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## Dallas, Dred Scott and Eyrie Erie

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## DALLAS, DRED SCOTT AND EYRIE ERIE

Arthur John Keffe\*

Glen DeValerio\*\*

### I. COMMON LAW OF CRIME

JUST as it was not a crime against the federal government for Charles J. Guiteau to kill James A. Garfield on July 2, 1881, at the Washington, D.C. railroad station and Leon Czolgosz to kill William McKinley on September 6, 1901,<sup>1</sup> in Buffalo, New York, it was also not a federal crime for Lee Harvey Oswald to kill John Fitzgerald Kennedy on November 22, 1963, in Dallas, Texas; if he did.

The reason for this is that there is no common law of crimes in America and absent a federal statute making it one, Oswald's assassination of John F. Kennedy was not a wrong against our federal government.

A statute has at last been passed making it a federal crime in the future to kill the President.<sup>2</sup> Of course, this statute (because it is criminal and not civil legislation) would be unconstitutional under the ex post facto clause were it given retroactive application.<sup>3</sup>

The doctrine of no common law of federal crimes arose in *United States v. Hudson and Goodwin*.<sup>4</sup> It began when Dr. Azel Backus

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<sup>1</sup> W. BENET, *THE READER'S ENCYCLOPEDIA* (Crowell 1948).

<sup>2</sup> 18 U.S.C. § 1751 (1970); for legislative history, see 1965 U.S. CODE CONG. AND ADMIN. NEWS 2866.

<sup>3</sup> *Calder v. Bull*, 1 U.S. (3 Dall.) 172 (1798).

<sup>4</sup> 2 U.S. (7 Cranch) 405 (1812).

preached a sermon in Connecticut against Thomas Jefferson for the so-called Walker episode.<sup>5</sup> Jefferson was one of Walker's bride-men and when Walker had to go into the woods for four months to deal with the Indians at Fort Stanwix, he made the mistake of asking Mr. Jefferson to look after his wife and infant daughter. Jefferson unsuccessfully propositioned the wife. But for his sermon, a grand jury in Connecticut returned an indictment against Azel Backus for criminal libel. In addition to Backus, criminal libel indictments were also returned against Judge Tapping Reeve, founder of the Litchfield Law School, Hudson and Goodwin as publishers of the *Hartford Currant*, Thomas Collier, as publisher of the *Monitor* and a young candidate for the ministry, Thaddeus Osgood—all for criminally libeling Mister Jefferson.

Under the common law of libel the truth is no defense but the Alien and Sedition Acts changed the common law to make it a defense.<sup>6</sup>

In authorizing these Connecticut libel actions, however, President Jefferson did so on condition that the truth was to be a defense because the Alien and Sedition Acts had been repealed<sup>7</sup> by the time of the *Hudson and Goodwin* case in 1808. Thus, the validity of the indictments depended upon whether the common law was a law of the United States.

Although Azel Backus pleaded to go to trial so that he could prove the truth of his sermon, Judge Pierpont Edwards, son of Jonathan, insisted on the determination of the question of jurisdiction.<sup>8</sup> On that question, he disagreed with the Circuit Justice Mr. Justice Livingston and the question was certified to the Supreme Court of the United States. When heard there, Crosskey tells us that the four Jeffersonian Justices (Johnson, Livingston, Todd and Duval) outvoted the three Federalists (Marshall, Story and Bushrod Washington) to dismiss the indictments as being beyond the Court's jurisdiction.<sup>9</sup> Thus, it was wrongly established in 1812 that there is

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<sup>5</sup> 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 772 (1953) [hereinafter cited as CROSSKEY].

<sup>6</sup> 1 Stat. 596; *Commonwealth v. Clap*, 4 Mass. 163 (1808) and *Commonwealth v. Morris*, 1 Va. Cas. 175 (1811).

<sup>7</sup> CROSSKEY at 774.

<sup>8</sup> *Id.* at 775.

<sup>9</sup> *Id.* at 764-84.

no common law of federal crime in America, not even when an assassin kills our President.

This was but the first step of many to destroy the jurisdiction of the Supreme Court of the United States, however, and prevent its becoming what the Constitutional forefathers intended—the juridical head of this nation.

## II. COMMON LAW IN CIVIL CASES

Meanwhile, the federal courts continued to use federal common law to decide civil cases. This use of the federal common law, of course, dates from 1789 when the founding fathers provided in the Constitution that “the judicial power of the United States shall be vested in one Supreme Court”<sup>10</sup> and that the judicial power shall extend not only to cases presenting federal questions but also to controversies between citizens of different states, between aliens and citizens and to all cases of admiralty.<sup>11</sup>

Alexander Hamilton in *THE FEDERALIST* explains why diversity jurisdiction was created:

[T]he national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial, between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.<sup>12</sup>

This seems very clear that from the beginning the Constitution was intended to give the federal courts independence from state statutes and state decisions.

Article III<sup>13</sup> when combined with the full faith and credit clause<sup>14</sup> and the supremacy clause<sup>15</sup> makes it clear that the Constitution in-

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<sup>10</sup> U.S. CONST. art. III, § 1.

<sup>11</sup> *Id.* § 2.

<sup>12</sup> *THE FEDERALIST* No. 30, at 588 (J. Hamilton ed. 1875) (A. Hamilton).

<sup>13</sup> U.S. CONST. art. III.

<sup>14</sup> U.S. CONST. art. IV, § 1.

<sup>15</sup> U.S. CONST. art. VI.

tends a single uniform system of nationwide rules of international and interstate conflict of laws.

By the time of *Swift v. Tyson*,<sup>16</sup> however, the Supreme Court had given up its right to ignore state statutes provided they were constitutional as construed by the state's highest court.

*Swift v. Tyson*, was subject to bitter attacks at Harvard Law School by John Chipman Gray, Charles Warren, Felix Frankfurter and finally Louis Dembitz Brandeis, who gave it the *coup de grace* in *Erie R.R. Co. v. Tompkins*.<sup>17</sup> In retrospect it is hard to understand how these otherwise able graduates of Harvard Law School could make such a mistake. The justice of *Swift v. Tyson* is unquestionable—a decision by an extraordinarily able Harvard graduate, Joseph Story.

Crooked Maine Yankees sold Tyson, a New Yorker, land in Maine that he said was worthless. Tyson had accepted a 1500 dollar bill of exchange, however, that Norton and Keith, the sellers of the land, drew on him. Thereafter the Maine owners transferred the bill to Swift who had indorsed a note of Norton and Keith and had been obliged to pay it.

The argument developed that Swift could not be a holder in due course because he did not pay cash but took the bill for a past consideration, to reimburse Swift for having had to pay Norton and Keith's note.

Story properly rejected this argument. A contrary decision would have destroyed negotiability. If negotiable paper is to pass freely from hand to hand, the decision in *Swift v. Tyson* must hold then and now.

Thus, there is no merit in the Harvard party line of Gray, Warren, Frankfurter and Brandeis questioning their fellow Harvard graduate's decision in *Swift v. Tyson*.

Moreover, when years later, the point came before New York's highest court, *Swift v. Tyson* became the law of the State of New York<sup>18</sup> and Chancellor Kent's contrary decision in *Coddington v. Bay*<sup>19</sup> was repudiated.

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<sup>16</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>17</sup> 304 U.S. 64 (1938).

<sup>18</sup> *Kelso & Co. v. Ellis*, 224 N.Y. 528, 121 N.E. 364 (1918).

<sup>19</sup> 5 Johns. Ch. 54 (N.Y. Ch. 1821), *aff'd* 20 Johns. 637 (N.Y. 1822).

## III. COMMON LAW AND DRED SCOTT

This was the state of things with respect to federal common law when *Dred Scott v. Sanford*<sup>20</sup> was decided in 1856.

Dred Scott, known as "Sam," belonged to a U.S. Army physician, Dr. Emerson, stationed at Jefferson Barracks in Missouri, then slave territory under the Missouri Compromise. Dr. and Mrs. Emerson were moved by the Army, first to Rock Island in Illinois, part of the Northwest Territory and a free state and thereafter to Fort Snelling in what was then the Wisconsin Territory and the northern part of the Louisiana Purchase and free territory under the Missouri Compromise. They took "Sam" with them.

Either at Rock Island or Fort Snelling, however, they gave "Sam" his name. It came from the threat to the military post of periodic visits by the then Chief of Staff of the Army, General Winfield Scott, who was a strict disciplinarian and a teetotaler. Hence came "Dred Scott." It was cheap military humor at Sam's expense.<sup>21</sup>

At Snelling, Dred Scott met Harriett after Dr. Emerson bought her from a Major Taliafero. Dr. and Mrs. Emerson allowed him to marry Harriett and subsequently "Eliza" was born to Dred and Harriett on the Mississippi River boat *Gipsy* in the Wisconsin Territory. Later when the Emersons moved back to Jefferson Barracks the Scott family went along and their second child, "Lizzie," was born there.

Of the two suits Dred Scott brought for his freedom, the first was against Mrs. Emerson in the Missouri state courts.<sup>22</sup> There, the trial judge decided in favor of Dred Scott but the Supreme Court of Missouri reversed, two to one dissenting. That court held that despite his going north into free territory Dred Scott and his family were still Emerson slaves.<sup>23</sup>

By that time, Dr. Emerson had died and his widow had remarried Congressman Chafee and moved to Boston. In abolitionist Boston, the Congressman could not own Dred Scott so Mrs. Emerson transferred him to her father, Dr. Sanford, who really did not want him either.

Back in Missouri, Blow, a former owner, took charge of Dred

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<sup>20</sup> 60 U.S. (19 How.) 393 (1856).

<sup>21</sup> W. LEWIS, WITHOUT FEAR OR FAVOR 382 (1965).

<sup>22</sup> *Id.* at 383.

<sup>23</sup> *Id.* at 383-84.

Scott's fight for freedom and hired a fine law firm in St. Louis that instituted the second suit in diversity of citizenship in the United States District Court for Missouri,<sup>24</sup> while the Missouri state judge held the first suit in abeyance.

In the federal court, attorneys for Dr. Sanford (inaccurately spelled Sandford) pleaded in abatement that there was no diversity of citizenship and no jurisdiction because Dred Scott could not be a citizen of the United States and residence at Rock Island or Fort Snelling and marriage there could not deprive the Emersons of their property, to wit, Dred Scott and his family.<sup>25</sup>

On this question Chief Justice Taney goes one way and Justice Ben Curtis the other, but the point that is interesting is the effect that the Court gives to the decision of the Supreme Court of Missouri.

Justice Taney takes the position that the Supreme Court is bound by the ruling of the highest court of Missouri, right or wrong, just or unjust, wise or stupid.<sup>26</sup>

Justice Ben Curtis said on the other hand:

In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the *status* of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of the contract of marriage, destroy his rights as a husband, bastardize the issue of the marriage, and reduce them to a state of slavery?<sup>27</sup>

And citing *Swift v. Tyson*, Justice Ben Curtis says:

Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of the State courts, however great respect might be felt for their learning, ability and impartiality.<sup>28</sup>

This causes him to conclude:

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law

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<sup>24</sup> *Id.* at 385-86.

<sup>25</sup> *Id.*

<sup>26</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>27</sup> *Id.* at 603.

<sup>28</sup> *Id.*

requires, to the authority of the decision in 15 Missouri Reports.<sup>29</sup>

In this result Justice Ben Curtis does not differ from any United States District Judge known to the authors today. Sitting to do justice under the Constitution, no district judge is going to make an unjust decision under the compulsion of a poor state decision. He is a judge not a ventriloquist's dummy and in one way or another, justice as the judge sees it will prevail in his court. *Swift v. Tyson* is, therefore, as much the law of our federal courts today as it was in 1842. It just is not cited.

In other words, to chain the federal courts in this day and age to decisions of state courts, right or wrong, turns the clock back to *Dred Scott*.

#### IV. EYRIE ERIE

Yet this is precisely what happened in *Erie R.R. Co. v. Tompkins*. It is *Dred Scott* reasoning.

In *Erie* the question was whether a railroad was liable in ordinary negligence to a trespasser who used a longitudinal path along its right of way. The railroad mowed down poor Tompkins with an open freight door as he walked along this path.

The railroad's argument was the technical one. Tompkins as a trespasser cannot recover without proof of gross negligence, whatever that is.

