direct conflict, the federal rule will prevail if it is constitutionally valid and if it meets the requirements of the Rules Enabling Act.[36] The Court concluded that rule 4(d)(1) was within the bounds of the Constitution and that, on the basis of *Sibbach v. Wilson & Co.*,[37] it did not violate the Rules Enabling Act.

What is the law under the *Erie* doctrine today? *Erie* was said to have a constitutional basis; yet Mr. Justice Brandeis failed to designate a specific section of the Constitution. This point alone has excited a great deal of comment.[38] The issue of whether Congress and the federal courts can declare the substantive rules of common law applicable in a state has not been specifically considered since *Erie;* however, it was referred to in one case.[39] Though *Hanna* does not answer the constitutional issue, it does tend to abolish any doubts concerning the constitutional validity of rules governing procedure in federal courts.

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, *though falling within the uncertain area between substance and procedure,* are rationally capable of classification as either.[40]

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[34] 56 NW. U.L. REV. 560 (1961).

[35] 380 U.S. 460 (1965).

[36] 28 U.S.C. § 2072 (1958), *supra* note 18.

[37] 312 U.S. 1 (1941). The Court in this case defined procedure as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14.

[38] See WRIGHT § 56.

[39] Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). Here, the Court specifically stated that they were avoiding the issue.

[40] 380 U.S. 460, 472 (1965). (Emphasis added.)

Hanna has seemingly clarified application of the *Erie* doctrine in three situations. First, where there is a direct conflict between a federal rule and a state rule, the federal rule will prevail if it is constitutionally valid and does not exceed the limitations established by the Rules Enabling Act.

Secondly, *Hanna* appears not to preclude future application of the "outcome-determinative" test in a certain class of cases. In *Hanna,* the difference between the Massachusetts rule and the federal rule would be "outcome-determinative" in the sense that either respondent would win because of insufficient service within the one-year limitation or the case would continue, but this is not the "outcome-determinative" sense in which the test is usually applied. The Court stated that it would be "outcome-determinative" if the plaintiff, in choosing whether to bring suit in federal or state court, faced a total bar to recovery due to the applicable rule in the state court. The Court was not confronted with this situation in *Hanna* because the special state statute of limitations had not run against the petitioner when the action was commenced and thus there was a choice of forum.[41]

The question remains as to when the test is still applicable. The answer would seem to lie in the Court's reference to a series of cases where a state rule was enforced though it was argued that a federal rule governed. In the words of the Court, "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law."[42] Two cases are illustrative of this situation. In *Ragan v. Merchants Transfer & Warehouse Co.,*[43] a state statute required the issue of summons in addition to the filing of the complaint to toll the statute of limitations. Federal rule 3 provided that the action was commenced with the filing of the complaint. The statute of limitations had run after the complaint was filed in the federal district court but prior to the service of summons. The Court held that the state statute was applicable and the claim barred. In *Cohen v. Beneficial Industrial Loan Corp.,*[44] a state rule which went one step further than

[41] *Id.* at 469.
[42] *Id.* at 470.
[43] 337 U.S. 530 (1949).
[44] 337 U.S. 541 (1949).

federal rule 23(b)[45] by requiring the posting of bond by the plaintiff in a shareholder's derivative suit was applied rather than rule 23(b).

Ragan and *Cohen* would clearly seem to be "outcome-determinative" test cases in the very sense the Court spoke of such a test in *Hanna*. In both cases there is a federal rule that is not as broad as the state rule, but does not conflict with it. Thus, the conclusion would seem to be that when there is a federal rule and a state rule which do not conflict, but the plaintiff may be barred in the state court because the state rule goes one step further, the "outcome-determinative" test is still appropriate and the state law should prevail.

Thirdly, the Court in *Hanna* made the following statement:

> [i]t is doubtful that, even if there were no Federal Rule making it clear that in hand service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. 'Outcome-determination' analysis was never intended to serve as a talisman.[46]

Here, the Court, citing *Byrd,* seemingly indicated that the *Byrd* balance test might still be applied where an established federal practice not specifically required by the federal rules conflicts with state procedure. *Byrd* involved a situation in which there was a general federal policy favoring jury trials and a contrary state rule specifically designed to meet the very fact situation before the Court.[47] It is important to remember that in *Byrd,* unlike in *Hanna,* there was no federal rule that was specifically and directly contrary to the state rule.[48] Thus, it seems fair to conclude that when a problem involves a federal practice that is not *specifically* contrary to the state rule, but conflicts with it, the Court will apply the balance test of *Byrd* with the most cogent in terms of policy prevailing.

[45] Fed. R. Civ. P. 23(b) provides that the plaintiff in a shareholder's derivative suit shall aver (1) that the plaintiff was a shareholder at the time of the wrong or that he got his shares by operation of law and (2) that the action is not collusive. The complaint must also show a demand for action upon the directors, and if necessary, the shareholders. If no demand is shown, reasons must be given for this.

[46] 380 U.S. 460, 466-67 (1965).

[47] The state rule specifically applied to a workmen's compensation issue.

[48] "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statute of the United States shall be preserved to the parties inviolate." Fed. R. Civ. P. 38(a). This rule is not mentioned in the majority opinion of *Byrd.*

As demonstrated by *Byrd,* if the federal practice has a strong federal or constitutional basis, it is likely to prevail.[49]

In summary, it would seem that *Hanna* is indicative of the Court's respect for the federal rules which it promulgated. For example, in the strict *Hanna* situation the federal rule prevails, and in the "outcome-determinative" class of cases there is no disrespect to the Federal Rules because there is no conflict. The balance test is also illustrative of the Court's respect for a uniform system of federal procedure. If the federal practice is not applied in a particular situation, it is only because the practice is not as essential to the maintenance of uniformity in federal procedure as the state rule is to the policy of intrastate uniformity in result.

JAMES L. NELSON

Federal Jurisdiction—Labor Law—Jurisdiction to Remove Suits to Enjoin Strikes to Federal Court

In *American Dredging Co. v. Local 25, Marine Div., Int'l. Union Operating Eng'rs*[1] the defendant union had ceased work, and the plaintiff, there being a no-strike clause in their contract, sought to enjoin the strike by a suit in the Pennsylvania state court. The defendant removed to federal court under section 1441(b) of the Judicial Code.[2] Plaintiff moved to remand under section 1447(c) of the Judicial Code.[3] The district court denied the motion,[4] holding that it had jurisdiction under section 301(a) of the Labor Management Relations Act of 1947[5] and that the case was, therefore, prop-

[49] Smith, *supra* note 16.

[1] 338 F.2d 837 (3d Cir. 1964), *cert. denied,* 380 U.S. 985 (1965), *reversing* 224 F. Supp. 985 (E.D. Pa. 1963).

[2] (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
28 U.S.C. § 1441(b) (1958).

[3] "If at any time before final judgement it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." 28 U.S.C. § 1447(c).

[4] 224 F. Supp. 985, 989 (E.D. Pa. 1963).

[5] (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States