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Federal Civil Procedure--Right to Trial by Jury--State Law Controlling in Characterization of Issues as Legal or Equitable

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FEDERAL CIVIL PROCEDURE—RIGHT TO TRIAL BY JURY—STATE LAW CONTROLLING IN CHARACTERIZATION OF ISSUES AS LEGAL OR EQUITABLE—An action for declaratory relief[1] was brought in a federal district court to determine the validity of a contingent fee contract and the reasonableness of attorney's fees in a will contest case. Plaintiff's motion for summary judgment was sustained. On appeal, the court of appeals reversed and remanded with instructions to grant defendant's motion for jury trial, in accordance with Oklahoma practice, on the question whether the contingent fee contract was fair and free from fraud.[2] The Supreme Court granted certiorari,[3] vacated the judgment,[4] and remanded the case for reconsideration in the light of a recent state decision.[5] On reconsideration by the court of appeals of its order granting defendant's motion for jury trial, *held*, reversed and remanded. Since cancellation of the contingent fee contract, the basic relief being sought, is an equitable action under present Oklahoma law, there is no right of trial by jury. *Simler v. Conner*, 295 F.2d 534 (10th Cir. 1961).

1 The change in form of an action to one for declaratory relief has no effect upon a litigant's right to trial by jury. City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949); Hargrove v. American Cent. Ins. Co., 125 F.2d 225 (10th Cir. 1942); Pacific Indem. Co. v. McDonald, 107 F.2d 446 (9th Cir. 1939). See also McCoid, *Right to Jury Trial in the Federal Courts*, 45 IOWA L. REV. 726, 739 (1960); Shimer, *Jury Trials in Declaratory Relief Actions: The Right Exists, But Under What Circumstances?*, 6 U.C.L.A. L. REV. 678 (1959).

2 Simler v. Conner, 282 F.2d 382 (10th Cir. 1960).

3 Conner v. Simler, 367 U.S. 486 (1961).

4 Three Justices dissented on the ground that plaintiff was entitled to a jury trial as required by Rule 38 of the Federal Rules of Civil Procedure, prior decisions, and the seventh amendment.

5 See Southard v. MacDonald, 360 P.2d 940 (Okla. 1961), which stated at 941, "Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter."

Since the adoption of the Federal Rules of Civil Procedure in 1938, it has been held that although Rule 2 provides for but one form of civil action, there remains implicit in our concept of jurisprudence the distinction between legal actions, triable on demand by jury,[6] and equitable actions, in which there is no right to jury trial as none existed at common law.[7] Rule 38, preserving the right of trial by jury as declared by the seventh amendment or as given by a statute of the United States, neither enlarges nor restricts the right to jury trial, but merely insures its enjoyment if the right exists.[8] Nor does Rule 38 attempt to enumerate the instances in which trial by jury shall be preserved, leaving such determination to be made on the basis of legal precedent.[9] Consequently, a problem has arisen, as yet unanswered by the Supreme Court, whether, in suits founded on diversity of citizenship, characterization of the relief sought as legal or equitable is to be governed by federal law or by the law of the state in which the federal court resides. The problem arises in but a few cases, for the practical difference in applying state law or federal law to characterize an action is likely to be minimal, since the tests employed by both in characterizing most actions are of common historical derivation.[10] When the question has arisen, however, the lower federal courts have not reached uniform results, some holding that state law,[11] and others that federal law,[12] should control.[13]

Those supporting the view that state law should determine the existence of the right to jury trial would rely primarily upon the doctrine of

6 Shields v. Thomas, 18 How. (59 U.S.) 253 (1855).

7 Bereslavsky v. Caffey, 161 F.2d 499 (2d Cir. 1947); Ettleson v. Metropolitan Life Ins. Co., 137 F.2d 62 (3d Cir.), *cert. denied*, 320 U.S. 777 (1943); Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563 (2d Cir. 1942); Williams v. Collier, 32 F. Supp. 321 (E.D. Pa. 1940); Bellavance v. Plastic-Craft Novelty Co., 30 F. Supp. 37 (D. Mass. 1939). See McKenna, *Trial by Jury Under the Federal Rules*, 29 GEO. L.J. 88 (1940).