At the time of the decision in *Erie* and indeed the majority rule in this country today is that a trespasser, such as Tompkins, has a right under these circumstances to recover on proof of simple or ordinary negligence.<sup>30</sup>

How could there be a just result otherwise?

On the merits the decision in *Erie* is as unjust and wrong as Chancellor Kent's decision in *Coddington v. Bay*.<sup>31</sup>

This is why such defenders as *Erie* has, do not want to discuss the justice or injustice of the *Erie* case on its facts.

Moreover, the reasons Mr. Justice Brandeis gives for his decision are unsound: *First*, Brandeis contends there is no such thing as

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<sup>29</sup> *Id.* at 604.

<sup>30</sup> W. PROSSER, LAW OF TORTS 360 (4th ed. 1971); see generally *Southern Ry. Co. v. Campbell*, 309 F.2d 569 (5th Cir. 1962); RESTATEMENT (SECOND) OF TORTS § 366 (1965).

<sup>31</sup> See note 19 *supra*.

Federal Common Law;<sup>32</sup> *second*, that an hitherto undiscovered draft of the Rules of Decision Act establishes that the draftsman, Chief Justice Oliver Ellsworth, intended by use of the word "laws" to bind our federal courts not only to statutes as Mr. Justice Story had held but to decisions of the state courts as well;<sup>33</sup> *third*, that, while the Rules of Decision Act itself is not unconstitutional, in some way Justice Brandeis does not explain that the judicial construction Story gives to the Act is;<sup>34</sup> and, finally, *fourth*, experience of the federal courts under *Swift v. Tyson* between 1842 and 1938 demonstrates that *Swift v. Tyson* is wrong.<sup>35</sup>

### A. No Federal Common Law

No less a person than Mr. Justice Robert Jackson knocks this point of Justice Brandeis into cocked hat by saying:

I do not understand Justice Brandeis' statement in *Erie R.R. Co. v. Tompkins* that 'There is no Federal general common law,' to deny that the common law may in proper cases be an aid to or the basis of a decision of Federal questions. In its context it means to me only that Federal Courts may not apply their own notions of the common law at variance with applicable state decisions except 'where the Constitution, treaties or statutes of the United States so require or provide.' Indeed, in a case decided on the same day as *Erie R.R. Co. v. Tompkins*, Justice Brandeis said that 'whether the water of an interstate stream must be apportioned between the two States is a question of 'Federal common law upon which neither the statutes nor the decisions of either State can be conclusive'.

Were we bereft of the common law, our Federal system would be impotent.<sup>36</sup>

By the transparent device of calling the *D'Oench, Duhme and Co. v. Federal Deposit Insurance Corporation* case<sup>37</sup> a federal question case, the Court there uses federal common law to hold, just as Justice Story did in *Swift v. Tyson*, that the Federal Deposit Insurance Corporation became a *bona fide* holder in due course of a promissory note given it by a Missouri bank that, when taking it

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<sup>32</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>33</sup> *Id.*; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

<sup>34</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>35</sup> *Id.* at 78-80.

<sup>36</sup> *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 469-70 (1942).

<sup>37</sup> *Id.*

from the borrower, had agreed with him not to enforce it. The Missouri state courts would have honored the agreement just as the New York state courts in *Swift v. Tyson*.

It is nonsense, therefore, to attempt to argue that the *Erie* rule is confined to diversity of citizenship cases. If the rule has any merit it is equally applicable to federal question and diversity cases. In both instances federal common law is used and state common law to the contrary is rejected. Even a staunch defender of Justice Brandeis, such as Judge Henry Friendly, concedes this.<sup>38</sup>

Why should federal common law apply to the United States but not to private litigants? The answer, of course, is that in using federal common law when the United States holds the note instead of the little Missouri bank, the Court is applying the most despicable rule of law of all—sovereign immunity, the King can do no wrong. Moreover it is being used in a flagrantly discriminatory way, the Court is saying that if the Missouri bank were the litigant, the Missouri state law would be followed but Uncle Sam is above the law.

How unjust and dishonest!

Today the federal common law, which Justice Brandeis says does not exist, is used and applied by the federal courts when the government holds a government bond,<sup>39</sup> in labor cases,<sup>40</sup> bankruptcy cases<sup>41</sup> and in cases involving both government prime and subcontracts.<sup>42</sup> More recently, at the October 1972 Term, the Supreme Court in *Illinois v. Milwaukee*<sup>43</sup> has unanimously held that claims with respect to the pollution of navigable waters “[w]ill support claims founded upon federal common law.”

### B. Ellsworth's Draft

Without question the principal cause for *Erie R.R. Co. v. Tompkins* was the discovery by Harvard Professor Charles Warren of a

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<sup>38</sup> Friendly, *In Praise of Erie—and of The New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

<sup>39</sup> *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

<sup>40</sup> *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

<sup>41</sup> *Corn Exch. Nat. Bank v. Klauder*, 318 U.S. 434 (1943).

<sup>42</sup> *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

<sup>43</sup> 406 U.S. 91 (1972); see contra, Josephson, *The Invalid Growth of the New Federal Common Law Dictates the Need for a Second Erie*, 9 HOUSTON L. REV. 329 (1971).

prior draft of section 34 of the original Judiciary Act of 1789.<sup>44</sup> This draft read as follows:

And be it further enacted, that the statute law of the several States *in force for the time being* and their *unwritten or common law now in use*, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, *except where the Constitution, Treaties or Statutes of the United States shall otherwise require or provide*, shall be regarded as rules of decisions *in trials at common law* in the courts of the United States *in cases where they apply*. (Emphasis supplied)<sup>45</sup>

In a brilliant analysis of this draft Professor William Crosskey establishes that while Professor Warren made a contribution with the discovery of the draft, he did not know how to read it.<sup>46</sup>

First, Professor Crosskey agrees that Professor Warren is correct in believing that when the explicit reference to unwritten law, underscored above, was stricken from this draft and the word "laws" substituted that the change was stylistic only and "laws" was meant to include both statutory and decisional law.<sup>47</sup>

But *second*, Professor Crosskey calls sharp attention to the use of the word "now" in the draft and argues unanswerably that the words "*now in use*" were intended to confine the application of state law in federal courts to the time, namely 1789. This means, says Professor Crosskey, that "[s]tate-court innovations made in the common law, if made *after* 1789,<sup>48</sup> were not to be 'regarded as rules of decision' by the national courts, as the section was originally drafted. . . ."<sup>49</sup>

And *third*, the reference at the end of the draft to the Constitution, the Treaties and Statutes of the United States and also to "*in trials at common law*" and "*in cases where they apply*" meant that not only was the statute to be limited to "*trials at common law*" but that the test for the propriety of the application also be "the law of

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<sup>44</sup> Warren, *supra* note 33.

<sup>45</sup> *Id.*

<sup>46</sup> See note 5 *supra* at 627-34; see generally Crosskey at 865-68, 912-37, 1365.

<sup>47</sup> See CROSSKEY at 868; *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), wherein Douglas, J., also agrees to the federal common law's being a part of section 1331(a) of Title 28.

<sup>48</sup> See CROSSKEY at 867.

<sup>49</sup> *Id.*

nations"—chiefly the general commercial law and what is known as "the conflict of laws."<sup>50</sup>

Significantly, writing in reply to an article written in this JOURNAL in 1963,<sup>51</sup> United States Circuit Judge Henry J. Friendly concedes:

Professor Crosskey is persuasive that the unearthing of Ellsworth's original draft of section 34 tended to confirm Story's interpretation more than to refute it.<sup>52</sup>

And he adds that:

Warren's conclusion could thus be reached only by an argument, contrary to the one he made, that the change from the original draft was not simply stylistic but had a substantive purpose as well.<sup>53</sup>

In other words the validity of Professor Crosskey's argument that Professor Warren misread Ellsworth's draft is accepted by Judge Friendly, who, when speaking in a counsel of despair, says that nothing can be done about it.<sup>54</sup> Why not? Has Judge Friendly lost his zest for justice?

There is no statute of limitations in this land that protects injustice and changes the character the founding fathers intended to give the federal courts of this country when drafting the Constitution for the protection of all. There is no reason to follow Judge Friendly's counsel of despair.

Moreover, there is a civil liberty issue here. Justice Pierce Butler, joined by the much maligned Justice McReynolds, asks in his dissent that the case be reargued as to the proper reading of the Ellsworth draft before the decision in *Erie* be made.<sup>55</sup> The majority refuses the request for reargument even though on the oral arguments and in the written briefs neither counsel had asked that *Swift v. Tyson* be overruled.<sup>56</sup>

This is but another instance when the Court decides a case on a point not briefed or argued to the sorrow of the country. While

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<sup>50</sup> *Id.*

<sup>51</sup> Keeffe, *Piercing Pearson*, 29 J. AIR L. & COM. 95 (1963).

<sup>52</sup> See note 38 *supra*, at 5-6.

<sup>53</sup> *Id.*

<sup>54</sup> See note 38 *supra*.

<sup>55</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 88-89 (1938).

<sup>56</sup> See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); Brandeis, J., speaking for the majority never mentions this but Butler, J., in the dissent points it out. *Id.* at 82.

these instances have been few, almost every one has led to a fundamentally bad result.<sup>57</sup>

*C. Is Swift v. Tyson Unconstitutional?*

Judge Henry Friendly in his Cardozo lecture<sup>58</sup> does attempt to argue that Justice Brandeis was right in deciding that Story's decision was an unconstitutional one but his position does not make sense.

Justice Brandeis wanted to hold section 34 unconstitutional but if he had Stone's vote would have been lost.<sup>59</sup> Consequently, Brandeis said:

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.<sup>60</sup>

Article III of the Constitution vests judicial power in the United States courts in federal question, diversity and admiralty cases,<sup>61</sup> and the choosing of applicable law by the courts in international and interstate cases does not seem at all unreasonable. Certainly it cannot be unconstitutional. The opinion of the Chief Justice at the October 1972 Term in *The Bremen v. Zapata Off-Shore Company*<sup>62</sup> is a step in the right direction.

Of course, as Judge Friendly says,<sup>63</sup> the federal courts would do well to exercise their jurisdiction with reference to their constitutional powers but this cannot mean that the Constitution requires them in cases in which they have jurisdiction to follow blindly the decisional law of any state whether right or wrong. Is *Dred Scott* still the law of the land?

This is why this phase of the Brandeis opinion has been called its "Achilles heel."<sup>64</sup>

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<sup>57</sup> See, e.g., *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957).

<sup>58</sup> See note 38 *supra*.

<sup>59</sup> A. MASON, HARLAND FISKE STONE: PILLAR OF THE LAW 479 (1956).

<sup>60</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938).

<sup>61</sup> U.S. CONST. art. III.

<sup>62</sup> 407 U.S. 1 (1972).

<sup>63</sup> See note 38 *supra*.

<sup>64</sup> McCormich and Hewins, *The Collapse of "General" Law in the Federal Courts*, 33 ILL. L. REV. 126, 134 (1938).

D. *Experience Under Swift v. Tyson Was Bad?*

Of all the arguments in the Brandeis opinion, this is probably the worst. It comes from an atrocious law review article written by Felix Frankfurter, when still a Harvard Law School Professor.<sup>65</sup> The cases cited in both Justice Brandeis' opinion and Professor Frankfurter's article, do not support their conclusions.<sup>66</sup> (Similar experience in analyzing the cases an opponent cites is not unusual.) Accordingly, the authors of *Weary Erie* felt obliged to say that Professor Frankfurter's contentions were "buttressed by evidence, fragmentary and misleading"<sup>67</sup> and that, quite to the contrary, *Swift v. Tyson* "did promote uniformity to a substantial degree—not that its effect was immediate but that it exerted a subtle, albeit inexorable, pressure upon the state court to march in harmony with its fellows."<sup>68</sup>

This analysis of experience under *Swift v. Tyson* corroborates the prior research of Professors Yntema and Jaffin.<sup>69</sup> Significantly, Judge Friendly does not question the soundness of this contention nor the Yntema-Jaffin research.<sup>70</sup>

For each of these four reasons, it is, therefore, the authors' firm belief that *Erie R.R. Co. v. Tompkins* was wrongly decided and that if the Supreme Court will take the question, it will be overruled. Stranger things have happened.

Needless to say the Supreme Court should take the question in the name of civil liberty alone because it is evident that it erred in relying on Ellsworth's draft and it was arbitrary and capricious for the Court of Brandeis and Stone to refuse Mr. Justice Butler's request that the case be set down for reargument.

