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Right to Jury Trial of Legal Issues in Diversity Suits

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NOTES

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INTRODUCTION

The "right" to a jury trial of legal issues[1] in federal court, where jurisdiction is based solely on diversity of citizenship, has raised significant problems resulting in a great deal of confusion. Certainly after the passage of nearly two hundred years, one would think the matter quite settled. However, case law, especially that which has developed over the past twenty-five years, indicates the right is hardly absolute. In fact, determining the basis for the right to jury trial in diversity suits is extremely confusing. Viewing the decisions as reasonably as possible, it still is difficult to decide whether the right is substantive, procedural, or a matter of federal policy. If the right is substantive in diversity situations, problems of applicable law (state or federal) arise. If the matter is procedural, determining whether and under which legal theory federal procedure applies becomes a matter of special consequence. But if the right is based solely on policy determination, a whole host of other problems are encountered, the most important of which involves ascertaining whether a policy decision made by a federal court is, in effect, substantive law. If such is the situation, then the principles of case law in this area, existent for over twenty-five years are being paid mere lip service by present day courts.

The Erie Test

To understand the problem in its proper perspective, a discussion of *Erie R.R. v. Tompkins*[2] and *Guaranty Trust Co. v. York*[3] is necessary, as these two cases are the foundation for recent decisions involving the asserted right to jury trial. In the *Erie* case, the right to jury trial

1. The purpose of this article is to determine how the right to a jury trial of *legal* issues is decided in diversity cases. This situation is distinguishable from the problem of conflicting equitable and legal claims. Often, in diversity cases, the plaintiff will enter a legal claim and defendant will counterclaim raising an equitable question. In such situations, the judge must decide which issues should be first decided. No matter how the judge decides, a plea of collateral estoppel will be raised in litigation of the second claim. The case law in this area is also confusing and interesting, but is not covered in this note.

Compare Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), *and* City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949), *and* Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935) *with* Ettelson v. Metropolitan Life Ins. Co., 137 F.2d (2d Cir. 1943), *cert. denied,* 320 U.S. 777 (1943). For interesting discussions of this rather intricate area of law see 5 MOORE, FEDERAL PRACTICE ¶ 38.35(2),(4) (2d ed. 1951); Note, *Right to Jury Trial in Cases Involving Both Equitable and Legal Issues,* 47 CALIF. L. REV. 760 (1959); Note, *The Right to Non-Jury Trial,* 74 HARV. L. REV. 1176 (1961).

2. 304 U.S. 64 (1938).

3. 326 U.S. 99 (1945).

was not specifically in issue. Instead, the entire body of so-called federal common law developed from the leading case of *Swift v. Tyson*[4] was abolished in diversity cases and replaced with the *Erie* test: in a diversity action, the substantive law applicable shall be that of the state, while procedural matters shall be controlled by the federal rules.

However workable the *Erie* test appeared at first glance, confusion in the federal court system soon resulted and has indeed continued to the present. First, the Court in its opinion did not expressly state how subsequent federal courts were to determine whether an issue involved was substantive or procedural. It was not made clear whether a federal court was to ascertain the matter in terms of the state law involved as interpreted by the particular state courts, or if the federal courts were to use independent techniques of inquiry. Second, regardless of which system controlled such interpretations, federal or state, it was soon found that deciding when a matter is "procedural" and when it is "substantive" is by no means an easy task. Thus, courts disagreed: some thought they were bound by a state court determination of the issue, while others insisted that a federal court in a diversity case should decide whether a state practice is substantive or procedural.[5]

The Outcome Test

Only seven years passed before a new standard, commonly called the "outcome" test, was adopted in *Guaranty Trust Co. v. York*.[6]

The so-called "outcome" test stated that a federal court sitting in a diversity case was *not* bound by a strict and sometimes impossible delineation between substantive and procedural law. As a matter of practicality, the Court held that the "outcome" of a diversity suit need only be "substantially the same" as it would be in the state court.[7] Viewing the proceedings as a whole, a federal court was to apply state substantive law only if the decision in the federal court would be substantially different than it would be in the state court.