8 City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949); Ettleson v. Metropolitan Life Ins. Co., *supra* note 7; Dottenheim v. Emerson Elec. Mfg. Co., 7 F.R.D. 343 (E.D.N.Y. 1947); Fleming v. Peavy-Wilson Lumber Co., 38 F. Supp. 1001 (W.D. La. 1941); Frazer v. Geist, 1 F.R.D. 267 (E.D. Pa. 1940).

9 Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922). See also Hogan, *The Effect of the Merger of Law and Equity on the Right of the Jury Trial in Federal Courts*, 36 GEO. L.J. 666 (1948); McCaskill, *Jury Demands in the New Federal Procedure*, 88 U. PA. L. REV. 315 (1940).

10 Also, no jury may be demanded, or there may be no opposition to the demand. Yet Rule 39(a) provides that the court on its own motion may find no right to jury trial and set the case for court trial.

11 See, *e.g.*, Beagle v. Northern Pac. Ry., 32 F.Supp. 17 (W.D. Wash. 1940); Ross v. Service Lines, Inc., 31 F. Supp. 871 (E.D. Ill. 1940).

12 See, *e.g.*, Curry v. Pyramid Life Ins. Co., 271 F.2d 1 (8th Cir. 1959); Bowie v. Sorrell, 209 F.2d 49 (4th Cir. 1953); Larsen v. Powell, 16 F.R.D. 322 (D. Colo. 1954); Logan v. Holman, 7 F.R.D. 596 (D.N.J. 1947); Williams v. Collier, 32 F. Supp. 321 (E.D. Pa. 1940); Hollingsworth v. General Petroleum Corp., 26 F. Supp. 917 (D. Ore. 1939).

13 See generally 5 MOORE, FEDERAL PRACTICE § 38.10 (2d ed. 1951); Annot., 43 A.L.R.2d 781 (1955); Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 CALIF. L. REV. 127 (1943).

Erie R.R. v. Tompkins,[14] and the viable concept of "substantive" rights it propounds. Under *Erie* the existence of a remedy and its characterization as legal or equitable would be viewed as involving more than mere procedural questions.[15] The argument is that since the intent of *Erie* was to insure substantial uniformity in the outcome of litigation, whether instituted in a state or federal court, the matter of right to a jury trial might well be considered "substantive" by virtue of the fact that it has an important bearing on the outcome of litigation.[16]

Apart from *Erie*, however, it can also be argued that either basis for characterization must entail a consideration of the substantive elements of the right sought to be enforced, such as the conditions under which relief will be granted, the appropriate remedy and its means of enforcement. Since questions such as whether enforcement is by personal decree, whether doctrines such as "clean hands" are applicable and whether an inadequate remedy at law must be shown, are present in delineating the character and scope of every right, and are questions determined by the particular state granting the right, state law must of necessity play the primary role in defining the very matter which is to be characterized as legal or equitable. A further reason favoring state characterization would be avoidance of the diverse results between a state and federal forum occasioned by the merely fortuitous circumstance of diversity of citizenship.[17] Recourse to state law, it is contended, would make for conformity in rules of decision, thereby avoiding such anomalous results.

Yet, despite the purported command of *Erie* and the desire to achieve uniformity in local rules of decision, countervailing considerations seemingly indicate that the right to jury trial is a procedural matter, thus more desirably, and perhaps mandatorily, a question of federal law. First, it may be questioned whether the dissimilarity between judge and jury as triers of fact is of sufficient magnitude to entitle a party to claim a divergence of result under the "outcome" test of *Erie*.[18] Moreover, should the "outcome" test be held applicable, it is difficult to envisage, as a practical matter, any workable standard by which the magnitude of divergence can be determined. Secondly, the view making characterization of the right a question of federal law is, by analogy, in accord with the accepted conflict-of-laws position which regards the question as procedural,[19]

14 304 U.S. 64 (1938).

