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John M. McMullen

there is not a compensable taking if one is left with reasonable access.

In summary, a damaging of one's right of access resulting from an exercise of the police power is noncompensable unless it amounts to a taking; but a compensable taking arises only when one is left without reasonable access to his property. Secondly, the right of access cannot be taken for the public use without the payment of compensation. Finally, a property owner must show that he is left totally without reasonable access to his property in order to recover for damage to his right of access in any particular street resulting from the construction of an improvement for the public use. *Archenhold* has limited the cul-de-sac rule of *DuPuy* by refusing to fragmentize the right of access in individual streets. In the future this should prove to be vital protection to city and state governments in the construction of public works.

Michael M. Boone

Refusal of State Court To Assume Jurisdiction After Federal Abstention

I. Origin and Development of the Abstention Doctrine

Under the abstention doctrine, a federal court stays or dismisses its proceedings in order to obtain from a state court an authoritative determination of applicable state law. For effective state adjudication of the issue, federal courts require review of such decision by the highest court of the state. *Railroad Comm'n* v. *Pullman*[1] is generally regarded as the origin of the abstention doctrine, although federal courts had previously refused to consider cases in which their jurisdiction had been properly invoked.[2] Justice Frankfurter, speaking for a unanimous court, stated that the federal district court's

[1] 312 U.S. 496 (1941). The Court had been asked to rule on the constitutionality of a Texas Railroad Commission order that stated that no sleeping car could be operated in Texas unless it was under the control of a pullman conductor.

[2] In Pennsylvania v. Williams, 294 U.S. 176 (1935), the Court ordered a district court to stay its proceedings where the state court procedure was adequate for supervision of liquidations. In Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940), the Court ordered a district court sitting in exclusive bankruptcy jurisdiction to leave a difficult question of state real property law to the state court. These decisions were based on the principles that no equity court would unnecessarily give extraordinary equitable relief even though that court had jurisdiction to do so, and that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.

decision on state law was merely a forecast of what the state courts might hold if the same issue were presented to them. The Supreme Court ordered the federal district court to retain jurisdiction but to stay proceedings pending an action in the state courts to determine the issue of state law. The Court reasoned that to do otherwise would permit a federal court to render only a tentative decision on a constitutional question because it could be displaced by a state ruling which would obviate the federal constitutional question. Furthermore, such a tentative decision was thought to create needless friction with state courts. *Pullman* was therefore based on two considerations: (1) decision of the federal constitutional question might become unnecessary; and (2) state courts should be given the first opportunity to interpret state statutes.

The abstention doctrine was invoked in a different context in *Burford* v. *Sun Oil Co.*[3] There, the Court abstained because of the undesirability of federal interference with a unified state policy relative to the highly regulated and complex oil industry. The Court's purpose was

> [to] leave these problems of Texas law to the state court where each may be handled as "one more item in a continuous series of adjustments."[4] These questions of regulation of the industry by the state administrative agency . . . so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.[5]

Burford is significant in the evolution of the abstention doctrine for two reasons: First, the *Pullman* technique was not used; the Court did not order the lower federal court to retain jurisdiction pending an action in the state courts, but instead ordered the action dismissed. Second, in *Burford*, unlike *Pullman*, the jurisdiction was based not only upon the existence of a federal question but also upon diversity of citizenship.[6] Because of the differences between *Pullman* and *Burford*, some text writers consider that the cases represent two different abstention doctrines.[7]

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[3] 319 U.S. 315 (1943). A district court refused to enjoin a Texas regulatory agency from enforcing an order permitting the drilling of certain oil wells and dismissed the action. The Fifth Circuit reversed and ordered an injunction. The Supreme Court reversed the Fifth Circuit and affirmed the judgment of the district court.

[4] Citing Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 584 (1940).

[5] 319 U.S. at 332.

[6] 319 U.S. at 336. Mr. Justice Frankfurter, dissenting, argued that Congress in 28 U.S.C. § 1332, had provided a federal forum to litigants in diversity actions which could not be abrogated.

[7] See, *e.g.*, WRIGHT, FEDERAL COURTS § 52 (1963); Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEXAS L. REV. 194; 1A MOORE, FEDERAL PRACTICE 2101-24, 3331-32 (2d ed. 1961).