With America and the world every day brought closer together by the airplane there is no more important question for the Supreme Court of the United States than what law its courts must apply in international and interstate cases. It is a problem of highest priority.

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<sup>65</sup> Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

<sup>66</sup> Keeffe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949).

<sup>67</sup> *Id.* at 504.

<sup>68</sup> *Id.*

<sup>69</sup> Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PENN. L. REV. 869 (1931).

<sup>70</sup> See generally note 38 *supra*.

### V. THE EXCESSES OF ERIE

Of course, *Erie* is today pressed to ridiculous lengths.

First, it has been held that the law that a federal court sitting in diversity must follow is the law of the forum.<sup>71</sup> This codifies "forum shopping" that *Erie* was to eliminate.

Second, in two indefensible cases it has been held that the law of the state is to be determined, in the absence of a decision by the highest court, by a decision of the lowest court in the state that may not even be binding on any other court in the state.<sup>72</sup>

Third, in the face of the express language in section 34 confining rules of decision to "trials at common law," the rule was wrongly extended to federal equity.<sup>73</sup>

Fourth, the *Erie* rule in *Reagan v. Merchants Transfer and Warehouse Co.*<sup>74</sup> was pressed into procedure—how a federal court serves process. Hopefully, however, *Ragan* is no longer law in view of the contrary decision by the Supreme Court in *Hannah v. Plummer*.<sup>75</sup>

Fifth, even in federal question cases *Erie* has been improperly applied. For instance, although federal law is applicable when a Federal Reserve Bank sues on a government bond<sup>76</sup> it does not apply when a private bank sues on the same bond<sup>77</sup> nor when the Small Business Administration sues in Texas.<sup>78</sup>

### VI. SUPREME COURT JURISDICTION SINCE ERIE

The Supreme Court of the United States in the last decade has seldom taken certiorari in a diversity airplane case.<sup>79</sup> Moreover,

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<sup>71</sup> *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

<sup>72</sup> *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940), *rehearing granted* 313 U.S. 550, *rehearing denied*, 314 U.S. 709 (1941); *cf.* *Thacher v. Trenton Trust Co.*, 119 N.J. Eq. 408, 182 A. 912 (1936); *Travers v. Reid*, 119 N.J. Eq. 416, 182 A. 908 (1936); *Hickey v. Kahl*, 129 N.J. Eq. 233, 19 A.2d 33 (1941). *See generally* CROSSKEY 923, 926-27.

<sup>73</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

<sup>74</sup> 337 U.S. 530 (1949).

<sup>75</sup> 380 U.S. 460 (1965); *but compare* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), *Angel v. Bullington*, 330 U.S. 183 (1947), and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), all of which are still on the books.

<sup>76</sup> *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

<sup>77</sup> *Bank of Am. Nat'l Trust and Savings v. Parnell*, 352 U.S. 29 (1956).

<sup>78</sup> *United States v. Yazell*, 382 U.S. 341 (1966).

<sup>79</sup> *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Richards v. United States*, 369 U.S. 1 (1962).

since *Erie*, it has been next to impossible to get the Supreme Court of the United States to take jurisdiction in any diversity case. Indeed it is easier for a thrice convicted felon to have his case reviewed in the Supreme Court of the United States<sup>80</sup> than for a private litigant to have his diversity case reviewed by the high Court.

Any lawyer who specializes in Supreme Court practice and who files a petition for certiorari in a diversity case will be pessimistic about the chances for success but he will file only as he would in a criminal case, when his fee is paid in cash in advance on the barrel head. Accordingly it is hard to overestimate the damage that this policy of the Supreme Court has done to the development of American private law, especially in the field of choice of law.

Undoubtedly, the greatest victim of this policy is the Court itself. It has become a court of police and administrative law and has lost prestige. For every point of private law it decides, there are 10,000 points of public law. It is no longer the court of the people that our constitutional forefathers intended it to be. Instead it is one for policemen and administrators to the exclusion of lawsuits between plain people. It is not that cases involving policemen and administrators do not deserve to be heard. Nor, indeed, that the Court has not been doing a good job in disposing of them. Rather these cases occupy the Supreme Court full time and by refusing to hear diversity cases the Court never reviews the cases that occupy seventy-five per cent of the time of American lawyers.

Consequently, by its black ball of diversity cases, the Court gives itself, wittingly or unwittingly, a bad public image and reduces its own constitutional jurisdiction.

It does this as effectively today as Thad Stevens did yesterday when he sneaked "an amendment to an inconspicuous bill"<sup>81</sup> that provided that so much of the Habeas Corpus Act of February 5, 1867:

as authorizes an appeal from the judgment of the circuit court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be and the same is, hereby repealed.<sup>82</sup>

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<sup>80</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>81</sup> Burton, *Two Significant Decisions: Ex Parte Milligan and Ex Parte McCordle*, 41 A.B.A.J. 121, 176 (1955), and 15 Stat. 44.

<sup>82</sup> 15 Stat. 44. See also Burton, note 81 *supra*.

The malicious purpose of Thad Stevens was to prevent the Supreme Court's review of the court martial of William McCardle, who, as the editor of a Vicksburg, Mississippi, newspaper, had attacked the then military occupation of Mississippi.<sup>83</sup> Mr. Justice Burton has stated that this statute was passed eighteen days after *Ex parte McCardle*<sup>84</sup> was argued in the Supreme Court and the weak Court of that era bowed to the will of Congress and on reargument held the statute constitutional, even though retroactive, and the Court to be without jurisdiction to hear McCardle's appeal from his Army court martial<sup>85</sup>—a repudiation by Congress and the Court of *Ex Parte Milligan*.<sup>86</sup>

Just as Thad Stevens' amendment was unconstitutional by robbing the Supreme Court of jurisdiction to hear appeals from federal courts in habeas corpus for fifteen years, so also is the refusal of the Supreme Court to hear appeals in diversity cases today unconstitutional.

In principle there is no difference between the refusal of our highest court to hear diversity cases, and the proposed bill to cut off the jurisdiction of the Supreme Court to hear appeals by applicants refused admission to state bars,<sup>87</sup> which Lyndon Johnson, when Majority Leader, defeated by a very close vote.<sup>88</sup> The Supreme Court of the United States is the third branch of our government and under the Constitution its supreme jurisdiction should not be reduced by the President, the Congress nor especially by itself.

This viciousness of the mistake called *Erie* is the effect it has had on the Court's hearing diversity cases. The Court refuses to review them leaving their disposition to the district courts and the courts of appeal.

In all honesty, if the Court possesses this power, why does it not order the district courts and the courts of appeal not to entertain the

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<sup>83</sup> Burton, note 81 *supra*.

<sup>84</sup> 73 U.S. (6 Wall.) 318 (1868).

<sup>85</sup> *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

<sup>86</sup> 71 U.S. (4 Wall.) 2 (1867).

<sup>87</sup> The principal cases were *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) and *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 252 (1957). In both cases the United States Supreme Court reviewed state action, remanding in *Konigsberg* and directing admission in *Schware*.

<sup>88</sup> On March 3, 1958, Senator Butler of Maryland introduced S. 3386 in the 85th Congress, Second Session to cut off review of state bar admission cases by the Supreme Court of the United States; 104 CONG. REC. 3187 (1958).

cases? What the Supreme Court has done since *Erie* is to refuse to review diversity cases and by this action it abdicates its jurisdictional position in our constitutional scheme.

Of course, with thousands of petitions for certiorari being filed each year, it is easy for the Court to eliminate from the applications for certiorari all those filed in diversity cases.

Recently, Mr. Justice Tom Clark stated that during his tenure on the Court, one of his experienced clerks performed this function thereby reducing the number of petitions for certiorari that he need examine.<sup>89</sup> He added that, of course, when there was a conflict between circuits, he would sometimes vote to hear without reading.

Perhaps, the worst case that Chief Justice Warren ever read was his lamentable decision in *Richards v. United States*.<sup>90</sup> In that case an American Airlines' plane fell in Missouri, which then limited liability to 15,000 dollars.<sup>91</sup> Alleging there was negligence in American Airlines' manufacturing plant in Tulsa, Oklahoma, the plaintiff sought an unlimited recovery under the law of Oklahoma. The Chief Justice in writing for a unanimous court, in effect, tells the plaintiff not to bother the Court with this silly question.

The net result is that the Supreme Court in *Richards* leaves the district and circuit courts without direction. And the Court is directly responsible for the confusion that prevails the country over in choice of law cases. The Supreme Court has substituted anarchy in choice of law cases for a rule of law. The following part of the article is a documentation of this statement.

#### A. Guest Cases in New York

In *Babcock v. Jackson*,<sup>92</sup> the New York court allowed the guests of a Rochester, New York, automobile driver who crashed in Ontario, Canada, where guests cannot sue drivers, to recover because New York allows guests to sue their hosts. The court reasoned that the case was a New York matter and the Rochester family just fortuitously happened to be in Ontario at the time of the crash.

But the ink was hardly dry on *Babcock v. Jackson*, when in *Kell*

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<sup>89</sup> Unpublished Speech by Justice Tom Clark at Catholic University Law School, Feb. 1972.

<sup>90</sup> 369 U.S. 1 (1962).

<sup>91</sup> Mo. REV. STAT. § 537.090 (1949).

<sup>92</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

*v. Henderson*<sup>93</sup> a Canadian family from Ontario go off on an automobile drive to New York and crash at Massena, New York. Unexpectedly, New York's intermediate court, the Appellate Division for the Third Department allowed recovery.<sup>94</sup> The Canadian family is subject to Ontario law but since the crash was in New York, where guests are free to sue hosts, the Appellate Division allows recovery.

The rule in New York under *Babcock* and *Kell* requires one to throw his brains out the window, shout infinity and roll New York's loaded dice, heads, the plaintiff wins, tails, the defendant loses.

Would New York act in this anarchial way if the Supreme Court of the United States in *Richards* had done its constitutional duty and decided the choice of law points?

Recall what Alexander Hamilton said in THE FEDERALIST:

The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes in which citizens of other countries are concerned.<sup>95</sup>

In one guest case, *Dym v. Gordon*,<sup>96</sup> New York denied recovery. There the guest and the host were both students and New Yorkers in summer school at the University of Colorado. Reversing the correct ruling of Mr. Justice Bernard Meyer at Special Term, Nassau County, the court of appeals applied Colorado law, which makes recovery in guest cases next to impossible.

Yet it was immediately following the decision of *Dym v. Gordon* when Senator Kenneth Keating, then a judge on the New York Court of Appeals, spoke for an almost unanimous court of appeals in allowing recovery by guests against the New York owner for an accident in Michigan,<sup>97</sup> which has a guest statute making recovery by a guest difficult, if not impossible.<sup>98</sup>

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<sup>93</sup> 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966).

<sup>94</sup> *Id.*

<sup>95</sup> See note 12 *supra*.

<sup>96</sup> 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

<sup>97</sup> *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

<sup>98</sup> MICH. COMP. LAWS § 257.401 (1967).

*Tooker v. Lopez* is distinguishable from *Dym v. Gordon*. The two guests in *Lopez* were full time students at the University of Michigan and not mere summer students. Moreover, in *Lopez* while the host and one plaintiff guest are New Yorkers, the other guest does not hail from either New York or Michigan and the case does not say whether the nation or state from which the guest hails has a guest statute.

And in *Tooker v. Lopez* Judge Keating assured us that no foreign jurisdiction with a guest statute can expect to have it honored when the insurer is a New Yorker and the suit is in New York. Alas, with Ex-Judge Keating away as Ambassador to India, his court repudiates his opinion by saying in *Neumeier v. Keuhner*<sup>99</sup> on July 7, 1972, that when a defendant is a New Yorker, licensed and insured in New York, and he has an accident in Ontario, that province's guest statute applies if plaintiff be a Canadian suing in the New York state courts.

