



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 49 | Number 4

Article 9

6-1-1971

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Recommended Citation

E. C. Howard, *Bankruptcy -- Wage Earner's Vacation Pay Held Not to Be Property Under Section 70a(5)*, 49 N.C. L. REV. 738 (1971).
Available at: <http://scholarship.law.unc.edu/nclr/vol49/iss4/9>

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plicate the already impossible task of lawyers and judges involved in antitrust litigation. It is regrettable that the Court picked such a complex vehicle as *Zenith*, which could have been decided on the issue of waiver alone,²⁶ to continue its policy of protection of the private plaintiff.

LANNY B. BRIDGERS

Bankruptcy—Wage Earner's Vacation Pay Held Not to Be Property Under Section 70a(5)

In *Lines v. Frederick*,¹ the Supreme Court has held that the accrued vacation pay of two bankrupt wage earners does not pass to a trustee in bankruptcy as "property" under section 70a(5) of the Bankruptcy Act.² The referee in each case had ordered the wage earner to turn over his vacation pay to the trustee on receipt, less an amount exempt under applicable California law.³ On appeal the district court affirmed, but the Ninth Circuit Court of Appeals reversed, maintaining that the accrued vacation pay was not "property" within the coverage of section 70a(5).⁴

²⁶ See the concurring opinion of Mr. Justice Harlan. 91 S. Ct. at 811.

¹ 400 U.S. 18 (1970) (per curiam).

² Bankruptcy Act § 70a, 11 U.S.C. § 110a (1964), provides:

The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition . . . except insofar as it is to property which is held to be exempt, to all the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt . . . shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process

³ CAL. CIV. PRO. CODE § 690.11 (West 1955) provided that the following shall be exempt from the claims of creditors:

One-half of the earnings of the defendant or judgment debtor received for his personal services within 30 days next preceding the levy of attachment or execution where such one-half is necessary for the use of the debtor, or his family supported in whole or in part by such debtor.

This California statute was repealed in 1970 by Ch. 1323, § 27, [1970] CAL. STATS. —, but substantially the same provision can be found in CAL. CIV. PRO. CODE § 690.6 (West Supp. 1971). Accordingly, under California law creditors could reach all but a small portion of the accrued vacation pay in *Lines*. This would suffice to pass the nonexempt portion under section 70a(5), assuming that vacation pay would be considered "property."

⁴ 400 U.S. at 18. Earlier the fifth circuit had reached an opposite conclusion in *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966).

In its per curiam opinion, the Supreme Court emphasized that the basic purpose of the Bankruptcy Act is "to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,'"⁵ and that this basic purpose circumscribes any judicial definition of property under section 70a(5).⁶ The Court reasoned that since vacation pay is a part of workers' weekly earnings, and functions "to support the basic requirements of life for them and their families during brief vacation periods or in the event of layoff," it is essential to bankrupt wage earners in making a "fresh start" and should not pass to the trustee.⁷

Section 70a of the Bankruptcy Act enumerates different kinds of interests which automatically vest in the trustee upon the filing of the petition, unless exempt under applicable state law. Under section 70a(5), as pertinent here, property passes if prior to the filing of the petition it was either transferable by the bankrupt or could have been levied upon and sold under judicial process against him.⁸ Ordinarily, federal courts follow local statutory or decisional law "upon the question of whether particular property is endowed with the legal attributes and incidents of transferability or susceptibility to sale by judicial process."⁹ In *Lines*, however, the Court never reached the question of whether, under California law, accrued vacation pay is transferable or leviable. Such an inquiry, which predominates in most cases involving section 70a(5), was obviated by the Court's determination that the vacation pay was not "property" and hence did not vest regardless of local law concerning its transferability or leviability.

The traditional scope of section 70a(5) was stated earlier by the Court in *Segal v. Rochelle*:¹⁰

⁵ 400 U.S. at 19, quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

⁶ 400 U.S. at 19.

⁷ *Id.* at 20.