The Court further extended the principles of the abstention doctrine in a situation similar to *Burford* in *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*[8] The Court held that comity required the federal courts in their discretion to decline the opportunity to interfere with state policies when adequate relief could be afforded through the state courts. Whether abstention could be invoked in a common law action where jurisdiction was based only on diversity of citizenship was not discussed in either *Burford* or *Alabama Pub. Serv. Comm'n.*

Whether a federal court should abstain in a diversity of citizenship case was first squarely presented in *Meredith v. Winter Haven.*[9] Here, the Supreme Court refused to invoke the doctrine. It reasoned that none of the purposes for abstention were present, and that a federal court could not refuse that jurisdiction, properly invoked, which Congress had created for litigants in diversity cases. It felt that abstention was an extraordinary doctrine and should be invoked only in special circumstances.[10]

The special circumstances alluded to in the *Meredith* case were expanded by the Court in *Louisiana Power & Light* v. *City of Thibodaux,*[11] where the Court invoked the abstention doctrine for the first time in a common law diversity suit. All previous exercises of the power had been in equity. The Court recognized the equitable origin of the abstention doctrine and the fact that an eminent domain suit was classified as a suit at common law. Nevertheless, the Court reasoned that since the power of eminent domain was intimately involved with the sovereign prerogative of the state, a federal judge was justified in staying proceedings pending a decision by the state's highest court, rather than make a tentative and dubious forecast. This sovereign prerogative concept, combined with the Court's desire to avoid federal-state friction, was the basis of the Court's decision.

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[8] 341 U.S. 341 (1951).

[9] 320 U.S. 228 (1943). Plaintiff-bondholders sued in federal district court for a declaratory judgment that defendant-city should not call and retire certain bonds and for an injunction restraining the city from calling the bonds. The district court dismissed for failure to state a cause of action. The Fifth Circuit reversed, ordering the case dismissed without prejudice to plaintiffs' right to proceed in state court. The law in question was unclear. The Supreme Court reversed and ordered the federal district court to decide the case on the merits.

[10] Railroad Comm'n v. Pullman, 312 U.S. 496 (1941) (avoidance of a premature decision of a constitutional question); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (interference with state policy in a highly regulated and complex industry).

[11] 360 U.S. 25 (1959). The city of Thibodaux filed an eminent domain proceeding asserting a taking of the land, buildings, and equipment of Louisiana Power and Light Co., a Florida corporation; the defendant removed the action to the federal district court on the basis of diversity of citizenship. The district court abstained. The Fifth Circuit reversed, 255 F.2d 774 (5th Cir. 1958), holding that the abstention procedure was not available in an eminent domain proceeding. The Supreme Court reversed and affirmed the decision of the district court.

The same day that *Thibodaux* was decided, a strikingly similar case, *County of Allegheny* v. *Frank Mashuda Co.*,[12] also was decided. This, too, was an eminent domain case, but the state law was thought to be clear. Here, the Court did not invoke the abstention doctrine. Considered together, the *Thibodaux* and *Mashuda* decisions seem to set forth the principle that the abstention doctrine may be invoked in a diversity eminent domain suit when the state law at issue is unsettled or unclear. *Thibodaux* and *Mashuda* also are significant for the fact that they were both common law actions and both were in the federal courts on the basis of diversity of citizenship.

Florida in 1957 enacted a unique statute[13] which allowed either the Supreme Court or a federal court of appeals to certify questions of state law to the Florida Supreme Court. In *Clay* v. *Sun Ins. Office Ltd.*, [14] the Supreme Court utilized this statute, ordering the Fifth Circuit to certify questions of state law to the Florida Supreme Court for resolution. This method has the advantage of avoiding the necessity of going through the entire state court system for an authoritative answer to the issue of state law before the Court can decide federal issues involved. Since the *Clay* decision, the Court has in two other instances certified questions of state law directly to the Florida court.[15] To date, no other state has followed the Florida example.

II. United Services Life Ins. Co. v. Delaney[16]

United Services Life Insurance Company insured the life of Lt. Robert H. Delaney on October 1, 1957. The policy contained the following clause:

> Limitation Due To Aviation Hazard
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> If this policy shall become a claim by death of the insured due to any service, training, travel, flight, ascent or descent in, on, or from any species of aircraft at anytime, except death resulting from travel as a *passenger* on an aircraft owned and operated by the United States Government . . . the liability of the company under this policy shall be limited to the premiums paid hereunder: . . . any provision in this policy to the contrary notwithstanding. (Emphasis added.)

