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Federal Procedure - Review of Diversity Jurisdiction Cases

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will be capable of heeding the trial judge's admonition not to give weight to the conviction. On the strength of these considerations, it is submitted that, absent absolute necessity,²⁰ a reference by a prosecuting attorney on retrial to the conviction of the accused by a previous petit jury should be treated as incurable reversible error.

Closely related to this problem are the difficulties which arise from the present practice of using the original indictment on retrial. Since the verdict rendered at the first trial is endorsed upon the original indictment, the jury will usually become aware of the former verdict through an examination of the indictment. This could be avoided by adopting a procedure under which a certified copy of the indictment would be used in a case in which the accused has been convicted of the crime charged. If the conviction at the first trial is of a lesser crime than that charged, it would probably be necessary to obtain a new indictment or a new bill of information for the retrial, in order to change the crime charged.²¹ Another solution would be to make it the statutory duty of the trial judge in such a case to amend the indictment so as to charge the lesser crime. Under this proposed procedure, all knowledge of the former trial and verdict could be kept from the jury and the objective of Article 515 would be greatly furthered.

Daniel J. McGee

FEDERAL PROCEDURE—REVIEW OF DIVERSITY JURISDICTION CASES

In an action brought in federal district court,¹ solely on the basis of diversity of citizenship,² plaintiff recovered for injuries sustained in an oil field accident. Defendant appealed from denial of motions for directed verdict and judgment *non obstante veredicto*, and on exceptions to instructions to the jury. The court of appeals reversed, holding that defendant's motion for directed verdict should have been granted.³ Plaintiff petitioned

20. The only "absolute necessity" situation would appear to be that presented in the *Crittenden* case, that is, a case in which the accused has been convicted of a lesser crime than that charged at a previous trial and it is necessary to explain the implied acquittal theory to the present jury. A remedy to this problem is proposed in the following paragraph.

21. See note 7 *supra*.

1. United States District Court for the Western District of Texas (unreported).

2. Plaintiff was a citizen of Texas; defendant was incorporated under the laws of Delaware.

3. *Phillips Petroleum Co. v. Gibson*, 232 F.2d 13 (5th Cir. 1956).

the United States Supreme Court for a writ of certiorari. In a very brief per curiam opinion⁴ the Court granted plaintiff's writs, vacated the judgment of the court of appeals, and reinstated that of the district court. In reaching its decision it was necessary for the Court to decide the question of error in the instructions to the jury, an issue not considered by the court of appeals,⁵ and not discussed by the Supreme Court. Four Justices dissented.⁶ In dissenting Mr. Justice Frankfurter expressed disapproval of the Court's reviewing cases within the federal judicial system solely because of diversity of citizenship of the litigants. *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956).

Diversity jurisdiction has been a highly controversial subject since its inclusion in the Constitution.⁷ The present prerequisites for the federal courts' exercise of diversity jurisdiction are set out in 28 United States Code Section 1332.⁸ This Note is concerned with the Supreme Court's review of cases

4. "Per Curiam. The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated, and the judgment of the District Court is reinstated."

5. In ruling that the motion for directed verdict should have been granted the court of appeals never reached the question of errors in instructions. The Supreme Court so stated in *NLRB v. Lion Oil Co.*, 352 U.S. 282, 304, n. 3 (1957).