As Judge Bergan said in dissent:

There is a difference of fundamental character between justifying a departure from *lex loci delictus* because the court will not, as a matter of policy, permit a New York owner of a car licensed and insured in New York to escape a liability that would be imposed on him here; and a departure based on the fact that a New York resident makes the claim for injury. The first ground of departure is justifiable as sound policy; the second is justifiable only if one is willing to treat the rights of a stranger permitted to sue in New York differently from the way a resident is treated. Neither because of "interest" nor "contact" nor any other defensible ground is it proper to say in a court of law that the rights of one man whose suit is accepted shall be adjudged differently on the merits on the basis of where he happens to live.<sup>100</sup>

#### B. Airplane Cases In New York and Pennsylvania

In *Kilberg v. Northeast Air Lines, Inc.*<sup>101</sup> there was an action by the personal representative of a deceased New Yorker who was

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<sup>99</sup> \_\_\_ N.Y.S.2d \_\_\_, \_\_\_ N.E.2d \_\_\_, (July 7, 1972) cited in 1972 N.Y.L.J. 5 (Aug. 11). The decision flies in the face of the principles of *Tooker v. Lopez* and as Judge Bergan in his dissent in *Neumeier* states, "What the court is deciding today is that although it will prevent a New York car owner from asserting the defense of a protective foreign statute when a New York resident in whose rights it has an 'interest' sues; it has not such 'interest' when it accepts the suit in New York of a nonresident. This is an inadmissible distinction."

<sup>100</sup> *Id.*

<sup>101</sup> 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

killed when a Northeast Air Lines' plane crashed at Nantucket, Massachusetts.

In the nation called New York there is unlimited recovery for wrongful death;<sup>102</sup> while in the nation called Massachusetts there was then a limit of 15,000 dollars.<sup>103</sup>

The New York court in *Kilberg* denied the motion to dismiss the complaint for recovery of 15,000 dollars and stated that in suing in the New York courts the plaintiff may rely on the Massachusetts statute to obtain recovery for damages for wrongful death free from the Massachusetts 15,000 dollar limit.

There is not one line in the *Kilberg* opinion concerning the Constitution of the United States nor with respect to any of the clauses in that document that are conceivably applicable, namely, the commerce clause,<sup>104</sup> article III,<sup>105</sup> full faith and credit,<sup>106</sup> privileges and immunities,<sup>107</sup> due process, equal protection or the just compensation clause in the fifth amendment.<sup>108</sup>

*Kilberg* is a naked claim by New York to allow recovery for New Yorkers irrespective of the law of any other nation or state. It is a claim of which this author as a native New Yorker, is as ashamed of his state as Texans must be of the awful opinion by Abe Fortas for the Supreme Court in *United States v. Yazell*,<sup>109</sup> when he allowed a Texan to escape liability on a note to the Small Business Administration because she was a married woman and a nonentity under Texas law.

Moreover, the absurdity known as *Kilberg* was followed by *Pearson v. Northeast Air Lines, Inc.*<sup>110</sup> *Pearson* came to trial in the Southern District of New York before United States District Judge John McGohey along with an action by a Mrs. Truitt, a New Jersey citizen, whose husband had also been killed in the Nantucket

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<sup>102</sup> N.Y. CONST., art. 1, § 16 provides: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

<sup>103</sup> MASS. GEN. LAWS ANN. ch. 229 § 2 (1955).

<sup>104</sup> U.S. CONST. art. I, § 8.

<sup>105</sup> U.S. CONST. art. III.

<sup>106</sup> U.S. CONST. art. IV.

<sup>107</sup> U.S. CONST. art. IV, § 2.

<sup>108</sup> U.S. CONST. amend. V.

<sup>109</sup> 382 U.S. 341 (1966).

<sup>110</sup> 199 F. Supp. 539 (S.D.N.Y. 1961), *rev'd* 307 F.2d 131 (2d Cir.), *but aff'd in part* 309 F.2d 553 (en banc 2d Cir. 1962).

crash.<sup>111</sup> Before the case went to the jury, Judge McGohey ruled that with respect to widow Pearson he would follow *Kilberg* and charge the jury it could allow any amount of damages, but with respect to widow Truitt, he would charge the jury it could only allow the 15,000 dollar limit in the Massachusetts statute.

Under these circumstances, Mrs. Truitt settled for 15,000 dollars<sup>112</sup> even though at that time New Jersey had not adopted New York's conflict of laws approach, as in *Babcock v. Jackson*.<sup>113</sup>

This ruling of Judge McGohey is clearly wrong because New Jersey is not Afganistan and under *Klaxon v. Stentor*,<sup>114</sup> the law is that the district court must follow the rule of the forum, which is as much *Kilberg* for the New Jersey widow as the New York widow. Both their husbands were on the same plane.

Even if the law of New York is that the law of the place is to apply, in the absence of a decision by the Supreme Court of New Jersey, the district court would be free to find the law of New Jersey. Whatever the law of New Jersey was then, of course, today it is clear that New Jersey has mounted the New York band wagon and allows unlimited recovery in an even more liberal way than New York.<sup>115</sup>

This ruling in *Pearson* by the district court turned out to be a very unjust one for the widow Truitt, wrong under the law of New York, wrong under the law of New Jersey and in our opinion, wrong under federal common law. How wrong can one case be?

When the jury returned a verdict of 132,000 dollars in *Pearson*, Judge McGohey added six per cent interest in accordance with the New York law and entered a 160,000 dollar judgment for Mrs. Pearson.

The Second Circuit reversed holding that under the full faith and credit clause, the trial court was bound to the 15,000 dollar limit in the Massachusetts statute.<sup>116</sup>

Thereafter, plaintiff petitioned for an *en banc* court of appeals that upheld the jury verdict of 132,000 dollars but reversed Judge

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<sup>111</sup> 199 F. Supp. at 539.

<sup>112</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>113</sup> *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

<sup>114</sup> Currie, *Conflict, Crisis and Confusion in N.Y.*, 1963 DUKE L.J. 1 at 7 n.21.

<sup>115</sup> *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970).

<sup>116</sup> 307 F.2d 553 (*en banc* 2d Cir. 1962).

McGohey's allowance of six per cent interest.<sup>117</sup> Thus, this otherwise great court of appeals gave no consideration to the constitutionality of the Massachusetts statute, and a ridiculous result that allowed recovery of unlimited damages under the law of New York but disallowed interest under the same law of New York. Why should New York law govern damages but not interest?

How does this decision reconcile with *Klaxon v. Stentor*, itself an interest case, when the Supreme Court chains *Erie* to the law of the forum?

Naturally, this method of deciding cases is contagious. Pennsylvania contracted the disease and without questioning the constitutionality of the Colorado wrongful death statute in *Griffth v. United Air Lines, Inc.*<sup>118</sup> allowed unlimited recovery for Pennsylvania citizens killed when an United Air Lines' D.C.-8 crashed at Denver.

In *Long v. Pan American World Airways, Inc.*<sup>119</sup> the defendant crashed a plane over Elkton, Maryland, and New York allowed unlimited recovery to Pennsylvania citizens killed there. The suit was in the New York state courts and of course Pan American Airways could not remove. It is a New York corporation with its principal place of business in New York.

*Griffth* established Pennsylvania as a state permitting unlimited recovery in airplane wrongful death cases. Taken together, *Griffth* and *Van Dusen v. Barrack*,<sup>120</sup> in which Judge Van Dusen was prohibited from transferring the case to Boston (the plane in question having crashed in Boston Harbor), means that on the law side of federal district courts in Pennsylvania a plaintiff, such as *Griffth*, is entitled to unlimited recovery.

Even today, under section 1407 of Title 28,<sup>121</sup> in multidistrict cases, the statute only allows transfer for discovery. Recovery is to be in the district where plaintiff sues.

It would have been better to have upheld Judge Van Dusen's order of transfer to Boston in *Van Dusen v. Barrack*. From that crash at Boston, more than 100 actions were brought in federal

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<sup>117</sup> 309 F.2d 553 (*en banc* 2d Cir. 1962).

<sup>118</sup> 416 Pa. 1, 203 A.2d 796 (1964).

<sup>119</sup> 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

<sup>120</sup> 376 U.S. 612 (1964).

<sup>121</sup> 28 U.S.C. § 1407 (1970).

courts across the country.<sup>122</sup> Why not have one judge and one court in Boston determine liability for all? Is the individual calendar system confined to each district court?

### C. *Wrongful Death in Admiralty*

A transfer of the Boston Harbor plane crash cases from Philadelphia to Boston was, regrettably, too sensible for men of law. Rather, the Supreme Court denied the transfer<sup>123</sup> thus evading the main issue, namely the applicable law under the United States Constitution, whether the lawsuit is in Boston or Philadelphia.

Moreover, in a day of crowded courts and litigation delay, there was danger that too intelligent a decision as the transfer of all the litigation to the scene of the crash in Boston might cause the laity to think well of the United States Supreme Court.

Article III of the Constitution vests the federal courts with admiralty jurisdiction, and when the action is *in personam* and not *in rem* the state courts have concurrent jurisdiction,<sup>124</sup> but, of course, the applicable law is federal admiralty law.

When Eastern's plane fell into Boston Harbor with numerous Philadelphia citizens aboard, a number of suits in admiralty were instituted in the Eastern District of Pennsylvania.<sup>125</sup>

In one case,<sup>126</sup> the Third Circuit was content to say that the suit would lie in admiralty because it involved a maritime tort.

In *Scott v. Eastern Air Lines*,<sup>127</sup> however, the Third Circuit faced the choice of law question. The trial judge sitting there in admiralty without a jury in an action against Eastern Air Lines for the Boston Harbor Electra crash followed *Griffith* that had followed *Pearson*. A panel of the Third Circuit reversed in a powerful opinion by Chief Judge Hastie relying on the admiralty decisions of the

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<sup>122</sup> Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U.L. REV. 299 (1969).

<sup>123</sup> *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

<sup>124</sup> See Justice Brennan's opinion in *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

<sup>125</sup> See Keeffe, *In Praise of Joseph Story, Swift v. Tyson, and The True National Common Law*, 18 AM. U.L. REV. 316 (1969).

<sup>126</sup> *Weinstein v. Eastern Air Lines, Inc.*, 316 F.2d 758 (3d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

<sup>127</sup> *Scott v. Eastern Air Lines, Inc.*, 399 F.2d 14 (3d Cir. 1967), *cert. denied*, 393 U.S. 979 (1968).

Supreme Court of the United States, particularly *The Tungus*<sup>128</sup> and *Hess v. United States*<sup>129</sup> in which a divided Supreme Court in effect held that, since there is no action for damages for wrongful death in admiralty apart from the Jones Act or the Death on the High Seas Act, a United States district court must allow or deny recovery depending upon what the state statute provides. As in *Pearson*, the losing plaintiffs asked and received an *en banc* Third Circuit court that reversed the Panel and allowed recovery, some judges on the theory of *Griffith*, some on *Klaxon* and some on admiralty and some on all three grounds. Once again, the Supreme Court denied certiorari, making certain that no one in America could ever tell what law governs an action for wrongful death in admiralty.

Fortunately for the profession this uncertainty came to an end when the Supreme Court of the United States decided *Moragne v. States Marine Lines, Inc.*<sup>130</sup> There, the deceased was killed while working as a longshoreman in Florida territorial waters. The United States district court felt obligated under decisions of the Supreme Court prior to *Moragne*<sup>131</sup> to follow the Florida wrongful death statute even in admiralty. Since, however, the Florida statute does not permit recovery based on the admiralty doctrine of unseaworthiness, on the facts the district court dismissed, the Fifth Circuit Court of Appeals affirmed.<sup>132</sup>

On appeal to the Supreme Court, the defendant argued that since neither the Jones Act<sup>133</sup> nor the Death on the High Seas Act<sup>134</sup> provides remedies for deaths occurring within state waters, then Congress intended state law to govern.<sup>135</sup>

Justice Harlan, however, observing that both the Jones Act and DOHSA were designed to achieve uniformity in the exercise of admiralty jurisdiction, states:

Our recognition of a right to recover for wrongful death under *general maritime law* will assure uniform vindication of federal

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<sup>128</sup> 358 U.S. 588 (1959).

<sup>129</sup> 361 U.S. 314 (1960).

<sup>130</sup> 398 U.S. 375 (1970).

<sup>131</sup> *Hess v. United States*, 361 U.S. 314 (1960); *Goett v. Union Carbide Co.*, 361 U.S. 340 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

<sup>132</sup> *Moragne v. States Marine Lines, Inc.*, 409 F.2d 32 (5th Cir. 1969).

<sup>133</sup> 46 U.S.C. § 688 (1970).

<sup>134</sup> 46 U.S.C. §§ 761-68 (1970).

<sup>135</sup> *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395 (1970).

policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.<sup>136</sup>

Accordingly, the Court held that recovery for wrongful death can be allowed in admiralty.

