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Federal Practice--Jurisdiction--In Diversity Cases Federal Law Must Be Looked To in Determining Foreign Corporation's Amenability to Service (Nash-Ringel, Inc. v. Amana Refrigeration, Inc., 172 F. Supp. 524 (S.D.N.Y. 1959))

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315. All attempts failed largely due to the inability of the legislators to agree on what the rule should be, rather than whether there should be immunity or not. The legislators seem agreed that specific enactments are needed.

A law enacted to accomplish this need should prevent inequitable liability as well as compensate for injuries after they have occurred. The present ruling seems to accomplish this. The defamed person has recourse against the guilty party who uttered the defamatory remarks, and at the same time the broadcaster, who had no control over the defamations, is relieved of liability. The familiar objection to this situation is that the defamed person may have no remedy because the speaker is impecunious. However, the Court overruled this possible private detriment in favor of greater public benefits. The broadcaster now needs no liability insurance which indirectly might cause the rates for political broadcasts to exceed those of ordinary air time. Higher rates are expressly prohibited by section 315.[39] Also, the broadcaster need not deny all political candidates the use of the station's facilities which is the broadcaster's privilege under section 315.[40] Such action is against congressional intent and FCC policy.[41] Protection for the few who may be deprived compensation is too expensive if the harm which results is the inhibiting of free political expression.

FEDERAL PRACTICE—JURISDICTION—IN DIVERSITY CASES FEDERAL LAW MUST BE LOOKED TO IN DETERMINING FOREIGN CORPORATION'S AMENABILITY TO SERVICE. — The defendant, an Iowa corporation, being sued in the Southern District of New York on the basis of diversity of citizenship, made a motion to dismiss the action for lack of jurisdiction. Service was attempted on the defendant by serving a vice-president of the Rocke International Corporation whose principal place of business was in New York City. For five years Rocke, who was concededly amenable to service, had solicited sales for the defendant on a commission basis all over the world except in the United States, Hawaii, Alaska and Canada. The basis for the defendant's motion was that its activities within New York were insufficient to bring it within the Court's jurisdiction. The Court in

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[39] 48 Stat. 1088 (1934) (amended by 66 Stat. 717 (1952), as amended, 47 U.S.C. § 315(b) (1952)).

[40] *Supra* note 39, § 315(a).

[41] Farmers Educ. and Co-op. Union v. WDAY, Inc., 360 U.S. 525, 534-35 (1959). The FCC "considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit." *Ibid.*

denying the defendant's motion *held* that in determining whether Rocke's activities on behalf of defendant were sufficient enough to bring the defendant within the jurisdiction of the Court, federal law as opposed to state law would apply. *Nash-Ringel, Inc. v. Amana Refrigeration, Inc.*, 172 F. Supp. 524 (S.D.N.Y. 1959).

Before *Erie R.R. v. Tompkins*[1] the federal courts had applied their own substantive law. This was done on the basis of *Swift v. Tyson*[2] which interpreted the Rules of Decision Act,[3] requiring state law to be applied by federal courts, as only applicable to state statutes, leaving the federal courts free to apply their own common law. The *Erie* decision destroyed the concept that there was a separate body of federal common law which could be applied in cases where jurisdiction was based on diversity of citizenship.

Procedural law before *Erie* was controlled in the federal courts by the Conformity Act[4] which said that the federal courts should conform "as near as may be" to practice in the state courts. Today practice in federal courts is governed by the Federal Rules of Civil Procedure originally promulgated in 1938.[5]

The *Erie* case denied to the federal courts the use of an independent body of substantive law because of the discrimination that resulted from such a practice. A non-resident plaintiff could choose two bodies of law when suing on a state-created right. The rationale of the *Erie* decision was that the result in the federal court should not be substantially different than it would be in a state court. *Guaranty Trust Co. v. York*[6] explained that the *Erie* holding was based on a policy that ". . . 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."[7]

In the principal case if jurisdiction were denied because of a state law the substantive rights of the litigants would be affected.[8] Should then the rationale of *Erie* be applied thereby making state law

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[1] 304 U.S. 64 (1938).

[2] 41 U.S. (16 Pet.) 1 (1842).

[3] Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92.

[4] Conformity Act of 1872, ch. 255, § 5, 17 Stat. 197.

[5] The Enabling Act of June 19, 1934, ch. 651, 48 Stat. 1064, gave the United States Supreme Court the power to prescribe by rules the practice of the district courts of the United States. Pursuant to this auhority the Supreme Court submitted a proposed draft to Congress which became effective in September 1938. See Daniel K. Hopkins, *The New Federal Rules of Civil Procedure Compared with the Former Federal Equity Rules and Wisconsin Code*, 23 MARQ. L. REV. 159 (1939). The rules are found in FED. R. CIV. P., 28 U.S.C. (1958).