15 Beagle v. Northern Pac. Ry., 32 F. Supp. 17 (W.D. Wash. 1940); Ross v. Service Lines, Inc., 31 F. Supp. 871 (E.D. Ill. 1940). See Gavitt, *States' Rights and Federal Procedure*, 25 IND. L.J. 1 (1949).

16 Guaranty Trust Co. v. York, 326 U.S. 99 (1945). See MOORE, *op. cit. supra* note 13, § 38.09.

17 See Gavitt, *supra* note 15, at 19.

18 See Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 537 (1958).

19 3 BEALE, THE CONFLICT OF LAWS 1607 (1935); RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 585, 594 (1958); Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 ST. JOHN'S L. REV. 1, 44 (1941); 12 MINN. L. REV. 263 (1928); 88 U. PA. L. REV. 1015 (1940).

and, as such, governed by the law of the forum on the theory that one forum should neither be forced in each case to determine whether or not the court of another forum would submit the case to a jury, nor continuously to make over its "machinery" for the administration of justice.[20] Also, to allow state law to govern would run counter to the congressional objective of establishing uniformity of procedure throughout the federal courts as an independent system for the administration of justice.[21]

By far, however, the most important considerations are those which hinge upon an interpretation of the seventh amendment, which constitutionally guarantees the right to jury trial as it existed in its fundamental elements as part of the common law of England as of the time the amendment was adopted.[22] The construction of the meaning of a constitutional provision should always be a federal question, determined exclusively on the basis of federal law.[23] As the Constitution necessarily must mean the same in all parts of the United States, the characterization of the right as procedural or substantive under the *Erie* doctrine would be of no significance, for in either case it is a matter governed by the federal constitution, upon which state law should have no influence.[24] Since the purpose of the seventh amendment is to preserve the substance of the common-law right of trial by jury,[25] to allow state law to be controlling would enable the state, by a process of attrition, to encroach upon this constitutional right through statute and decision. To do so would make the constitutional guarantee of trial by jury in federal courts continuously shift with the

20 This argument loses force when it is considered that conflicts rules are designed for courts which do not continuously and traditionally apply foreign law, and therefore have a substantial burden imposed upon them when forced to determine whether or not another forum would submit the case to a jury. By comparison, most district court judges know as much about state law as do the state court judges, and apply state law almost as frequently.

21 Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. See Ilsen, *supra* note 19.

22 See Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Galloway v. United States, 319 U.S. 372 (1943); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935); Dimick v. Schiedt, 293 U.S. 474 (1935); Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913); Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961). See Sparks, *Federal Courts: Right to Jury Trial in Cases Involving Both Equitable and Legal Issues*, 47 CALIF. L. REV. 760 (1959).

23 Patton v. United States, 281 U.S. 276 (1930); Slocum v. New York Life Ins. Co., *supra* note 22; Maxwell v. Dow, 176 U.S. 581 (1900); Mississippi Mills v. Cohn, 150 U.S. 202 (1893); Whitehead v. Shattuck, 138 U.S. 146 (1891); McConihay v. Wright, 121 U.S. 201 (1887). See Holtzoff, *supra* note 13, at 140.

24 The holding of Erie Ry. v. Tompkins, 304 U.S. 64 (1938), is qualified at 78, "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."