By this decision, Justice John Harlan is using statutes to make common law<sup>137</sup> when statutes express the legislative will and there are gaps in which the statutes do not specifically apply or the point is one of first impression and the policy of the statute fits.

Some may wish to argue that removing the bar to recovery here is merely a limited extension of DOHSA or state law. But Justice Harlan does not tie himself to this narrow interpretation; he goes much further. He holds that general maritime law is the federal common law of admiralty.<sup>138</sup> It exists independent of the Jones Act, DOSHA or state law.

Recognizing that choice of law problems in admiralty were aggravated by *The Harrisburg*,<sup>139</sup> which *Moragne* expressly overrules,<sup>140</sup> Justice Harlan declares:

[T]he recognition of a remedy for wrongful death under general maritime law can be expected to bring more placid waters.<sup>141</sup>

Of course, *Moragne* involves a maritime tort but does it apply to aircraft crashes?

As this analogy begins to crystallize, the potential significance of Justice Harlan's decision in *Moragne* likewise begins to emerge. The existence of federal common law is apparent (Brandeis, J. notwithstanding),<sup>142</sup> and if there is a general maritime law that is being invoked to provide uniformity in a field that desperately needs it, then why should not the Supreme Court follow Justice Harlan's lead and extend *Moragne* to create a general federal common law of aviation?

An extension of the principles enunciated in *Moragne* would be

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<sup>136</sup> *Id.* at 401 (emphasis added).

<sup>137</sup> Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATHOLIC U.L. REV. 401 (1968).

<sup>138</sup> *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970).

<sup>139</sup> 119 U.S. 199 (1886).

<sup>140</sup> *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970).

<sup>141</sup> *Id.* at 408.

<sup>142</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

logical because the analogy between air and maritime commerce is compelling. Both are essentially interstate and international, and the courts are faced with the same choice of law problems in aviation accidents as in maritime mishaps.

In one of its first tests, the extension of the principles of *Moragne* into aircrash litigation, and especially the spirit of that decision, has received a setback in the Third Circuit. In *Dugas v. National Aircraft Corp.*,<sup>143</sup> Judge Van Dusen speaking for himself and Judges Biggs and Rosenn ruled that DOHSA is not the exclusive remedy for an aircrash outside the three mile territorial limit. Rather the Third Circuit held that DOHSA precludes the use of state *wrongful* death statutes only, and thus the Pennsylvania *survival* statute may be employed to supplement the amount of damages.<sup>144</sup>

In that case, two teenage girls, Kathryn Dugas and Christina Hart, were killed when the private plane in which they were flying crashed at sea enroute from South Caicos in the Bahamas to San Juan, Puerto Rico. The parties stipulated that the accident occurred in international waters and that DOHSA was the applicable federal statute.<sup>145</sup>

At the conclusion of a hearing on the defendants' motion for summary judgment, the district court ruled that the DOHSA was not the sole remedy but that any award under that statute could be supplemented by the state survival statute.<sup>146</sup>

Following the trial in admiralty, the court made awards pursuant to both the DOHSA and the Pennsylvania state survival statute. The defendant appealed from this ruling.

Judge Van Dusen succinctly stated the issue of the case saying that:

[T]he Courts have clearly held that the need for uniformity requires that the Act supersede any state wrongful death statute. However, it is not so clear whether the Act preempts the separate and distinct remedy encompassed in the state survival statutes which preserve in the administrator of the decedent's estate that cause of action for pain and suffering which the decedent had until the moment of her death . . . .<sup>147</sup>

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<sup>143</sup> 438 F.2d 1386 (3d Cir. 1971).

<sup>144</sup> *Id.* at 1389.

<sup>145</sup> *Id.* at 1388.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

In a well written opinion, Judge Van Dusen goes on to trace the legislative history of the Act and many pre-*Moragne* decisions. He concludes that Congress did not intend to preclude the use of state survival statutes wherever applicable.<sup>148</sup>

In this decision, Judge Van Dusen misunderstands *Moragne*, which pleads for a uniform common law of admiralty when DOHSA is silent.

It has been aptly stated<sup>149</sup> that it is "mere sophistry"<sup>150</sup> to extend Pennsylvania's survival statute beyond the three mile limit to cover an aircraft somewhere between San Juan and the Bahamas. The "maritime but local" doctrine, which seems to be the court's rationale, is basically faulty because traditionally, "local" has meant within territorial waters.<sup>151</sup> Moreover, there is neither rhyme nor reason to overruling *The Harrisburg*, and precluding the use of state wrongful death statutes either in territorial waters or on the high seas, on one hand, while allowing state survival statutes to be applied to *any* maritime accident on the other.

Judge Van Dusen seems to have missed a further distinction when he said:

A refusal to permit an award under the state survival statute will result in a distinction between the recovery which could be had on land and that on the high seas, a distinction which is unreasonable and unnecessary.<sup>152</sup>

The Court fails to see that it holds for a different award for deaths on land and on the high seas. Deaths on the high seas are governed by federal statutes and general maritime law welded into one uniform body of admiralty law, which is neither *restricted* nor *liberalized* by the laws of the states where the federal court sits. That is the spirit of *Moragne* and that is what *Dugas* violates.

Despite the *Dugas* decision, hopefully the magnificent opinion of John Harlan in *Moragne* will not only point the way to recovery of damages for wrongful death (both for loss of life and pain and suffering) not only in admiralty but also in diversity. It is absurd

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<sup>148</sup> *Id.* at 1390.

<sup>149</sup> Craig and Alexander, *Wrongful Death in Aviation and Admiralty: Problems of Federalism, Tempests and Teapots*, 37 J. AIR L. & COM. 3 (1971).

<sup>150</sup> *Id.* at 33.

<sup>151</sup> *Curtis v. Garcia Y Cia*, 241 F.2d 30 (3d Cir. 1957).

<sup>152</sup> *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1391 (3d Cir. 1971).

for federal courts to perpetuate the distinction between damages for loss of life and pain and suffering. It is far better to allow one recovery under federal common law for both as *Moragne* teaches.

One thing is certain, *Moragne* clears up the doubts expressed in *Scott v. Eastern Air Lines* between the Panel and the *en banc* court allowing recovery either in diversity or admiralty for estates of victims of the Boston Harbor crash.<sup>153</sup> It also answers the questions raised when planes crash into the Great Lakes as in *Harris v. United Air Lines, Inc.*<sup>154</sup>

Justice Harlan in *Moragne* does not deal with whether a passenger suffering wrongful death on the high seas can sue under his own state law in addition to a remedy under DOHSA. Rather, *Moragne* only discusses the right to sue for wrongful death under the admiralty doctrine of unseaworthiness when the death occurs in territorial waters when DOHSA does not apply.

If the wrongful death occurs on the high seas, however, section 6 of the Death on the High Seas Act<sup>155</sup> specifically gives the named beneficiaries the right to sue under *state* law for damages for wrongful death. Under *Kilberg* and other cases, New York allows suit for deaths occurring outside New York. Whereas DOHSA has a two year statute of limitation,<sup>156</sup> New York has three.<sup>157</sup> The beneficiaries allowed to sue under DOHSA are also different from those allowed to sue under state law.

Query, notwithstanding that Congress so intended in section 6 of the DOHSA and state law so permits, can the Congress constitutionally so limit admiralty jurisdiction? The debates concerning section 6 of DOHSA indicate that Congress was aware of this point but, upset by *The Harrisburg*, provided section 6 as a protection.<sup>158</sup>

Perhaps now that *Moragne* has read *The Harrisburg* out of admiralty law, the Court in the interests of uniformity in admiralty can now safely read section 6 out of DOHSA. Let's hope so.

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<sup>153</sup> Compare the decision of Judge Hastie in *Scott v. Eastern Air Lines*, 399 F.2d 14, 16 (3d Cir.) with the *en banc* decision, 399 F.2d 14, 18 (3d Cir. 1963).

<sup>154</sup> *Harris v. United Air Lines, Inc.*, 275 F. Supp. 431 (S.D. Iowa 1967).

<sup>155</sup> 46 U.S.C. § 761 (1970).

<sup>156</sup> 46 U.S.C. § 763 (1970).

<sup>157</sup> N.Y. CIV. PRAC. § 214 (McKinney 1972).

<sup>158</sup> Act of March 30, 1920, Pub. L. No. 165, § 6, 41 Stat. 537.

#### D. Jurisdiction In Wrongful Death by Attaching Insurance Policies

Although *Kilberg* was outrageous and it forced ridiculous contortions in federal courts in *Pearson*, *Kilberg* seems truly miniscule in comparison with the absurd limits to which the New York courts have pushed *Kilberg* and *Babcock* in *Seider v. Roth*.<sup>159</sup>

There a husband and wife were injured in a three car accident in Vermont, involving the Seiders, Roth and one Lemeux from Canada. The couple, who were New York citizens, filed against Lemeux in New York by obtaining an attachment on

. . . the contractual obligation of Hartford Accident and Indemnity Co. to defend and indemnify Lemeux under a policy of automobile liability issued in Canada by Hartford to Lemeux.<sup>160</sup>

By a slim four to three decision, the court of appeals of New York, with Chief Judge Desmond writing the opinion, upheld this attachment. The key issue was whether an attachment of this form of "debt" was what New York's statute was intended to cover.<sup>161</sup>

Chief Judge Desmond finds this issue rather simple. In his words:

The Hartford policy is in customary form. It requires Hartford, among other things, to defend Lemeux in any automobile negligence action and, if judgment be rendered against Lemeux, to indemnify him therefore. Thus, as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a "debt" within the necessary meaning of CPLR 5201 and 6202.<sup>162</sup>

The majority also heavily relied on *In re Matter of Riggle's Estate*<sup>163</sup> for the proposition that the "debt" of a liability insurance policy is personal property. It was only one short step for the court to conclude that the attachment of a liability insurance policy issued by a New York based carrier is sufficient to invoke jurisdiction in the New York courts over an accident between a New York plaintiff and a non-resident defendant for an accident occurring outside New York.

Judge Adrian Burke in his dissent feels that the only time a debt comes into being is if a judgment is awarded to the plaintiff and the

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<sup>159</sup> 17 N.Y.2d 111, 269 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

<sup>160</sup> 17 N.Y.2d at 112, 269 N.E.2d at 313.

<sup>161</sup> 17 N.Y.2d at 113, 269 N.E.2d at 314.

<sup>162</sup> *Id.*

<sup>163</sup> 11 N.Y.2d 73, 181 N.E.2d 436, 226 N.Y.S.2d 416 (1962).

defendant actually *has* to pay. Thus, in Judge Burke's view, a judgment against the insured defendant must precede any attachment of the debt under the insurance policy.

The *Seider* doctrine has received a bad press from legal pundits.<sup>164</sup> It ought to. It smacks of provincialism, namely for New Yorkers. A year later, the *Seider* doctrine was half-heartedly affirmed in *Simpson v. Loehmann*,<sup>165</sup> only after Judge Breitel mistakenly joined the majority out of "team spirit" although he admits the decision was wrong. The opposition continued until Judge Croake of the United States District Court for the Southern District of New York in *Podolsky v. Devinney*<sup>166</sup> finally ruled the *Seider* attachment unconstitutional primarily because of section 320(c) of the CPLR, which he construed as preventing a suit *in rem's* being defended on the merits unless the defendant submits to full *in personam* jurisdiction.<sup>167</sup>

Following Judge Croake's decision in *Simpson* the defendant subsequently moved for re-argument,<sup>168</sup> and the court of appeals, in what is known as "a miraculous *per curiam*"<sup>169</sup> decision informed Judge Croake that he had misinterpreted the New York statutes i.e., that under a *Seider* type attachment a defendant is free to defend on the merits without subjecting himself to *in personam* jurisdiction beyond the policy limits. Thus, notwithstanding Judge Croake, *Seider* was re-affirmed.

Query whether this *per curiam* can be limited only to defense of *Seider v. Roth* type attachments. Does not the reason for the decision apply to all attachments in New York and elsewhere?

In 1968, the United States Court of Appeals for the Second Circuit sitting first as a panel, then *en banc*, surprisingly upheld a *Seider v. Roth* attachment in *Minichiello v. Rosenberg*.<sup>170</sup> Judge Henry Friendly wrote the majority opinion for himself and Judge Feinberg with Judge Anderson dissenting.