6. Justices Reed and Burton would deny certiorari; Justice Harlan joined with Justice Frankfurter, dissenting.

7. U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, . . . between citizens of different States . . ." This provision was highly contested during the period of ratification. It was supported by Wilson, in 2 ELLIOTS DEBATES 491 (1937); Pendleton, 3 ELLIOTS DEBATES 518 (1937); Madison, 3 ELLIOTS DEBATES 533 (1937); Marshall, 3 ELLIOTS DEBATES 556 (1937). It was opposed by Patrick Henry, in 3 ELLIOTS DEBATES 542 (1937); Mason, 3 ELLIOTS DEBATES 523 (1937); Grayson, 3 ELLIOTS DEBATES 565 (1937). The controversy is still very much alive. Present day advocates: Brown, *The Jurisdiction of Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179 (1929); Grinnell, *The Bills Pending Before Congress to Repeal the Federal Courts' Jurisdiction in Cases of Diversity of Citizenship*, 30 MASS. L.Q. 21 (1945); *Shall Federal Diversity of Citizenship Jurisdiction Be Abolished or Modified?*, 30 J. AM. JUD. SOC. 169 (1947); Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1932). Among its adversaries are Collier, *A Plea Against Jurisdiction for Diversity of Citizenship*, 76 CENTRAL L.J. 263 (1913); *Shall Federal Diversity of Citizenship Jurisdiction Be Abolished or Modified?*, 30 J. AM. JUD. SOC. 169 (1947); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L.Q. 499 (1928); McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225 (1943).

8. "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States;

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;

"(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) The word 'states', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. As amended July 26, 1956, c. 740, 70 Stat. 658."

arising under these provisions, which is ordinarily achieved by writs of certiorari,⁹ rather than with the controversy over the jurisdiction itself. Review by certiorari assumed its present position of importance in 1891 when the intermediate appellate courts were created to relieve a seriously over-burdened Supreme Court docket.¹⁰ In several areas, including diversity jurisdiction cases, the decisions of these courts were intended to be "final"¹¹ in that they were to be subject only to discretionary review by the Supreme Court.¹² Review on writs is not a matter of right but of sound judicial discretion.¹³ An application will normally be approved when four Justices consider the case meritorious.¹⁴ The Court has indicated generally, by rule¹⁵ and decision, the considerations governing the granting of writs. It has been clearly stated that writs will issue only for special and important reasons¹⁶ of public rather than merely private concern.¹⁷ One

9. Review in the greatest majority of cases is by writs of certiorari under 28 U.S.C. § 1254 (1948). There is also the possibility of review by certification. Prior to 26 STAT. 826 (1891), under 18 STAT. 316 (1875), parties in a diversity case had the right of *appeal* when the amount in controversy exceeded \$5,000.

10. 26 STAT. 826 (1891), 28 U.S.C. §§ 1291-94 (1948). This overload had become a serious problem which the Supreme Court viewed as "one of great peril." Forsythe v. Hammond, 166 U.S. 506, 512 (1897). In 1890 there were 1200 cases backlogged and a span of four years existed between docketing and final argument and decision. Remarks of Senator Evart, 21 CONG. REC. 10220 (1890). The relief was achieved by transferring much of the former obligatory review to the realm of discretionary review.

11. 26 STAT. 826, 828 (1891); American Construction Co. v. Jacksonville R. W. Co., 148 U.S. 372, 382 (1893) (opinions final except in extraordinary cases).

12. 26 STAT. 826, 828 (1891); Colombia v. Cauca Co., 190 U.S. 524 (1903); Senator Vest's remarks, 21 CONG. REC. 10224 (1890).

13. Sup. Ct. Rev. Rules 19(1); Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1933); Hyde v. Shine, 199 U.S. 62 (1905); *In re* Tampa Suburban R.R., 168 U.S. 583 (1897).

14. Mr. Justice Stone, *Fifty Years Work of the United States Supreme Court*, 14 A.B.A.J. 428, 436 (1928). Letter from Chief Justice Hughes to Senator Wheeler in S. REP. No. 711, 75th Cong., 1st Sess. 38, 40 (1947): "Furthermore, petitions for certiorari are granted if four Justices think they should be. A vote by a majority is not required in such cases. Even if two or three of the justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote."

15. Sup. Ct. Rev. Rules 19.

16. Rice v. Sioux City Cemetery, 349 U.S. 70 (1955); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (writs granted for benefit of the judicial system); Ohio *ex rel.* Seney v. Swift and Co., 260 U.S. 146 (1922).

17. Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) (court not sitting for the benefit of the particular litigants); Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) (Writs not granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); Chief Justice Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves

such reason is the necessity for a uniform application of the law by the courts of appeals.¹⁸ The existence of a "federal common law" during the reign of the *Swift v. Tyson*¹⁹ doctrine made it necessary to grant writs frequently, in diversity cases, to achieve this uniformity. However, the repudiation of that doctrine has obviated this requirement.²⁰ In those cases in which a federal court's jurisdiction is based solely on the citizenship of the parties the court is considered merely an additional state court and applies local law as interpreted by state tribunals.²¹ Another situation warranting the granting of writs arises when a court of appeals has decided an important state or territorial question in a manner conflicting with state or territorial law.²² This, of course, has specific application to diversity cases. However, in the instant case it would not appear that any important state question was involved or that the outcome of the litigation was of public rather than private concern.

principles, the application of which is of wide public or governmental interest, and which should be authoritatively declared by the final court.").

18. *Warner v. New Orleans*, 167 U.S. 467, 474 (1897): "In order to guard against any injurious results which might flow from having nine appellate courts, acting independently of each other, power was given to this court to bring before it for decision by certiorari any case pending in either of those courts. In that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable."

19. 41 U.S. (16 Pet.) 1 (1842). The First Judiciary Act, 1 STAT. 73, § 34 (1789), had established that local law was to be applied in diversity cases. The Court refused to apply this section on grounds that it did not extend to contracts or instruments of a commercial nature. This began 96 years of a continuous development of the "federal common law."

20. The renunciation of this doctrine came after many years of a slow buildup of dissatisfaction in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Of note is the fact that the Court overruled a precedent of almost a century's standing which had not been contested by counsel. The Court stated (*id.* at 77) that "the injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the *unconstitutionality* of the course pursued has now been made clear, and compels us to do so." (Emphasis added.) It would appear that this is the only time that the Supreme Court has considered one of its own actions as unconstitutional. In *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938), the court stated that in questions controlled by state law, conflict among circuits alone is not of itself reason for granting writs.

21. 28 U.S.C. § 1652 (1948); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940) (federal courts are bound to follow the decisions of the highest state court); *Six Co. v. Highway District*, 311 U.S. 180 (1940) (if the highest court has not acted, the interpretation of intermediate courts must be followed); *cf. Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940).

22. Sup. Ct. Rev. Rules 19(1). Former Rule 38(5) (B), which covered this subject, stated that writs would be granted when the decision of the court of appeals was probably in conflict with local law. Presently writs are to be granted when the decision is in conflict. Some significance apparently should be given to this change.

In dissenting, Mr. Justice Frankfurter viewed this case as an "ordinary suit for damages" in which no overriding question of policy was presented. In pointing out the dangers of granting writs in such suits he noted that an investigation of local law must be made to determine whether the court of appeals erred. This could readily lead to the Supreme Court's sitting to determine the local law of each of the forty-eight states, an activity certainly incongruous with the Court's primary function of resolving important matters of federal concern. Cases adjudicated by the federal courts solely because of diversity of citizenship of the parties are placing an increasing burden on these courts.²³ These apprehensions of Mr. Justice Frankfurter seem well founded.

In addition to the problem presented above, a further difficulty arises from the use made of the per curiam opinion in the instant case. Per curiam opinions, ever an instrument of expedition, once reflected unanimity of the Court. This is no longer the case.²⁴ Nevertheless, use of the per curiam today makes it easier to give the stamp of finality to litigation with a minimum of time and effort. Normally the device is used to dispose of cases concerning well-settled principles of law not requiring full consideration. Often references are made to prior decisions, as is exemplified by the treatment accorded recent segregation cases.²⁵ The ordinary diversity case does not lend itself readily to such summary disposition, for in the absence of

23. In recent years there has been a marked increase of private civil cases in federal courts solely because of diversity jurisdiction. In 1941 there were 7,286 cases; in 1951 there were 13,474; and in 1955 there were 19,123. See *Report of the Judicial Conference* for these years. A recent measure, highly contested, but supported by both the Judicial Conference (REPORT OF THE JUDICIAL CONFERENCE 15 (Sept. 1952)) and the Attorney General of the United States (REPORT OF THE JUDICIAL CONFERENCE 39 (Sept. 1955)) is an increase in the jurisdictional amount from the present \$3,000.00 to \$10,000.00. See H.R. REP. Nos. 5007, 7203, 84th Cong., 1st Sess. 3072, 10109 (1955).