25 Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935); Herron v. Southern Pac. Co., 283 U.S. 91 (1931); Gillen v. Phoenix Indem. Co., 198 F.2d 147 (5th Cir. 1952); Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62 (3d Cir. 1943); Diederich v. American News, 128 F.2d 144 (10th Cir. 1942). See Baggett, *Federal Practice, the Jury Right in Diversity Cases*, 9 OKLA. L. REV. 74 (1956). On the question of enlargement and restriction of the right to jury trial, see 5 MOORE, *op. cit. supra* note 13, § 38.11.

diversities and vagaries of local law.[26] Illustratively, while state rules of procedure often conform to federal practice, states are not required by the Constitution to maintain the historic line between the functions of the jury and those of the court.[27] As such, they may decrease the size of the jury[28] or do away with it altogether,[29] or modify the requirements for a verdict,[30] or make the jury judges of law as well as of fact.[31] Though the force of these illustrations is somewhat mitigated by the fact that, as to them, the alteration is directly aimed at modifying the character of the right to jury trial, whereas a change in the characterization of a right as legal or equitable would affect the right to jury trial only indirectly, the constitutional objections would seem to remain. Moreover, in a federal forum the adoption of local practices of this type could work not only to deprive a litigant of his constitutional rights,[32] but conceivably to enlarge them by making every non-federal issue, including the most complicated and those undoubtedly equitable under former practice, triable to a jury on demand in federal courts.[33]

By similar reasoning, moreover, other related questions arising under the seventh amendment have been held to be matters determinable by federal law, notwithstanding state statutes or constitutional provisions to the contrary.[34] For example, it has been held that statutes declaring that only a scintilla of evidence is sufficient to require submission of the case to a jury,[35] or state constitutional provisions requiring that the defenses of contributory negligence or assumption or risk must always be submitted to the jury,[36] are not binding on judges in diversity cases. To hold otherwise, it is said, would result in a usurpation of the power of the judiciary

26 See Green, *Protection of Jury Trial in Diversity Cases Against State Invasions*, 35 TEXAS L. REV. 768 (1957).

27 Chicago, Rock Island & Pac. Ry. v. Cole, 251 U.S. 54 (1919).

28 See American Publishing Co. v. Fisher, 166 U.S. 464 (1897), where statute authorizing verdict by nine or more jurors was held inapplicable to federal proceeding in diversity cases.

29 Walker v. Sauvinet, 92 U.S. 90 (1875).

30 Minneapolis & St. L. Ry v. Bombolis, 241 U.S. 211 (1916).

31 Statutes making the jury judges of the law as well as of fact in proceedings for libel are common in some of the states. See, *e.g.*, Sparf v. United States, 156 U.S. 51 (1895); Georgia v. Brailsford, 3 Dall. (3 U.S.) 1 (1794).

32 Common-law rules are not recognized in Louisiana under a civil law system which gives judgment on the facts without intervention of jury. See Wright v. Paramount-Richards Theatres, 198 F.2d 303 (5th Cir. 1952).

33 See Green, *supra* note 26.

34 See, *e.g.*, Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959); Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525 (1958).

35 Allen v. Matson Nav. Co., 255 F.2d 273 (9th Cir. 1958); Reuter v. Eastern Air Lines, 226 F.2d 443 (5th Cir. 1955); Lowry v. Seaboard Airline Ry., 171 F.2d 625 (5th Cir. 1948); White v. New York Life Ins. Co., 145 F.2d 504 (5th Cir. 1944). *But cf.* Pierce Consulting Engineering Co. v. City of Burlington, 221 F.2d 607 (2d Cir. 1955); Lovas v. General Motors Corp., 212 F.2d 805 (6th Cir. 1954).

36 St. Louis, I.M. & S. Ry. v. Vickers, 122 U.S. 360 (1887); Basham v. City Bus Co., 219 F.2d 547 (10th Cir. 1955); Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942); F. W. Woolworth Co. v. Davis, 41 F.2d 342 (10th Cir. 1930).

to weigh the sufficiency of the evidence and, as such, contravene the seventh amendment's mandate preserving the historic functions of judge and jury. The considerations applicable to these decisions, the preservation of the right to a jury trial as it existed at common law free from state encroachment, and the retention of the historic separation of functions between judge and jury, seem equally applicable to the present problem of which law should be used in characterizing issues as legal or equitable. Thus, the better view seems to be that federal law should govern the determination of whether the right to trial by jury exists.

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