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<sup>164</sup> See, e.g., Reese, *The Expanding Scope of Jurisdiction Over Non-Residents—New York Goes Wild*, 35 INS. COUNSEL J. 118 (1968).

<sup>165</sup> 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967).

<sup>166</sup> 281 F. Supp. 488 (S.D.N.Y. 1968).

<sup>167</sup> 281 F. Supp. at 495.

<sup>168</sup> Motion for re-argument denied, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968).

<sup>169</sup> Slegel, *Commentary on N.Y. Civ. Prac.* § 5201 (McKinney Supp. 1968) at 15.

<sup>170</sup> 410 F.2d 106 (2d Cir. 1968).

In that case, Marie Minichiello, a New York resident, sued for personal injuries and damages for the death of her husband, Thomas, arising from an auto accident near Harrisburg, Pennsylvania, who had collided with Rosenberg, a Pennsylvania citizen. Jurisdiction was obtained by attaching an automobile liability insurance policy issued to Rosenberg by All-State Insurance Company that was doing business in New York. Rosenberg removed to the United States District Court for the Western District of New York and there sought dismissal on the grounds that a *Seider* attachment violates the Constitution of the United States.

The "sine qua non" for Judge Friendly was whether New York can constitutionally provide a "direct action against an insurer doing business in New York by a New York resident with respect to an injury suffered elsewhere."<sup>171</sup> In finding that New York has the power, Chief Judge Friendly cited *Watson v. Employer's Liability Assurance Co.*,<sup>172</sup> which upheld a direct action against an insurer in Louisiana for an accident that took place in Louisiana. In *Minichiello* as in *Seider*, however, the accident occurs outside New York. Nevertheless, Judge Henry Friendly still applied *Watson* arguing that there Justice Black realized the potential problems in bringing defendants in *Seider* type cases before the courts of the plaintiff's home state.<sup>173</sup> He reasons from *Watson* that the Supreme Court would approve direct action statutes to insure a forum for the plaintiff in his home state.

Judge Friendly also touches the *res judicata* problem raised by *Podolsky* and circumvented by *Simpson* on rehearing, by admitting the possibility that some other jurisdiction may hold that a decision based on a *Seider* type attachment is *res adjudicata* in a suit *in personam* in a distant state for recovery beyond the face value of the insurance policy attached.<sup>174</sup> Although real, this possibility, is not considered sufficient to vacate *Seider*. As Judge Friendly says:

To be sure it may be cold comfort to a non-resident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of

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<sup>171</sup> 410 F.2d at 109.

<sup>172</sup> 348 U.S. 66 (1954).

<sup>173</sup> *Minichiello v. Rosenberg*, 410 F.2d 106, 110 (2d Cir. 1968).

<sup>174</sup> *Id.* at 111-12.

the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so.<sup>175</sup>

Somehow the thread of logic and constitutionality is missing in Judge Friendly's approach.

An important factor in *Minichiello*, which Judge Friendly merely glosses over, is that the accident *did not* occur in plaintiff's state, but rather, in the defendant's home state or some third state. It seems that this difference should be fatal to a *Seider v. Roth* type attachment because the long-arm statutes and minimum contact cases upon which Judge Friendly relies<sup>176</sup> are predicated on the defendant's contact with the place of the tort.

Judge Anderson, dissenting to both the first hearing<sup>177</sup> and the rehearing *en banc* in *Minichiello*,<sup>178</sup> interprets the *Seider v. Roth* procedure of deciding liability in a forum other than the place of the tort as a denial of due process. He reads the "traditional notions of fair play and substantial justice" doctrine of *International Shoe*<sup>179</sup> as the proper test rather than *Watson*. If the balancing of interests enunciated in *International Shoe* are employed, Judge Anderson quite rightly concludes:

a direct action statute purporting to provide a New York forum for a New York plaintiff, regardless of other local contacts or considerations, is unreasonable and parochial in the due process sense.<sup>180</sup>

But he also warns:

As a result each party will commence suit as quickly as possible in an endeavor to have the litigation in the state where he resides. It would also appear to be a natural and logical consequence of the approval of the *Seider* procedure that retaliatory laws will be

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<sup>175</sup> *Id.* at 112.

<sup>176</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1940).

<sup>177</sup> 410 F.2d at 113.

<sup>178</sup> 410 F.2d at 120.

<sup>179</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). It should be noted, as Anderson does in his dissent, that the *Seider* result does not square with the previous rulings on direct action statutes, which were allowed only if the accident occurred within the state seeking to invoke jurisdiction. *Guess v. Read*, 290 F.2d 622 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962); *Honeycutt v. Indiana Lumbermans Mut. Ins. Co.*, 130 So. 2d 770 (La. Ct. App. 1961).

<sup>180</sup> *Minichiello v. Rosenberg*, 410 F.2d 106, 117 (2d Cir. 1968).

adopted by other states to impose certain conditions upon residents from *Seider* procedure states to protect the states' own residents from being subject to the jurisdiction of the foreign state. This is likely to impose a serious burden on interstate travel and commerce. It is also reasonably certain that the adoption of this procedure will work a substantial increase in the cost of insurance, which is not in the public interest.<sup>181</sup>

The modern long-arm statute actually rests on the assumption that *Pennoyer v. Neff*<sup>182</sup> was wrongly decided in that a man, such as Neff, who does business with a lawyer named Mitchell in Portland, Oregon, with respect to land in Oregon, should be subject to service of process *in personam* either by publication, or by the Sheriff of Multomah County at the Palace Hotel in San Francisco, where Neff lives and drinks in perpetuity for the amusement and education of law students.

But not the most violent critic of what, for clarity, is called *Mitchell v. Neff*, has ever had the temerity to suggest that if Mitchell had represented Neff in Dade County, Florida, with respect to land there instead of in Portland with respect to Multomah County land, that Neff would have been subject to service of process in Oregon either by publication in the Pacific Coast Christian Advocate newspaper or personally by the Sheriff of Multnomah at the Palace Hotel bar.

It could be that Judge Henry Friendly does not understand either *Erie R.R. Co. v. Tompkins* or *Pennoyer v. Neff*.

In *Minichiello*, the Second Circuit has thrown holy water on a dirty Irish trick by which a New Yorker can sue in his native state with respect to an accident miles away in another state or country by the levy of an attachment against a national or international insurance carrier.

Direct suit in New York against an insurance carrier, such as Hartford, with respect to a Vermont accident is an unreasonable burden on commerce and therefore unconstitutional. It also violates procedural due process since the courts of Vermont are open to the plaintiff and putting venue of Vermont automobile accidents in New York is as much against the national interest as permitting victims of airplane accidents to sue other than at the scene of the crash.

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<sup>181</sup> *Id.*

<sup>182</sup> 95 U.S. 714 (1877).

Granted if the plane or automobile crashed in Afganistan, or if the defendant was served personally in New York, there might be some special reason, *e.g.* statute of limitations, why New York should be allowed to entertain the suit. Normally, the doctrine of forum non conviens should prevent New York's assuming jurisdiction if the courts of the place of the accident are open and fair.

There is no reason why New York, by a *Seider v. Roth* attachment, should be allowed to burden the already overcrowded state and federal courts of New York with a Vermont personal injury case. Neither should courts place the additional costs of defending these actions on national insurance carriers knowing that additional expense of defense in New York will be paid by increased insurance premiums. This is but another concrete example of how *Erie R.R. Co. v. Tompkins* is a burden on the firms in America that do a national business.

Quite inconsistently in *Farrell v. Piedmont Air Lines, Inc.*,<sup>183</sup> the Second Circuit refused to allow non-residents to sue in New York by a *Seider v. Roth* type of attachment.

How can *Minichiello* and *Farrell* be reconciled? Why should it make any difference that the plaintiff in a *Seider v. Roth* type attachment happens to be a New York resident?

The decision in *Farrell* unmaskes the decision in *Minichiello* as being an unconstitutional discrimination in favor of residents and against non-residents in violation of the fourteenth amendment, due process, privileges and immunities and equal protection.

In truth the more one studies these New York decisions, the more discriminatory in favor of New Yorkers they become and for this reason flagrantly unconstitutional. Judge Bergan alone sees them for what they are.

## VII. LIABILITY OF AIR CARRIERS FOR WRONGFUL DEATH UNDER THE WARSAW CONVENTION<sup>184</sup>

The Warsaw Convention was ratified in the 1920's and limits liability of airplane carriers for wrongful death or personal injury to 8500 Poincare francs or about 8,200 dollars.<sup>185</sup> To say the conven-

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<sup>183</sup> 411 F.2d 812 (2d Cir. 1969).

<sup>184</sup> Convention For the Unification Of Certain Rules Relating To International Transportation by Air, Oct. 29, 1934, 49 Stat. 3000, T.S. No. 876 [hereinafter cited as the Warsaw Convention].

<sup>185</sup> Warsaw Convention, art. 22(1).

tion is very much out of date is an understatement. Moreover, the Convention has no application to manufacturers of airplanes, only to carriers. To be applicable to a carrier, the trip must be on an international ticket between two countries that are signatories to the Warsaw Convention.<sup>186</sup> Of course once the trip begins on the international ticket, the Warsaw Convention limit governs even though the plane falls within the continental United States.

Today, in 1972 it is hard to understand how the United States could ever have agreed to the treaty. But the rationale that inspired the Warsaw Convention is the same rationale that caused the enactment of wrongful death statutes. For example, the Massachusetts statute, involved in *Kilberg* and *Pearson* limits damages for wrongful death to 15,000 dollars. Its purpose was to encourage companies to build canals and roads.<sup>187</sup> Similarly, the purpose of the Warsaw Convention was to encourage airplane carriers to fly passengers overseas.<sup>188</sup>

For this reason wrongful death statutes in this modern world have come to be known as "back-up" statutes in that the astute driver knowing an injured man in Massachusetts can sue for unlimited damages is encouraged to back up and kill his victim so that his estate will be limited to suing for 15,000 dollars. Furthermore, the same philosophy of aiding businesses with a high degree of risk caused states with wrongful death statutes to limit recovery to "gross" negligence, and to deny recovery to the legal representative of the deceased and all except close dependent relatives. For instance, in Maryland an airline can kill non-breeders with impunity.<sup>189</sup>

To suggest that any federal district court judge in the land should be bound by a genuinely inane law is an insult to his intelligence.

Just as Justice Harlan, in *Moragne* uses common law to repudiate *The Harrisburg* and bring actions for wrongful death occurring in territorial waters in line with the Jones Act and DOHSA, our

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<sup>186</sup> Warsaw Convention, art. 1(2).

<sup>187</sup> See Anderson, *A Model State Wrongful Death Act*, 1 HARV. J. LEGIS. 28 (1964).

<sup>188</sup> See Preamble to the Warsaw Convention, Oct. 29, 1934, 49 Stat. 3013, T.S. No. 876.

<sup>189</sup> MD. ANN. CODE, art. 67, § 4 (1957) wherein a cause of action is created only for the surviving spouse, parent and child of the deceased, or a person who was wholly dependent on him. *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

federal courts should likewise permit recovery of unlimited damages in all airplane cases by applying this same federal common law.

To avoid the damage limitations imposed by the Warsaw Convention reasoning similar to that employed by Judge Bua of Chicago will have to be employed.<sup>190</sup> Unfortunately the case before Judge Bua involved a Canadian Pacific plane that carried a passenger that boarded at Singapore, which was not a signatory to the Warsaw Convention. The plane fell in waters off Japan. The court held that the Warsaw Convention was not binding.<sup>191</sup>

He could have added that as a treaty the Warsaw Convention is held to the same standard as a law of Congress. In *Reid v. Covert*<sup>192</sup> Mr. Justice Black pointed out that treaties are as much if not more, subject to the Constitution than acts of Congress.<sup>193</sup>

Furthermore, one can argue that treaties that are negotiated by the President and only ratified by the Senate by a two-thirds vote, should be more strictly construed than laws that to be enacted must not only receive Presidential approval but also pass both the House and Senate by majority vote.

In 1965, the State Department lost patience with the limit on wrongful death in the Warsaw Convention and denounced it.<sup>194</sup> When the international air carriers finally agreed at Montreal to pay 75,000 dollars,<sup>195</sup> to anyone lost on a Warsaw Convention flight, the State Department withdrew its denunciation.<sup>196</sup>

Query whether it is valid? Query whether there is a legal obligation under the Warsaw Convention for the United States to pay anything but 8500 Poincare francs? If the Warsaw Convention imposes an insufficient limit on damages for wrongful death, how in this day and age can it any longer be constitutional?