⁸ See note 2 *supra*. The proviso in section 70a(5) states that rights of action for certain types of personal injuries will not pass to the trustee, unless subject to judicial process.

⁹ Annot., 16 A.L.R.2d 839 (1951). See, e.g., *Taylor v. Voss*, 271 U.S. 176 (1926) (state law determines whether a wife's interest in the bankrupt's property passed to the trustee); *Hewitt v. Berlin Mach. Works*, 194 U.S. 296 (1904) (state law determines whether vendor's title upon a conditional sale was valid and subject to pass to trustee); *Danning v. Lederer*, 232 F.2d 610, 613 (7th Cir. 1956) (state law controls whether a bankrupt's interest in a spendthrift trust will pass); *Cullom v. Kearns*, 8 F.2d 437 (4th Cir. 1925) (state law determines whether a bankrupt's interest in an estate held by the entirety passes).

¹⁰ 382 U.S. 375, 379 (1966).

The main thrust of § 70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leivable form when he files his petition. To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.

Ordinarily federal courts have chosen to follow state court rulings on various types of property interests. Where federal courts have not followed local rulings, the reason has been that the state courts had defined "property" too narrowly and had thereby prevented the passing of assets intended to be within the reach of section 70(5).¹¹ As was observed by the Court in *Board of Trade v. Johnson*,¹²

Congress derives its power to enact a bankruptcy law from the Federal Constitution, and the construction of it is a federal question. Of course, where the bankruptcy law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a *broader* construction of the statute than the state decisions would give it, federal courts can not be concluded by them.

The Court in *Lines* interposes its own definition of "property" without regard to state law, but it does not do so in order to secure assets for creditors through a "broader construction of the statute." In fact, it is the Court itself in *Lines* which is narrowly defining "property" so as to prevent the passing of assets clearly alienable or leivable under state law.¹³ Thus, the Court subverts its traditional policy of sweeping all assets of value into the bankruptcy estate to its concern for giving the debtor a "fresh start" after bankruptcy. Indeed, a definitional approach formerly employed by the federal courts in furtherance of one policy is being used in *Lines* to serve an entirely different objective.

In *Wetmore v. Markoe*,¹⁴ which appears to be the seminal case articulating the "fresh start" rationale, the Court stated that

¹¹ See, e.g., *Board of Trade v. Johnson*, 264 U.S. 1 (1924) (seat on stock exchange passes as transferable property, notwithstanding prior state court determination that such was not "property"); *Young v. Handwork*, 179 F.2d 70 (7th Cir. 1949) (bankrupt's interest in trust passes although Illinois law provided that creditors cannot reach a debtor's interest in trusts created by others and state court had interpreted this law to prevent passage to the trustee).

¹² 264 U.S. 1, 10 (1924) (emphasis added).

¹³ See note 3 *supra* & note 26 *infra*.

¹⁴ 196 U.S. 68, 77 (1904) (emphasis added).

[s]ystems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a *fresh start* in business or commercial life, freed from the obligation and misfortunes which may have resulted from business responsibilities.

It was in furtherance of such a design that the Court in *Local Loan Co. v. Hunt*¹⁵ ruled that a state court could not enforce an assignment of future wages that a bankrupt had made before declaration of bankruptcy. There the Court said:

The new opportunity in life and the clear field for future effort, which it is the purpose of the Bankruptcy Act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to bankruptcy.¹⁶

The Court also noted that "wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors" and that an individual's earning capacity is not "property within the meaning of the bankruptcy act."¹⁷ Although it is easily seen that a wage earner in the *Local Loan Co.* situation could hardly make a "fresh start" if deprived of his earnings subsequent to discharge, to hold as the Court does in *Lines* that vacation pay *already accrued* is not property within the meaning of the Bankruptcy Act goes far beyond the "fresh start" rationale as articulated in *Local Loan Co. v. Hunt*.