On May 8, 1959, Lt. Delaney died of injuries received as the *pilot*

[12] 360 U.S. 185 (1959).
[13] Fla. Stat. Ann. § 25.031 (1957).
[14] 363 U.S. 207 (1960).
[15] See Aldrich v. Aldrich, 375 U.S. 75 (1963), and Dresner v. City of Tallahassee, 375 U.S. 136 (1963).
[16] 396 S.W.2d 855 (Tex. 1965). United Services Life Insurance Company only insures military officers.

and only occupant of an aircraft owned and operated by the United States Government. The insurer, a District of Columbia corporation, denied liability on the basis of the aviation hazard clause. Mrs. Delaney, a citizen of Texas, brought suit in the federal district court on the basis of diversity of citizenship, contending that the decedent was a passenger within the meaning of the policy. The federal district judge, applying Texas law, decided in favor of Mrs. Delaney on the basis of *Continental Cas. Co.* v. *Warren.*[17] The Fifth Circuit affirmed in a two to one decision.[18] In *Warren,* the Texas Supreme Court construed "as a passenger" in a similar aviation hazard clause to mean "as an occupant."[19] Upon an *en banc* rehearing of *Delaney* along with *Paul Revere Life Ins. Co.* v. *First Nat'l. Bank,*[20] the court reversed its earlier holding in a five to four decision.[21] A majority of the Fifth Circuit thought that the principles of the *Warren* case as applied to the facts of the *Delaney* and *Paul Revere* cases were too unclear for the federal court to provide more than a forecast of what a state court confronted with the same issue might decide. The court invoked the abstention doctrine, staying the proceedings and retaining jurisdiction for the purpose of taking such further action as might be required. The parties were advised to seek a declaratory judgment in the Texas courts as to the meaning of the word "passenger" under Texas law. The four dissenting circuit judges felt that the court had no right to refuse the jurisdiction Congress had provided[22] and that the facts did not fall within any of the classes of cases where the abstention doctrine previously had been applied.[23]

Pursuant to the Fifth Circuit's instructions, the insurer brought suit in a Texas district court for a declaratory judgment to construe the aviation hazard clause in the insurance contract. The district court dismissed for want of jurisdiction. The Texas court of civil appeals affirmed, holding that the suit was instituted for the purpose of procuring an advisory opinion.[24] In affirming the civil appeals decision,[25] the Texas Supreme Court held that the purpose of the Fifth Circuit in staying proceedings was to obtain from the Texas courts

[17] 152 Tex. 164, 254 S.W.2d 762 (1953).
[18] 308 F.2d 484 (5th Cir. 1962).
[19] 254 S.W.2d 762, 764 (1953).
[20] 328 F.2d 483 (5th Cir. 1964), *cert. denied,* 377 U.S. 935 (1964).
[21] *Ibid.*
[22] 28 U.S.C. § 1332. This section provides a federal forum for citizens of different states.
[23] Railroad Comm'n v. Pullman, 312 U.S. 496 (1941) (avoidance of a premature constitutional question); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (interference with state policy in a highly regulated and complex industry); Louisiana Power & Light v. City of Thibodaux, 360 U.S. 25 (1959) (an eminent domain action with an unclear issue of state law in question).
[24] 386 S.W.2d 648 (Tex. Civ. App. 1965).
[25] 396 S.W.2d 855 (Tex. 1965).

a decision on a point of Texas law so that the federal court could render a judgment thereon.[26] The Court noted that as a prerequisite to the declaratory judgment process, "(a) there shall be a real controversy between the parties, which (b) *will be actually determined by the judicial declaration sought.*"[27] The court then held that the Fifth Circuit's reservation of jurisdiction to render final judgment made the state proceedings advisory in nature since a state court must have the power to settle the controversy by entry of final judgment. Justice Steakley, speaking for the dissenters,[28] stated that the Texas court's decision on the merits of the case would constitute a final judgment due to the *Erie* rule and the principles of res judicata.

The Fifth Circuit's decision in *Delaney* was based on the *Pullman* and *Thibodaux* cases.[29] Yet in Delaney there is no constitutional issue that would be premature. The decision is clearly inconsistent with the rule laid down by the Supreme Court in the *Meredith*[30] decision. Of the factors previously providing the basis for abstaining—(1) avoidance of a premature constitutional adjudication,[31] (2) equitable discretion to refuse jurisdiction,[32] (3) interference with a state administrative agency in a complex and highly regulated industry,[33] (4) adequate state court review of an administrative order,[34] (5) eminent domain action involving an issue of unsettled state law[35]—none were present.