Just as are *The Harrisburg*, automobile back-up statutes and

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<sup>190</sup> *Bordell v. Canadian Pacific Air Lines, Ltd.*, No. 66 L 10799 (Cook Co. SR Ct. Nov. 7, 1968); see note 125 *supra*.

<sup>191</sup> See note 125 *supra*, at 353.

<sup>192</sup> 354 U.S. 1 (1957).

<sup>193</sup> 354 U.S. at 16.

<sup>194</sup> DEPT. OF STATE RELEASE NO. 268 (Nov. 15, 1965).

<sup>195</sup> "Interim Agreement" (known as Montreal Agreement), Civil Aeronautics Board Order No. E-23, 680, May 13, 1966. See generally Lowenfield and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 495 (1967).

<sup>196</sup> DEPT. OF STATE RELEASE NO. 111 (May 14, 1966); DEPT. OF STATE RELEASE NO. 110 (May 13, 1966).

guest statutes, the Warsaw Convention is out of place in the modern world. It puts an unconstitutional burden on passengers instead of on the industry in which the risk can be spread over all. The limits on recovery imposed by the Warsaw Convention takes property in violation of the fifth amendment for the benefit of the airplane carriers, unreasonably restrains airplane travel under the commerce clause<sup>197</sup> and denies passengers privileges and immunities and equal protection under the due process clause of the fourteenth amendment.<sup>198</sup> It may also violate the ninth amendment.<sup>199</sup> Accordingly, the Supreme Court in Warsaw Convention cases ought to follow DOHSA and allow unlimited recovery.<sup>200</sup>

### VIII. LIABILITY OF MANUFACTURERS OF MILITARY PLANES

As shown in *Feres v. United States*<sup>201</sup> a man on active duty in uniform injured or killed on a military plane cannot sue the United States under the Federal Tort Claims Act. There is nothing to prevent the service man or his legal representative from suing the manufacturer of the plane, however, if he has enjoyed government medical services and hospital treatment, he must on recovery reimburse the government for those expenses.<sup>202</sup>

### IX. FERES AND GOVERNMENT CONTRACTS

Usually the manufacturer of the government airplane is one of the major airframe contractors and, for what is known in the insurance trade as third-party liability, carries insurance for which the government reimburses them in their overhead cost.<sup>203</sup>

Perhaps for this reason and out of fear they would lose the insurance business, in none of the suits by service personnel against

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<sup>197</sup> U.S. CONST. art. I, § 8.

<sup>198</sup> U.S. CONST. amend. XIV.

<sup>199</sup> U.S. CONST. amend. IX.

<sup>200</sup> "There is nothing in the history of the passage of the Act . . . to indicate that the accomplishment of its remedial purposes should be construed to cut off other and distinct remedies." Petition of Gulf Oil Corp., 172 F. Supp. 911, 917, n.29 (S.D.N.Y. 1959).

<sup>201</sup> 340 U.S. 135 (1950).

<sup>202</sup> *Brooks v. United States*, 337 U.S. 49 (1949). Annot., 12 A.L.R.3d 1245 (1967); AMERICAN LAW INSTITUTE, LITIGATION WITH THE FEDERAL GOVERNMENT (Schwartz & Jacoby ed. 1970).

<sup>203</sup> Testimony in *Australia v. Lockheed and Menasco Litigation*, note 211 *infra*.

airframe manufacturers has there been a defense of no liability under an extension of the doctrine of *Feres v. United States*.<sup>204</sup> It is true that the estate of a service man or woman killed in South Viet Nam by the negligence of the United States cannot recover any but the benefits provided by the Congress.<sup>205</sup> At first glance, these seem small indeed, but when the benefits accruing to the family over the years are added together they turn out to be quite substantial.

Query whether a service injury or death should be given in addition a recovery against a government contractor? It must be recognized that the government is paying for that recovery by reimbursing the airframe contractors for third party insurance. To this extent, however, it is denying equal protection to a soldier negligently killed on the battlefield in South Viet Nam or on the dock going or coming from there. Furthermore, this recovery is a trap for the unwary. Many families are ignorant of their right to sue and the services do not volunteer the details of military aircraft accidents so that suit by service families is difficult. As a result the airframe contractors are charged a lower premium for this third party insurance than is charged for civilian insurance.<sup>206</sup>

When the last airship the Navy built crashed, the legal representatives of eleven of the deceased passengers sued the Goodyear Aircraft Corporation.<sup>207</sup> Goodyear did not carry third party insurance since it was not a regular airframe government contractor. In its defense Goodyear argued there was no liability because building an airship like the SST challenges the state of the art so that to saddle Goodyear with a judgment was in reality giving judgment against the United States in violation of *Feres v. United States*.<sup>208</sup> When the government engages a defense contractor, such as Goodyear, to build weapons on a cost reimbursement basis, the costs arising out of the performance of the contract belong to the government. If therefore, judgment had gone against Goodyear, Uncle Sam would have had to pick up the check.

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<sup>204</sup> 340 U.S. 135 (1950).

<sup>205</sup> *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1969).

<sup>206</sup> See the cases generally at notes 205 *supra* and 211 *infra*.

<sup>207</sup> 231 F. Supp. 447.

<sup>208</sup> 340 U.S. 135 (1950).

The court found the point meritorious but found that Goodyear was not negligent and therefore dismissed without need to rule on the defense.<sup>209</sup>

#### X. THE MENASCO FIASCO<sup>210</sup>

Recently in the Central District of California, a law suit was brought by Australia against the Lockheed Corporation of California and the Menasco Manufacturing Company for approximately five million dollars for the crash of a P-3 Electra airplane, (the Australians and the Navy refer to it as a P-3 Orion) resulting from a collapsed landing gear after the Navy had delivered the plane to Australia.<sup>211</sup> The plane was one of ten purchased by Australia through the Pentagon and manufactured as part of a large contract by Lockheed for the Navy. Menasco manufactured the landing gear and sold it to Lockheed.

Choice of law once more came into focus. Since the prime contract with Lockheed and the subcontract to Menasco were government procurement contracts, it was argued they were subject to federal common law.

Since the case was settled for an undisclosed consideration prior to trial there was no need for Judge William Gray to rule on the point.<sup>212</sup> As a result the answer to the many questions of choice of law raised in that interesting litigation will never be known.

The plane in question was delivered to the Navy and accepted as satisfactory. Then the Navy delivered the plane to Australia and shortly thereafter, when in the hands of Australia, the plane crashed.<sup>213</sup> Had the lawsuit been between the Navy and Lockheed, it would have been on the contract and under the standard disputes clause present in government contracts a Contracting Officer would have initially decided the dispute giving Lockheed the right to appeal to the Armed Services Board of Contract Appeals. If the de-

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<sup>209</sup> 231 F. Supp. 447.

<sup>210</sup> This name came from the "Ebasko Fiasco" in the Dixon-Yates case. It was given there to a plant built at excessive cost by an wholly owned subsidiary of Electric Bond and Share, named "Ebasko."

<sup>211</sup> See No. 69-1623 W.P.G. Civil United States District Court for the Central District of California, March 1972 and article entitled, The Menasco Fiasco 12 Government Contracts Chronicle 2 (June 16, 1972) (published by Independent Publishing Co.).

<sup>212</sup> 231 F. Supp. 447.

<sup>213</sup> *Id.*

cision there were adverse to Lockheed, it could then appeal to the Court of Claims and from there to the Supreme Court of the United States by certiorari.

Since Australia was not a party to the Navy-Lockheed contract, however, it asserted its own right to sue both Lockheed and Menasco in federal court. In upholding Australia's right to sue in the United States district court, Judge Gray ruled that "the role of the United States Navy was that of 'purchasing agent' for Australia."<sup>214</sup>

To this ruling of Judge Gray the United States took exception and at the direction of the General Counsel of Defense, the United States Attorney stated:

the position of the United States supported the contentions of Lockheed and Menasco, i.e. that the United States in connection with the purchase of these airplanes by Australia was not that of an agent but, rather, the transaction was a purchase by the United States and a sale over to Australia.<sup>215</sup>

Australia sued on the *MacPherson v. Buick*<sup>216</sup> theories of product liability, breach of warranty and negligent manufacture of the plane's landing gear. To save money on the costs per plane, Australia had the Navy build its ten planes as part of a larger Navy contract. In handling the transaction this way, however, the United States agreed to protect Australia by asserting on Australia's behalf, and at its request, any liability of Lockheed for breach of warranty.

The difficulty, however, was that if the United States was to act for Australia, under the disputes clause Lockheed would have to appeal from an adverse Contracting Officer's decision to the Armed Services Board of Contract Appeals.

During the litigation, it was expected that Lockheed or Menasco would have moved to refer the litigation to the Armed Services Board of Contract Appeals by arguing that Australia's warranty claims were merged into the Navy-Lockheed contract and the court needed Board advice. Moreover, it could have argued that since the remedy under the contract was open to Australia, there was no jurisdiction in the district court until the remedies open to Australia under the Navy-Lockheed contract were exhausted. Since, however, no contention was raised, the correct answer will not be

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

known until another foreign country sues another American plane manufacturer.<sup>217</sup>

Lockheed and Menasco defended on the ground that if the United States was the plaintiff, there would have been no liability because it is the custom and usage of the United States not to hold its aircraft manufacturers responsible when an entire aircraft is destroyed by the negligence of a manufacturer.

The Judge, however, did not question the testimony of the General Counsel of the Navy, his Deputy General Counsel and the Counsel for the Naval Air Systems Command of the Navy when they stated that under the contract by which Lockheed built the plane that Lockheed, if negligent, was liable for the loss of the plane.

Indeed, there was, in the authors' opinion, no basis upon which he could. Assuming Australia was right in its contention that the defect in the landing gear was "latent," the inspection clause required by the General Services Administration to be in the contract, clearly provided that acceptance of the plane by the Navy was not conclusive as against "latent defects."<sup>218</sup> In addition, the Armed Services Procurement Regulations (ASPR-324.2) forbade any warranty clause in the contract from limiting the rights of the government under the inspection clause. No doubt mindful of ASPR-324.2, before Lockheed signed the contract it insisted that its liability for latent defects be limited to a period of six months after the Navy accepted the plane.

But the trial judge allowed the defendants to subpoena accident files from the Navy and the Air Force and he held that if the Navy was the plaintiff, there was a custom and usage under which the United States would not have sued either Lockheed as a prime contractor or Menasco as a subcontractor for damages for the loss of the plane due to ordinary negligence.<sup>219</sup>

In addition, he accepted a number of affidavits from former General Counsel of the Navy to the effect that it was Navy policy not to hold its air frame contractors liable for loss of planes to avoid

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<sup>217</sup> 231 F. Supp. 447.

<sup>218</sup> 41 C.F.R. § 1-16.101 (1970); subdivision 5 of Standard Form 32 of June 1964.

<sup>219</sup> 231 F. Supp. 447. *See also* Order of Judge William P. Gray, date Jan. 10, filed Jan. 11, 1972.

the Navy's paying to insure against their loss. Query whether under section 207(a) of Title 18 these affidavits related to "particular matters" these former lawyers for the Navy handled within the meaning of section 207(a) of Title 18 and whether in any event legal ethics permitted their use as against the interest of the United States and in the aid of private clients?<sup>220</sup>

In any event, after receipt of the above evidence, Judge Gray found these facts:

3. For several years prior to the time that the ten planes were manufactured and sold by Lockheed, and throughout the period of such manufacture and sale, it was the practice of the United States not to make damage claims against manufacturers of military aircraft that it purchased for its own use, in the event of the loss of such aircraft. This practice was followed irrespective of any conclusion that the Navy might hold with respect to such matters as negligence or breach of warranty on the part of the manufacturer.

4. The practice described in paragraph 3 hereof was maintained and was generally made known to the airframe industry for two principal reasons:

(a) In order that the manufacturers might be encouraged to refrain from obtaining products liability insurance and passing the premium cost on to the Navy.

(b) Thereby to encourage the manufacturers to cooperate fully, and without apprehension in the investigations into the causes of any crashes, in order that such causes might be overcome and similar accidents thereby avoided in the future.<sup>221</sup>

Judge Gray also held, however, that this custom or usage did not bind Australia that "did nothing to cause Lockheed to believe it would waive any claim of manufacturer's liability." Australia had actually purchased insurance to cover the dangerous period when the aircraft was being test flown prior to delivery and acceptance by the Navy. The price Australia paid "was substantially greater than the price that the United States would have paid had the aircraft been for its use."