It is well-settled that compensation owed to a bankrupt for services fully performed by the time bankruptcy is declared passes to the trustee under section 70a(5),¹⁸ even though payment is not to be made until after discharge.¹⁹ In *Legg v. St. John*,²⁰ a case arguably similar to *Lines*, the Supreme Court held that the accrued right of a bankrupt to receive disability benefits in the future under an insurance contract does pass to the trustee. There the Court noted that

¹⁵ 292 U.S. 234 (1934).

¹⁶ *Id.* at 245. See also the concurring opinion of Judge Brown in *Kolb v. Berlin*, 356 F.2d 269, 272 (5th Cir. 1966).

¹⁷ 292 U.S. at 243.

¹⁸ *In re Hannan*, 127 F.2d 894 (7th Cir. 1942); *Florance v. Kresge*, 93 F.2d 784 (4th Cir. 1938). See generally 9 AM. JUR. 2d *Bankruptcy* § 912 (1963).

¹⁹ *In re Leibowitz*, 93 F.2d 333 (3d Cir. 1937).

²⁰ 296 U.S. 489 (1936).

[t]he right to receive disability benefits in the future does not differ from any other right acquired before adjudication to receive money thereafter. . . . Like other property, it passed to the trustee, unless exempted by the law of the bankrupt's domicile. *The principle declared in Local Loan Co. v. Hunt . . . is not applicable here.*²¹

This case would seem to be strong authority for the proposition that accrued vacation pay should pass as property, since the right to the money vests before adjudication.²²

In other cases involving interests similar to accrued vacation pay, the lower federal courts have consistently arrived at conclusions different from that reached in *Lines*. The Fifth Circuit Court of Appeals has held that both money due for annual leave²³ and the right to receive a lump sum payment of a retirement fund contribution²⁴ are "property" passing under section 70a(5). Moreover, there are two recent federal court decisions in California which have concluded that accrued vacation pay does pass. *In re Kuether*²⁵ held that accrued vacation pay passed to the trustee since under California law such an interest was clearly assignable.²⁶ The bankruptcy court in *In re Cohen*²⁷ found that a bankrupt school teacher's right to receive summer vacation pay as part of a prorated twelve month salary, but for which no additional services were required, was "property" within the reach of section 70a(5). These cases and others

²¹ *Id.* at 495-96 (emphasis added).

²² *Cf. In re Wright*, 157 F. 544 (2d Cir. 1907) (bankrupt insurance agent's right to receive renewal premiums passes even though bankrupt had to continue present employment in order to receive the payments).

²³ *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966).

²⁴ *Hill v. Schaefer*, 221 F.2d 914 (5th Cir. 1955).

²⁵ 203 F. Supp. 223, 224 (N.D. Cal. 1962).

²⁶ The Court's conclusion that the right to receive accrued vacation pay is an assignable interest under California law is clearly correct. CAL. CIV. CODE § 1044 (West 1954) provides that "[p]roperty of any kind may be transferred, except as otherwise provided by this Article." CAL. CIV. CODE § 1045 (West 1954) adds that "[a] mere possibility, not coupled with an interest, cannot be transferred." The California courts have consistently held, however, that under these two sections even future wages or money to become due in the future upon the happening of a contingency are assignable. *See Baumgarten v. California Pac. Title & Trust Co.*, 127 Cal. App. 649, 16 P.2d 332 (Dist. Ct. App. 1926). There can be little doubt that had the Supreme Court in *Lines* considered the question, it would have found accrued vacation pay to be assignable under California law. Note 3 *supra* concludes that most of the accrued vacation pay in *Lines* could have been reached by creditors. Thus the vacation pay could have passed to the trustee by satisfying either or both of the conditions of section 70a(5).

²⁷ 276 F. Supp. 889, 892 (N.D. Cal. 1967).

suggest that under case law prior to *Lines* accrued vacation pay passes as "property" so long as it is alienable or leivable under applicable state law.