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

[7] *Id.* at 108.

[8] Note, 21 ST. JOHN'S L. REV. 184 (1947). "To say that a plaintiff has substantive rights, but he lacks a remedy, is to say the plaintiff is without a right." *Id.* at 189. The Supreme Court has said that the state rule as to burden of proof should be applied in the federal courts because it substantially affects state-created rights. Cities Service v. Dunlap, 308 U.S. 208 (1939).

applicable or should the federal courts be allowed to apply federal law in determining jurisdiction over a foreign corporation on the basis that the Federal Rules of Civil Procedure [9] give the federal courts the right to serve a foreign corporation?

The particular problem in the principal case is, which law should apply, state or federal, in determining whether the foreign corporation is sufficiently present within the jurisdiction to bring it within the power of the district court. After *Erie* was decided, the problem of the instant case had been considered only in lower court cases.[10]

The Southern District of New York had taken the position that federal law was to be applied.[11] However, in March of 1959, a month before the principal case was decided, the Southern District per Dimock, J., held in *Shawe v. Wendy Wilson, Inc.*,[12] on the basis of the *Erie* rationale, that state law should be applied. The *Shawe* case pointed out that the Second Circuit had applied state law in *Bomze v. Nordis Sportswear, Inc.*[13] The *Bomze* case was a case removed from the state courts to the federal courts, but *Shawe* said a distinction between removed cases and cases originally brought in the federal courts was "logically irrelevant." [14]

The principal case, in interpreting the reasoning in *Bomze* (a case removed to the federal court) and other similar cases [15] which were originally brought in the federal courts, observed that the Second Circuit has at least intimated that federal law should apply.[16]

However, from an examination of the *Bomze* case it appears that the Second Circuit applied state law. There are also cases from the First,[17] Third,[18] Fifth [19] and Seventh [20] Circuits which apply

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[9] FED. R. CIV. P. 4(d)(3).

[10] 2 MOORE, FEDERAL PRACTICE § 4.25 at 969 (2d ed. 1948) states that the general law applies to whether a foreign corporation is doing business within a jurisdiction and cites for authority a pre-*Erie* Supreme Court decision, Barrow Co. v. Kane, 170 U.S. 100 (1898), and a post-*Erie* district court case, Hedrick v. Canadian Pac. Ry., 28 F. Supp. 257 (S.D. Ohio, 1939). *But see* Partin v. Michaels Art Bronze Co., 202 F.2d 541, 542 n.2 (3d Cir. 1953), where the comment by Moore is discussed in light of the *Erie* decision.

[11] Satterfield v. Lehigh Valley R.R., 128 F. Supp. 669 (S.D.N.Y. 1955).

[12] 171 F. Supp. 117 (S.D.N.Y. 1959).

[13] 165 F.2d 33 (2d Cir. 1948).

[14] Shawe v. Wendy Wilson, Inc., *supra* note 12, at 120.

[15] *E.g.*, French v. Gibbs Corp., 189 F.2d 787 (2d Cir. 1951). The principal case uses *Bomze* to uphold two ideas. The first is that federal courts can decide *how* their service should be served. The other is that the federal courts can determine *what foreign* litigants can be brought before it. Nash-Ringel, Inc. v. Amana Refrigeration, Inc., 172 F. Supp. 524, 525 (S.D.N.Y. 1959).

[16] The *Shawe* case points out that the Second Circuit has never expressly stated that federal law must apply in cases originating in the federal courts. Shawe v. Wendy Wilson, Inc., 171 F. Supp. 117, 120 (S.D.N.Y. 1959).

[17] Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948).

[18] Partin v. Michaels Art Bronze Co., 202 F.2d 541 (3d Cir. 1953).

[19] Albritton v. General Factors Corp., 201 F.2d 138 (5th Cir. 1953).

[20] Canvas Fabricators v. William E. Hooper & Sons Co., 199 F.2d 485 (7th Cir. 1952).

state law in determining effectiveness of process on a foreign corporation. The Court in the instant case distinguishes these cases on their facts from the principal case.[21]

The *Shawe* case follows these circuits' holdings. In so doing it rejects the concept of a strict dichotomy between substantive and procedural law, and, basing its decision on the *Erie* rationale, holds that the result in the federal courts should not be different than it would be in the state courts when a state-created right is involved.