The technique employed in abstaining in *Delaney* also appears incorrect. The court retained jurisdiction even though only a single issue of state law was in question—the construction of a clause in an insurance contract. There was no reason to retain jurisdiction if the issue as decided by the state court would settle the dispute between the parties. This retention was the primary reason for the refusal of the Texas courts to take jurisdiction. The better method would have been to dismiss the complaint as was done in *Burford* and *Alabama*

[26] *Id.* at 860.
[27] *Ibid.*
[28] Chief Justice Calvert and Mr. Justice Hamilton joined his dissent.
[29] 328 F.2d at 484. The court stated: "The Supreme Court has 'increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law.' Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S. Ct. 1070, 3 L.Ed.2d 1058, reh. den, 360 U.S. 940, 79 S. Ct. 1442, 3 L.Ed.2d 1552. It is appropriate that this court stay its hand until the courts of the State of Texas shall have declared the law of the State of Texas which is applicable to and controlling in the disposition of these appeals."
[30] See Note 9 *supra* and accompanying text.
[31] Railroad Comm'n v. Pullman, 312 U.S. 496 (1941).
[32] See note 3 *supra.*
[33] Burford v. Sun Oil Co., 319 U.S. 315 (1943).
[34] Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951).
[35] See note 12 *supra* and accompanying text.

Pub. Serv. Comm'n, assuming that the statute of limitations would not bar further proceedings in state court.

By invoking the abstention doctrine in *Delaney*, the Fifth Circuit has set forth the rule that a federal court must abstain in a common law diversity action if the issues of state law are unclear. Such a rule, if widely used by the lower federal courts, could completely destroy federal diversity jurisdiction. Supreme Court dictum in *McNeese* v. *Board of Educ.*[36] indicated that mere difficulty in ascertaining state law did not justify abstention. Yet, in *Delaney*, this was exactly the reason given for abstention.

When both federal and state courts are employed in litigation due to the abstention doctrine, the long delay and piecemeal litigation make the doctrine of doubtful value.[37] In *Spector Motor Serv. Inc.* v. *McLaughlin*,[38] nine years of litigation in five different courts were required before the case was finally decided on the merits.[39] In *Delaney*, although the insured died in 1959, a decision on the merits was not reached until March 31, 1966, when the Fifth Circuit vacated its prior decision and reversed and remanded, holding that Lt. Delaney was not a passenger within the meaning of the clause.[40]

The Texas Supreme Court, in refusing to accept jurisdiction in *Delaney*, relied on *Morrow* v. *Corbin*[41] and *Douglas Oil Co.* v. *State*[42] to show that it was being asked for an advisory opinion.[43] It should

[36] 373 U.S. 668, 674 (1963).

[37] Mr. Justice Douglas, dissenting in Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 228 (1960), criticised the doctrine for this reason:

> Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.

[38] 323 U.S. 101 (1944).

[39] Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

[40] 358 F.2d 714 (5th Cir. 1966).

[41] 122 Tex. 553, 62 S.W.2d 641 (1933). The court held unconstitutional a statute [TEX. REV. CIV. STAT. ANN. art. 2218b (1933)] authorizing certification of constitutional questions by the district and county courts to the courts of civil appeals.

[42] 81 S.W.2d 1064 (Tex. Civ. App. 1935), *rev'd on other grounds*, Federal Royalty Co. v. State, 128 Tex. 324, 98 S.W.2d 993 (1936). This case involved certified questions of law to the Austin Court of Civil Appeals and was cited by the *Delaney* court for its quotation from an earlier hearing of the case before the Texas Supreme Court: "The certificate calls upon the Supreme Court to give an advisory opinion, which is not permitted. (124 Tex. 232, 76 S.W.2d 1043, 1044)."