Lines can be viewed as the latest of a series of decisions in which the Supreme Court has asserted that a bankruptcy proceeding is of an equitable nature.²⁸ In *Pepper v. Litton*²⁹ the Court noted that

by virtue of [section 2a of the Bankruptcy Act] a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred [upon the court] by the Act, it applies the principles and rules of equity jurisprudence [E]quitable powers have been invoked to the end that fraud will not prevail, substance will not give way to form, technical considerations will not prevent substantial justice from being done.

Easily seen here is the Court's implicit warning that it may look increasingly to equitable principles for the solution to problems arising out of the administration of the Bankruptcy Act.

Unfortunately, the Court at times has exercised its equitable powers at the expense of disregarding clear statutory language in the Act. In *Bank of Marin v. England*,³⁰ a bank had honored checks drawn by a depositor after his declaration of bankruptcy. Despite the fact that section 70d(5) specifically invalidates any transfer made by or in behalf of the bankrupt after filing,³¹ with certain exceptions not applicable in *Bank of Marin*,³² the Court ruled that the trustee was liable for the amount of the checks. The Court concluded that payment in this instance was not a "transfer" within the meaning of the statute because "it would be inequitable to hold liable a drawee" under these circumstances.³³ The result here, as noted by Justice Harlan in dissent,³⁴ may seem equitable but nonetheless contravenes clear statutory language.

A similar criticism can be leveled at the Court's decision in *Reading*

²⁸ See Aug, *Recent Trends in the Application of Equitable Principles of Bankruptcy*, 43 REF. J. 109 (1969).

²⁹ 308 U.S. 295, 304-05 (1939).

³⁰ 385 U.S. 99 (1966).

³¹ Bankruptcy Act § 70d(5), 11 U.S.C. § 110d(5) (1964), provides:

A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided . . . no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee

³² For exceptions to this rule, see Bankruptcy Act §§ 21g, 70d(1)-(5), 11 U.S.C. §§ 44g, 110d(1)-(5) (1964).

³³ 385 U.S. at 103.

³⁴ *Id.* at 103-11.

Co. v. Brown,³⁵ in which a tort claimant sued a bankrupt estate on the basis of an injury caused by the negligence of the receiver. The Court held that the claim was an "actual and necessary" cost of administration³⁶ and accorded the claim first priority under section 64a of the Bankruptcy Act.³⁷ The Court noted: "The Act does not define 'actual and necessary' nor has any case directly in point been brought to our attention. We must, therefore, look to the general purposes of Section 64a, Chapter XI, and the Bankruptcy Act as a whole."³⁸ Thereupon, the Court felt free to exercise its equitable powers in defining "actual and necessary" so as to achieve the basic objective of "fairness to all persons having claims against an insolvent."³⁹ For the Court to regard a tort claim as an actual and necessary cost and expense of preserving the estate taxes the language of the statute, especially in view of the effect of according such a claim first priority status.⁴⁰

This technique of reaching what the Court considers a "fair" result by selective definition of key words in the Bankruptcy Act provisions is applied in *Lines*, as it was in *Bank of Marin* and *Reading*. One problem surrounding the application of this technique is that it tends to make the bankruptcy court a "place for a disregard or in effect a repealing of the express provisions of statutory law."⁴¹ The possibilities for a complete judicial overhaul of the entire area of bankruptcy administration in the name of "equity," or "fairness," or to "assure the debtor a fresh start" would appear limitless in light of the *Marin-Reading-Lines* line of decisions.

Also in *Lines*, the Court, in its determination to assure the bankrupt a "fresh start," virtually ignored the other basic purpose of the Act of securing all of the bankrupt's assets and dividing them among his creditors.

³⁵ 391 U.S. 473 (1968).

³⁶ *Id.* at 476.

³⁷ Bankruptcy Act § 64a, 11 U.S.C. § 104a (1964), provides:

The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition

³⁸ 391 U.S. at 476.

³⁹ *Id.*

⁴⁰ In *Reading*, because of the limited assets of the estate in bankruptcy, the effect of according first priority status to the tort claimant was to prevent the other creditors from recovering any amount on their claims. See the dissent of Chief Justice Warren. 391 U.S. at 486-91.