Many writers immediately recognized the speculative nature of the "outcome" test and serious questions in regard to its validity were raised.[8] Federal courts today, without expressly abolishing the "out-

4. 41 U.S. (16 Pet.) 1 (1842).

5. See Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935).

6. See note 3 *supra*. One particularly interesting fact has resulted from the rendering of this decision. Not one court which has decided a case subsequent to the *Guaranty* case has expressed the opinion that it overruled the *Erie* case. Indeed, what would seem to be a significant change in the federal court system's approach to diversity cases has not been treated in such a manner. Instead, courts have often cited *both* cases together, apparently assuming they are not in conflict. See text *infra* at 785.

7. Guaranty Trust Co. v. York, 326 U.S. 99, 110-12 (1945).

8. *E.g.*, Merrigan, *Erie to York to Ragan — A Triple Play on the Federal Rules*, 3 VAND L. REV. 711 (1950); Note, 30 MINN. L. REV. 643 (1946).

come" test, are reluctant to use it.[9] But whether these courts have restored the test employed in the *Erie* case is debatable. When read literally, some of the more recent decisions indicate a return to the holding in the *Erie* case. At least the liberal use of words such as "substantive" and "procedural" in opinions would lead to that conclusion.[10] Nevertheless, the holding of a case must be interpreted in light of the fact situation involved. Many of the fact situations are quite distinguishable from those in the *Erie* case,[11] and different fact situations often destroy the logic and applicability of this test. Of primary importance is the fact that fixed principles are *not* being enunciated by the courts. These factors make this particular area of law confusing, frustrating, and oftentimes disheartening.

MODERN DEVELOPMENT

Byrd v. Blue Ridge Rural Elec. Co-op., Inc.[12]

The first case before the United States Supreme Court which involved the sole issue of the right to jury trial in a diversity suit embracing legal issues was *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*[13] The question presented was whether the judge or jury should resolve the issue of employer immunity from common-law suits under the South Carolina workmen's compensation statute, the statute being silent in regard to who should decide the matter. Because South Carolina courts in the past had considered the issue as one for the judge's determination, respondent contended that federal courts were bound by the South Carolina

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9. *Cf.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Angel v. Bullington, 330 U.S. 183 (1947). These cases show a gradual shift away from the "outcome" test. For example, the Court in the *Angel* case declared that in diversity actions, a federal court is "only another court of the state." This seems quite contrary to the ruling in the *Guaranty* case. When compared with decisions involving a federal policy decision, as mentioned in this note, it is apparent that conflict of a substantial nature exists. See text *infra* at 781.

10. This conclusion, it is submitted, is correct. After all, the *Erie* case is the decision that initiated the distinction between substantive and procedural law. Thus, courts faced with diversity situations which decide a matter in terms of substantive and procedural law must necessarily be thinking of the *Erie* test. *Quaere,* what happens to the *Erie* test when federal policy is involved? Which is stronger, the test or the policy?

11. As mentioned previously, the *Erie* case involved determining whether Pennsylvania law (the situs of the cause of action) controlled, or if federal courts could establish their own common law. But when the question is one *not* clearly procedural or substantive, in effect "quasi substantive" or "quasi procedural," then the *Erie* test is almost impossible to apply. That is, if a right is considered "substantive" by state statutes, case law, and the like, are federal courts to question such determinations? See generally LOUISELL & HAZARD, PLEADING AND PROCEDURE 1272-76 (1962).

12. 356 U.S. 525 (1958).

13. *Ibid.*

decisions and petitioner, therefore, was not entitled to a jury trial in federal court.