[43] In Bichel v. Heard, 328 S.W.2d 462 (Tex. Civ. App. 1959), the court of civil appeals held that an action to declare an order of a police chief invalid did not involve a justiciable controversy until the order was actually enforced against the plaintiff. In California Products, Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S.W.2d 780 (1960), the question of whether the proposed use of a certain type of bottle by one of the parties would violate a previous injunction was merely an advisory opinion until California Products marketed its bottle in the same market with Puretex. The court of civil appeals in Republic Cas. Co.

be pointed out that both of these cases were decided before the passage of the Texas Declaratory Judgment Act.[44] Before the act, a suit not asking for equitable or consequential relief was considered to be an advisory opinion.[45] However, under the act, courts are empowered to declare rights and other legal obligations whether or not other relief is sought.[46] The court in the *Delaney* case apparently misunderstood the purpose of declaratory relief. Previously, in construing the Texas Declaratory Judgment Act, the Texas Supreme Court had declared that the purpose of the declaratory judgment was to provide "a speedy and effective remedy for the determination of the rights of the parties when a real controversy has arisen."[47] It had also stated that "the action for declaratory judgment is an instrumentality to be wielded in the interest of preventative justice and its scope should not be hedged about by technicalities."[48] In the *Delaney* case, the court seems to ignore its own holdings. The refusal to assume jurisdiction certainly negates any "speedy and effective" relief, as it leaves the parties without a decision on the merits after several years of litigation. Calling a decision on the merits of the case an advisory opinion seems to be a "technicality." All that would be left for the Fifth Circuit to do would be to dismiss or enter judgment for the liquidated amount due under the policy. The Court stated that the retention of jurisdiction by the Fifth Circuit prevented the Texas courts from rendering a final enforceable judgment.[49] In Texas, as a prerequisite to a declaratory judgment proceeding, there must be a controversy which will actually be determined by the judicial declaration sought.[50] The court stated that the *Erie* rule was one of precedent and wholly unrelated to res judicata. While this is undoubtedly true, the court is ignoring the realities of the situation. The suit is concerned with but a single point of state law, and a decision by the court would be final as there would really be nothing left for the federal court to decide. The state decision would conclusively settle the controversy between the parties. The court cited *England* v. *Louisiana State Bd. of Medical Examiners*[51] for the proposition that a state decision in some circumstances on a *federal* issue might not be

v. Obregon, 290 S.W.2d 267 (Tex. Civ. App. 1956) *error ref. n.r.e.*, assumed jurisdiction and ruled on the merits in a case where the insurer had sought a declaratory judgment, alleging non-liability under an exclusion clause in the policy.

[44] TEX. REV. CIV. STAT. ANN. art. 2524-1 (1943).

[45] See notes 41 and 42 *supra*.

[46] TEX. REV. CIV. STAT. ANN. art. 2524-1 (1943).

[47] Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709 (1945).

[48] Guilliams v. Koonsman, 154 Tex. 401, 279 S.W.2d 579 (1955).

[49] 396 S.W.2d 855, 859.

[50] *Id.* at 860.

[51] 375 U.S. 411 (1964).

res judicata. However, the court in *Delaney* had to decide only the single state issue. In view of this, it is difficult to see why the state decision on a state issue would not be res judicata.

In his dissent, Justice Steakley recognized this conclusion when he stated: "What is decided by our courts will terminate the controversy between the parties and in my view will be res judicata as to the entire case. Clearly, the judgment will be a decision made in adversary litigation in our courts and will leave nothing for the federal courts to decide."[52]

III. Conclusion

By ignoring the principles of res judicata, the *Erie* doctrine, and its previous holdings in construing the Texas Declaratory Judgment Act, the Texas Supreme Court was mistaken in calling a decision on the merits of the *Delaney* litigation an "advisory opinion." The Fifth Circuit seemingly misapplied the abstention doctrine in abstaining in a common law diversity suit. Both the Fifth Circuit and the Texas Supreme Court have treated *Delaney*, in the words of Justice Douglas, as an "academic exercise,"[53] in denying relief to the parties before them. Because of the long delay and expense to the parties, the abstention doctrine as applied in *Delaney* appears to have doubtful value. There are not present in the *Delaney* litigation any of the exceptional circumstances previously providing the basis for federal abstention, and the rule of *Delaney* threatens the very existence of federal diversity jurisdiction. For these reasons, the U. S. Supreme Court should, at its earliest opportunity, reappraise the abstention doctrine, limit its application to exceptional circumstances, and enumerate clearly and concisely once and for all exactly under what circumstances the lower federal courts may invoke the abstention doctrine.

John M. McMullen

[52] 396 S.W.2d at 867 (Steakley, J., dissenting).
[53] See note 37 *supra*.