Accordingly, since Lockheed had solicited the sale of the plane to Australia and knew Australia to be its purchaser, Judge Gray held it to be liable if negligent in its manufacture.<sup>222</sup> Judge Gray made a similar ruling with respect to Menasco providing only that

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<sup>220</sup> *United States v. Standard Oil*, 136 F. Supp. 345 (S.D.N.Y. 1955). *See also*, MANNING, *FEDERAL CONFLICT OF INTEREST LAW* (1964).

<sup>221</sup> 231 F. Supp. 447.

<sup>222</sup> *Id.*

evidence might be offered to establish that Menasco also knew the plane in question was being purchased by Australia. His ruling left open the question of liability of Lockheed under the inspection clause for gross negligence amounting to fraud by ruling that if the United States was not estopped from suing then neither is Australia.<sup>223</sup>

There were problems of proof. The Judge Advocate General of the Navy was opposed to giving details of military aircraft accidents and stated to the court that there was an agreement to keep the files secret so that manufacturers will be encouraged to allow their employees to testify freely about the accidents before military boards of investigation.<sup>224</sup>

In 1947, Thomas Finletter headed a presidential commission that recommended an independent board investigate all aircraft accidents, both civil and military, but nothing came of it.<sup>225</sup>

Considering the amount of money spent in the development of aircraft by the military, the soundness of this policy is questionable. Moreover, even though the United States contributes to the cost of third-party insurance, this policy keeps aggrieved parties from ascertaining defects in planes that would allow them to sue plane manufacturers.

The General Counsel, the Deputy General Counsel and the Counsel for the Naval Air Systems Command who have responsibility for drawing naval aircraft contracts,<sup>226</sup> have all stated that they did not know of any policy that would prevent the Navy from exercising its contract rights,<sup>227</sup> even though the former General Counsel of the Navy said they did. They were only able to cite one instance, however, in which the Navy held the manufacturer of a helicopter liable for the destruction of the craft<sup>228</sup> and only one instance when the Navy asked the Department of Justice to sue a subcontractor for 132,000 dollars in consequential damages to a plane as the result of a defect in an item costing 134 dollars. The Justice Department settled the claim after a suit for 92,000 dollars.

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Report to President Truman at close of World War II.

<sup>226</sup> Meritt Steger, General Counsel, Albert H. Stein, Deputy Counsel and Frederick Sass, Jr., Counsel, Naval Air Systems Command.

<sup>227</sup> 231 F. Supp. 447.

<sup>228</sup> *Id.*

Because of custom and usage, Judge Gray ruled that if the United States was suing Lockheed and Menasco, it would be estopped from suing on the contract for damages to a plane it had accepted and for which Lockheed and Menasco would otherwise be liable for ordinary negligence under the warranty clauses in the contract. He went on to rule, however, that Australia in its own purchases did not have this custom or usage and since Lockheed knew Australia to be the purchaser it was liable under *MacPherson v. Buick*<sup>229</sup> for negligent manufacture of the plane and Menasco was equally liable if it knew Australia to be the purchaser.

As a result of these rulings, which were made on motions for summary judgment by both the plaintiff and the defendants, the parties settled on the eve of the trial. An effort was made before settlement to appeal Judge Gray's rulings, but he refused to certify an intermediate appeal under section 1292(b) of Title 28.

The potential outcome of this very important litigation is now only conjecture.

Insofar as choice of law, however, one can be confident that Judge Gray would have applied federal common law and, of course, because of the presence of Australia, the law of nations.

#### XI. PER ORATIO

The Supreme Court of the United States began to decline in power and prestige as early as 1812 when it held there was no federal common law of crimes. Accordingly, in the absence of special statute, the assassination of an American President, while a state crime, was not a wrong against our national government.

While the federal courts continued to use common law in deciding civil cases, there was pressure in the nineteenth century, first in *Swift v. Tyson* and then in *Dred Scott* to chain United States district courts to state decisions, just or unjust, wise or stupid.

This development is particularly difficult to grasp when article III of the Constitution so clearly vests the judicial power of this nation in the federal courts in diversity, admiralty and federal question cases.

*Dred Scott* is an excellent example of the low degree of mentality

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<sup>229</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

that has reversed *Swift v. Tyson* and brought us *Erie R.R. Co. v. Tompkins*.

All three of these decisions have one thing in common. In each the state law the federal courts is asked to follow, is as unjust and diabolical as a legal rule can be.

In *Dred Scott* and *Erie R.R. Co. v. Tompkins* the Supreme Court blindly follows the unjust state decision making a mockery of Article III of the Constitution and in *Dred Scott* contributing to a bloody and unnecessary war. In contrast to *Dred Scott* and *Erie*, *Swift v. Tyson* was such a just and wise decision on its facts that it remains the law of the land.

The war between the states reversed *Dred Scott* but *Erie R.R. Co. v. Tompkins*, while ostensibly remaining the law of the land, is so fundamentally unsound that United States district courts honor it more today in the breach than in the observance

Moreover, the four reasons Mr. Justice Brandeis gave for *Erie R.R. Co. v. Tompkins* were unsound.

Inasmuch as counsel did not brief or argue for the reversal of *Swift v. Tyson* and the majority cavalierly rejected the plea of Justice Butler in his dissent that the case be put down for reargument as to the validity of the Warren Research, *Erie R.R. Co. v. Tompkins* was an arbitrary and capricious decision that violates fundamental principles of civil liberty.

As Hamilton explained long ago in *THE FEDERALIST*, there are solid reasons why in diversity and admiralty cases the federal court should handle choice of law principles. Moreover, the many excesses of *Erie* reduce that decision to an absurdity. What is worse than anything, however, is the unconstitutional refusal of the Supreme Court to take certiorari in diversity cases that district and circuit courts entertain.

This confines the Supreme Court to police and administrative law cases, ignoring the principal work lawyers do and giving itself a bad reputation as a purely political court.

By its decision in *Richards v. American Air Lines*,<sup>230</sup> the Supreme Court has left choice of law in diversity cases to be decided by each state as it chooses in violation of the full faith and credit, the commerce and just compensation clauses of the Constitution, and in

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<sup>230</sup> 369 U.S. 1 (1962).

violation of the holy trinity of the fourteenth amendment, namely privileges and immunities, equal protection and due process.

The New York and Pennsylvania guest and airplane cases defy reasoned analysis, smack of provincialism and substitute anarchy for law. No matter how intellectually dressed, their basis is favoritism to residents.

The recent admiralty decision in *Moragne* written by the late Justice John Harlan has at last applied federal common law to allow recovery in admiralty for damages for wrongful death in territorial waters and reversed *The Harrisburg*, which so long denied a right to sue in admiralty for damages for wrongful death. Thus, there is hope that the Supreme Court will use the precedent of *Moragne* to allow recovery in airplane and guest cases. Otherwise there will be one rule for planes that crash on water and another for planes crashing on land.

Certainly there is no constitutional basis for New York by a *Seider v. Roth* type attachment to allow its citizens injured elsewhere to sue in New York by attaching the insurance policy of the non-resident defendant. This is a perversion of *Pennoyer v. Neff* and gives a direct action against an insurance company doing a national business in a state where the accident does not occur.

The limitation of liability to 8,200 dollars in the Warsaw Convention is as unconstitutional as similar limitations in state statutes. Moreover, the President and the Senate were as powerless as the states to enact this unconstitutional limitation. It is questionable, indeed, whether uniformed service personnel on active duty who cannot sue the United States for negligence should be allowed to sue manufacturers of military planes.

Admittedly it is good business to keep investigations of military plane accidents secret, since it prevents plane victims from obtaining information needed to sue. In view of the millions of dollars expended for the manufacture of airplanes and the danger to secrecy with respect to plane defects, however, perhaps the time has come to reconsider the policy. In the recent case in federal court before Judge Gray, he held that while Australia was free to sue Lockheed and Menasco for the loss of an Electra plane that the United States had purchased as agent for Australia, the United States was estopped from suing on its own behalf because it has so seldom made claims against plane manufacturers for losses they had no reason to insure.

This dictum is the more remarkable and questionable because Judge Gray does not question that under the contract Lockheed was liable. Can custom and usage void a government contract?

Unfortunately the Australian litigation before Judge Gray was settled on the eve of trial, but from his preliminary rulings it is quite clear that he would have resolved the choice of law points in accordance with federal common law and the law of nations.



# Multidistrict Litigation



*Subsequent to the presentation of these articles to the Symposium in March of 1972, rule 15 has twice been amended by Judicial Panel for Multidistrict Litigation. The most recent amendment, effective August 30, 1972, reads as follows:*

## **RULE 15. TERMINATION AND REMAND**

In the absence of unusual circumstances,

(a) Actions terminated in the transferee court by valid judgment, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation, shall not be remanded by the Panel and shall be dismissed by the transferee court. The clerk of the transferee court shall send a copy of the order terminating the action to the Clerk of the Panel and to the clerk of the transferor court but shall retain the original files and records unless otherwise directed by the transferee judge or by the Panel.

(b) Each transferred action that has not been terminated in the transferee court will be remanded to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge transfers an action under 28 U.S.C. §§ 1404(a) or 1406, an order of remand shall not be necessary to authorize further proceedings including trial.

(c) The Panel shall consider remand of each transferred action or any separable claim, cross-claim or third-party claim at or before the conclusion of coordinated or consolidated pretrial proceedings on

(i) motion of any party;

(ii) suggestion of the transferee court; or,

(iii) its own initiative, by entry of an order to show cause, a conditional remand order or other appropriate order.

(d) If remand is sought by motion of a party, the motion shall be accompanied by:

(i) An affidavit reciting that all common discovery and other pretrial proceedings have been completed in the action sought to be remanded and that all orders of the transferee court have been satisfactorily complied with or that remand is otherwise appropriate; and

(ii) A copy of the transferee court's final pretrial order, where such order has been entered.

Motions to remand and responses thereto shall be governed by Rules 4, 5, 6, 7 and 8 of these Rules.

(e) When an order to show cause why an action or actions should not be remanded is entered pursuant to paragraph (iii) of Rule 15(c), any party may file a response and accompanying brief within fifteen days of the filing of said order unless otherwise provided for in the order. Within five days of receipt of a party's response or brief, any party may file a reply brief limited to new matters. Responses and replies shall be filed and served in conformity with Rules 4, 5, 6, 7 and 8 of these Rules.

(f) Conditional Remand Orders

(i) When the Panel has been advised by the transferee judge that pretrial proceedings in the litigation assigned to him are concluded or that remand of an action or actions is otherwise appropriate, an order may be entered by the Clerk of the Panel remanding the action or actions to the transferor court. The Clerk of the Panel shall distribute a copy of the order to each party to the litigation but, in order to afford all parties the opportunity to oppose remand, shall not send the order to the clerk of the transferee court for fifteen days from the entry thereof.

(ii) Any party opposing the remand shall file a Notice of Opposition with the Clerk of the Panel within the fifteen-day period. If a Notice of Opposition is received by the Clerk of the Panel within this period, the Clerk of the Panel shall not transmit said order to the clerk of the transferee court until further order of the Panel.

(iii) Within fifteen days of the filing of its Notice of Opposition, the opposing party shall file and serve on *all parties* a motion to vacate the conditional remand order and brief in support thereof. Any party desiring to respond shall serve and file an answering brief on all parties within fifteen days after service of said motion to vacate. Unless otherwise ordered by the Panel, the Clerk of the Panel shall set the motion for hearing at the next session of the Panel. Failure to file and serve a motion and brief shall be deemed a withdrawal of the opposition and the Clerk of the Panel shall forthwith transmit the order to the clerk of the transferee court.

(iv) Conditional remand orders do not become effective unless and until they are filed with the clerk of the transferee court.

(v) Motions to vacate such orders of the Panel and responses thereto shall be governed by Rules 4, 5, 6, 7 and 8 of these Rules.

(g) Upon receipt of an order to remand from the Clerk of the Panel, the parties shall furnish forthwith to the transferee clerk a stipulation or designation of the contents of the record to be remanded and furnish the transferee clerk all necessary copies of any pleading or other matter filed so as to enable the transferee clerk to comply with the order of remand.