⁴¹ Aug, *supra* note 28, at 112.

There is authority suggesting that the congressional intent in passing the Act in 1898 to afford the debtor a "fresh start" through discharge in bankruptcy was subordinate to that of providing a procedure for the collection and distribution of all the bankrupt's assets among his creditors.⁴² But, setting the historical argument aside, the Court in deciding any close question in bankruptcy administration should always weigh the rights of both creditor and debtor; the *Lines* opinion would appear to stand as a notable example where this has not been done, to the detriment of the creditor.

Furthermore, in allowing the bankrupt to retain his vacation pay accrued prior to filing, the Court goes beyond its stated objective of providing the discharged debtor with a "fresh start." The point is cogently made by the dissenting Justice Harlan when he argued that the majority opinion in *Lines* in effect gives the bankrupt a *head start* over his hypothetical counterpart who begins work for the first time on the day after bankruptcy is declared.⁴³ The Court summarily attempts to justify this by noting that accrued vacation pay, as a part of wages, is a "specialized type of property"⁴⁴ within the ambit of its decision in *Sniadach v. Family Finance Corp.*⁴⁵ This treatment is hardly satisfactory. In *Sniadach* the Court was concerned with a state garnishment procedure whereby a creditor could freeze all of a debtor's wages by service of a complaint upon both employee and garnishee.⁴⁶ These wages would remain frozen until adjudication of the complaint, although the garnishee was required under state law to pay the worker a subsistence allowance of at least twenty-five dollars but not exceeding fifty per cent of the latter's owed

⁴² See *In re Leslie*, 119 F. 406, 410 (N.D.N.Y. 1903). Judge Ray, the deciding judge, had been a member of the House Judiciary Committee during the passage of the Bankruptcy Act of 1898 and had served as chairman of that committee during the passage of the 1903 amendment. 1 H. REMINGTON, BANKRUPTCY 18 (4th ed. 1934). Judge Ray made these comments on the spirit of the Bankruptcy Act of 1898:

The main purpose of the bankrupt law is to prevent preferences, and secure a fair and an equitable division of the bankrupt estate among the creditors, not to grant discharges. This end accomplished, the bankrupt is granted a discharge from all his debts. The attainment of the first is not to be sacrificed to the accomplishment of the last.

119 F. at 410.

⁴³ 400 U.S. at 21-22.

⁴⁴ *Id.* at 21.

⁴⁵ 395 U.S. 337 (1969).

⁴⁶ *Id.* at 338-39. See also Note, *Poverty Law—Garnishment—Protection of Debtors' Rights*, 48 N.C.L. REV. 164 (1969).

wages.⁴⁷ The effect of this procedure was to deprive the employee of at least half of his earnings before he was given an opportunity to be heard.⁴⁸ Emphasizing the severe hardship imposed upon wage earners by such prejudgment garnishment and noting the special nature of wages,⁴⁹ the Court struck down the state procedure as violative of due process.⁵⁰ It is apparent in *Sniadach* that the procedure there could indeed "drive a wage-earning family to the wall."⁵¹ But there is certainly less hardship imposed upon the wage earner in the position of the bankrupt in *Lines* who is being deprived only of his accrued vacation pay representing a small fraction of his wages. The Court, however, makes no attempt to distinguish the compelling considerations that prompted its decision in *Sniadach* from those in *Lines*.⁵²

In effect, the Court in *Lines* has subjected the Bankruptcy Act to the Court's own conception of a national exemption policy with regard to accrued vacation pay, thereby superseding applicable state exemption laws. Moreover, by implication, no form of accrued wages would pass under section 70a(5). This significantly overturns a long-established judicial policy in conjunction with section 6 of the Bankruptcy Act⁵³ of leaving

⁴⁷ Ch. 507, § 1, [1965] Wis. Sess. L. —. This statute is former WIS. STAT. ANN. § 267.18(2) (a), which was repealed and recreated by Ch. 127, § 10, [1969] Wis. Sess. L. —. This new statute is codified as WIS. STAT. ANN. § 267.18(2) (a) (Supp. 1970-71).