The principal case also rejects the strict dichotomy concept, but it disagrees with the conclusion reached by *Shawe*. The Court felt ". . . that Federal Courts, within the bounds of due process, of course, have a right to decide how their own process may be served and what foreign litigants may be brought before them." [22] The Court goes back to the position of the Southern District prior to *Shawe*, that is, federal law should be looked to in determining the effectiveness of service on a foreign corporation.[23]

The United States Supreme Court has not answered the problem of which law, state or federal, should be applied in determining whether a corporation is sufficiently present in a jurisdiction to be amenable to service.[24] It had decided, before the *Erie* case, that the federal courts could obtain jurisdiction over a foreign corporation when it was not amenable to service of process under state law.[25]

However, in *Woods v. Interstate Realty Co.*,[26] jurisdiction was denied to a federal court because state law prohibited the foreign corporation from enforcing its claim in the state courts on the grounds that the foreign corporation had not qualified to do business in the state. The Court said ". . . that where . . . one is barred from recovery in the state court, he should likewise be barred in the federal court." [27]

This supports the position of the Supreme Court in the *Guaranty Trust Co.* case.[28] It was there stated that ". . . since a federal court

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[21] Nash-Ringel, Inc. v. Amana Refrigeration, Inc., 172 F. Supp. 524, 526 (S.D.N.Y. 1959). The Court says the *Pulson* case, *supra* note 17, and the *Partin* case, *supra* note 18, were decided under rule 4(d)(7) and not 4(d)(3) of the Federal Rules. The *Albritton* case, *supra* note 19, was concerned with service on the Secretary of State, while in the *Canvas Fabricators* case, *supra* note 20, the plaintiff conceded that state law controls.

[22] Nash-Ringel, Inc. v. Amana Refrigeration, Inc., *supra* note 21, at 525.

[23] See, *e.g.*, Satterfield v. Lehigh Valley R.R. Co., 128 F. Supp. 669 (S.D.N.Y. 1955). *But see* Ultra Sucro v. Illinois Water Treatment Co., 146 F. Supp. 393 (S.D.N.Y. 1956).

[24] See International Shoe Co. v. Washington, 325 U.S. 310 (1945), where the Court formulated a test for determining the constitutionality of suing a foreign corporation. See Bomze v. Nardis Sportswear, Inc., 165 F.2d 33 (2d Cir. 1948), for a discussion of this test in relation to New York law on presence of a foreign corporation.

[25] Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898).

[26] 337 U.S. 535 (1949).

[27] *Id.* at 538.

[28] 326 U.S. 99 (1945).

adjudicating a State-created right solely because of the diversity of citizenship . . . is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." [29]

To allow the federal courts jurisdiction over foreign corporations when the state courts did not have jurisdiction would be allowing the federal courts to substantially affect the recovery of state-created rights. The Supreme Court when faced with the problem will probably follow the lead of the *Erie* and *Guaranty Trust Co.* cases and apply state law in determining jurisdiction over foreign corporations.

The conclusion of the principal case is not as sound as that of the *Shawe* case. Since it rejects the strict dichotomy between procedural and substantive law, it would seem that it should then accept the conclusion that since jurisdiction substantially affects the state-created rights, state law should be applied to determine jurisdiction. The reasoning in the principal case does not take into consideration the strong policy reasons for not allowing the federal courts to affect recoveries in cases involving state-created rights. The litigants enforcing state-created rights should have no greater right in the federal courts than they would in the state courts.

INSURANCE—VARIABLE ANNUITY HELD TO BE A SECURITY AND SUBJECT TO REGISTRATION WITH SEC.—Petitioner sought to enjoin respondent from issuing their variable annuity contracts [1] without

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[29] *Id.* at 108-09. *But see* Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958). Outcome is not the only controlling factor. The Court here applies federal rules on presentation of facts to a jury. "The federal system is an independent system. . . . The policy of uniform enforcement of its state-created rights and obligations, see, *e.g., Guaranty Trust Co. v. York* . . . , cannot in every case exact compliance with its state rule. . . ." *Id.* at 536-38.

[1] The variable annuity is similar to the conventional annuity in the matter of premium payments, the annuitant making a fixed number of premium payments during his productive years. The fundamental difference lies in the matter of investment policy since most of the premiums paid under the variable annuity are invested in common stock. "Each premium payment, after the deduction for loading charges, is credited to the annuitant's account in the form of 'accumulation units.' The number of 'accumulation units' to be credited is determined by dividing the net amount of the premium payment by the current value of an 'accumulation unit.' . . . At stated periods thereafter, usually monthly, the basic unit value is adjusted dependent upon the current investment experience of the common stock portfolio. . . . The unit value is not affected by the mortality experience or current operating expenses of the program. These factors are assumed by the insurer who is compensated