24. *Fidelity and Deposit Co. v. United States*, 187 U.S. 315, 319 (1902). The Court in this case was speaking of a per curiam opinion rendered in *Smoot v. Ritterhouse*, decided January 10, 1876. The *Smoot* decision was unreported, as were many per curiams prior to 1900, but a copy may be found in 27 Wash. L. Rep. 741 (1899). This unanimity of the court is no longer present in all per curiams. Dissents have increased in recent years. In 1943 there was only one case with a dissent; in 1944 there were 4 with dissents, 14 in 1952, and 13 in 1955. Use of the per curiam device has also increased considerably. During the 1953 term 86 cases were so disposed, 23 after oral argument; in 1954, 102 cases, 16 after oral argument (REPORT OF THE JUDICIAL CONFERENCE 85 (Sept. 1955)). In the 1955 term 127 per curiams rendered, 7 after oral argument. *The Supreme Court 1955 Term*, 70 HARV. L. REV. 83, 99 (1956).

25. *Florida ex rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Tureaud v. Board of Supervisors, Louisiana State University and Agric. and Mech. College*, 347 U.S. 971 (1954).

a clear conflict with local law there may be neither a well-settled principle of law nor decisions available for reference. In the instant case the Court resolved questions concerning instructions to the jury not passed on by the court of appeals,²⁶ and denied itself and counsel the benefits of briefs and oral argument. The Court assigned no reason for its action, leaving the parties uninformed as to the basis upon which their rights were adjudicated. Such a situation may easily lead to confusion as to the state of the law,²⁷ and lower federal court judges may encounter difficulty in determining a course of action in similar cases. One Texas appellate court has chosen to ignore the Supreme Court's reversal of the court of appeals in the instant case and to cite the latter with approval.²⁸ It is submitted that except in extraordinary instances the judgments of the courts of appeals in diversity cases should be left undisturbed. If a case is of such a nature as to warrant consideration by the Supreme Court, a full disposition should be accorded. If, however, the Court finds it necessary to resort to the per curiam device, it is submitted that some indication should be given as to the legal principles upon which the decision is founded.

Henry A. Politz

INSURANCE — AUTOMOBILE LIABILITY INSURANCE — CONSTRUCTION OF THE TERM "INSURED" IN EMPLOYEE AND WORKMEN'S COMPENSATION EXCLUSIONS

Mitchell, while loading Southern's truck, negligently killed an employee of Southern, the name insured in a liability policy on the truck. Plaintiff, spouse of deceased, sued Employer's Liability Assurance Corporation as the insurance carrier on the

26. See note 5 *supra*.

27. Mr. Justice McReynolds, *Hearings Before Committee by Judiciary on H. R. 8206*, 68th Cong., 2d Sess. 22 (1925): "To me it seems that the real function of our Court is this: to settle the law, so that lawyers may know how to advise their clients and so that trial judges may know how to instruct their juries or how to decide cases that come before them."

28. *Nance Exploration Co. v. Texas Employers' Ins. Assoc.*, unreported, 1957: "True it is that the Supreme Court of the United States, in a very recent per curiam opinion (1 L. Ed.2d 77), without giving any rhyme or reason for its action, set aside the holding of the Circuit Court in this case It is impossible to determine from the Supreme Court opinion why it took this action. It cannot be determined if it thought the Texas law was wrong, or if it thought that the Fifth Circuit had wrongly applied it. Be that as it may, we are not bound by Federal decisions in this case. On the contrary, Federal courts are supposed to follow State decisions We consider the Fifth Circuit opinion well reasoned and in accord with the Texas decisions, by which we are governed. Federal cases are used by us as persuasive, but not decisive. In this case, we choose to cite with approval the Fifth Circuit's opinion."