⁴⁸ 395 U.S. at 339.

⁴⁹ *Id.* at 340.

⁵⁰ *Id.* at 342.

⁵¹ *Id.* at 341-42.

⁵² The Court in *Lines* observed that "[w]here the minimal requirements for the economic survival of the debtor are at stake, legislatures have recognized that protection which may be unnecessary or unwise for other kinds of property may be required." 400 U.S. at 20. The Court cites the Consumer Credit Protection Act § 301, 15 U.S.C. § 1671 (1970), as an example of such legislative recognition. 400 U.S. at 20. Section 1673 of the Consumer Credit Protection Act restricts the garnishment of any disposable earnings of a wage-earner to the lesser amount of twenty-five per cent of his weekly earnings or thirty times the minimum hourly wage. Consumer Credit Protection Act § 303, 11 U.S.C. § 1673 (1970). Arguably these restrictions on garnishment would operate to exempt from passage to the trustee a large portion not only of a bankrupt's future wages, but also of any accrued wages, including vacation pay. See Comment, *Title to Property—Employee Bankrupt Vacation Pay*, 45 AM. BANKR. L.J. 115, 119 (1971) [hereinafter cited as AM. BANKR. L.J.]. There is nothing in the legislative history of the Consumer Credit Protection Act, however, to suggest that Congress intended the restrictions in section 1673 to extend beyond the creditor's remedy of garnishment.

⁵³ Bankruptcy Act § 6, 11 U.S.C. 24 (1964), provides: "This title shall not affect the allowance to the Bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws . . ."

the matter of exemptions exclusively to the states.⁵⁴ The prospect of the Court, and not the Congress, fashioning a "national, uniform exemption policy by placing limitations on the meaning of the word 'property' as used in section 70a(5) of the Act"⁵⁵ on a piecemeal basis is hardly appealing. Unfortunately, however, such a prospect would appear likely in the wake of the *Lines* decision.

E. CADER HOWARD

Conflict of Laws—Enforcement of Foreign Judgments in Federal Courts

In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,¹ a federal court was recently called upon to decide whether to apply the state or federal rule on enforcement of foreign judgments. The court had jurisdiction by reason of international diversity,² held that the choice of law was governed by *Erie Railroad Co. v. Tompkins*,³ and applied the state rule. This note will explore the issue of whether *Erie* should be controlling with respect to enforcement of foreign judgments when the court has jurisdiction by reason of international, as opposed to intra-national, diversity of citizenship.

The *Somportex* case has a rather complex background. *Somportex* originally brought suit against Philadelphia Chewing Gum Corporation for an alleged breach of contract. The suit was brought in England, and the defendant was served at its offices in Pennsylvania. The defendant made a conditional appearance in the English court and sought an order

⁵⁴ AM. BANKR. L.J. 117. See *United States v. Sharpnack*, 355 U.S. 286 (1958); *Eaton v. Boston Trust Co.*, 240 U.S. 427 (1916); *Dixon v. Kopljar*, 102 F.2d 295 (8th Cir. 1939). In the last case it was observed that

the rights of a bankrupt to property as exempt are those given him by the state statutes; and the federal courts, sitting as courts in bankruptcy, will determine exemptions according to those statutes, and the decisions of the courts of last resort of the states construing and applying those statutes. *Id.* at 297.

⁵⁵ AM. BANKR. L.J. 117.

¹ 318 F. Supp. 161 (E.D. Pa. 1970).

² "The district court shall have original jurisdiction of all civil actions . . . between—(1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof. . . ." 28 U.S.C. § 1332 (1964). The first clause provides for intra-national diversity jurisdiction, and the second for international diversity jurisdiction.

³ 304 U.S. 64 (1938). In *Erie*, the Court held that in a diversity case a federal court must apply the substantive law of the state in which it is sitting.