The Court disagreed with respondent's argument. It concluded that the statute's wording, when read in conjunction with the South Carolina opinions, did not indicate the necessary "special relationship" between the "form and mode" of trial and the substantive law of the act.[14] It was held that even though the cases did not expressly state whether the matter was substantive or procedural, in South Carolina it was clearly procedural. Thus, apparently employing the *Erie* test, the Court decided that petitioner was entitled to a jury trial in federal court.

Byrd v. Blue Ridge: The Erie Test and Outcome Tests

The Court, however, went further and discussed the case in terms of the "outcome" test. It reasoned that the right to jury trial in diversity cases was a matter of federal policy *under* the "outcome" test. Because the seventh amendment influenced this policy, the Court concluded that jury trials were to be favored in federal courts. This latter portion of the Court's opinion was literally a re-analysis of the *Byrd* case, after the issue had seemingly been resolved under the *Erie* test.[15] And because the Court in the *Byrd* case analyzed the matter from two viewpoints, subsequent cases have conflicted.

One of the most interesting points raised in the opinion was the meaning of magic words such as "special relationship." Indeed, what is the requisite "special relationship" between the "form and mode" of trial and the substantive law which would make the right or non-right to jury trial a state's substantive law? Apparently, several factors exist which could temper the necessary relationship. First, a state law could exist because it appeared by virtue of a provision in the state constitution. Second, a state statute could expressly provide the rule of law. Third, the rule of law could exist because of the state's case law. Fourth, a combination of the foregoing factors could establish the rule.

In the *Byrd* case, the state statute was silent, as was the South Carolina Constitution. Only case law had decided the matter. Obviously, the Court found this insufficient to meet the requisites. But how far does this rule carry? Does it mean all the ingredients (state constitution, statutes, and case law) would have to *expressly* provide for the mat-

14. Several other interesting points are raised by the *Byrd* decision. First, assuming that the *Erie* test is still the law of the land, why was it necessary for the Court to discuss the *Guaranty* case? Conversely, if the *Erie* test is not the law of the land, but instead *Guaranty* controls, why not admit this and decide only in terms of the "outcome" test? Second, assuming the "outcome" test is the prevailing law, why must the court rely on a prevailing federal policy to buttress its decision? Is not the substantial effect of state law on the case the purport of the "outcome" test, *not* whether the decision may be contrary to federal policy? Third, why use any test at all if policy is to be the determinant factor?

15. 356 U.S. 525, 528 (1958).

ter? Would a statute be sufficient? Or would the *Byrd* case result be the same regardless of how many sources of state law provided that a certain matter, such as a right or *non*-right to jury trial, was substantive? It is submitted that the *Byrd* test leaves little room for leeway; that, in effect, the *Byrd* decision has eliminated state consideration of the nature of the right to jury trial.[16]

Recent Cases Citing Byrd v. Blue Ridge

The significance of the decision in the *Byrd* case arises because of the manner in which courts have cited it as authority for the adjudication of an asserted right to jury trial. Also, cases exist which extend this principle to other situations. Indeed, recent decisions have cited the *Byrd* case for at least five propositions which, generally speaking, are not in harmony with each other.[17]

Byrd v. Blue Ridge and the Seventh Amendment — Wirtz v. District 21, Bhd. of Painters[18]

First, the *Byrd* case has been relied on for the proposition that the right to jury trial in federal court is derived through the operation of the seventh amendment, whether jurisdiction is based upon diversity of citizenship or arises out of a federal statute.

A good illustration of this situation is the *Wirtz* case. The action was brought in federal district court, but jurisdiction was based on a federal statute, *not* on diversity of citizenship.[19] According to previous case law, none of the problems involved in the *Erie, Guaranty,* and *Byrd* cases were similar to the *Wirtz* fact situation. Therefore, any application of the three major cases to the *Wirtz* situation would be unwarranted. Nevertheless, the court did apply the *Byrd* case. Immediately raised is the question of how encompassing is the scope of a federal policy decision.

The statute in the *Wirtz* case did not expressly provide for the right

16. See, *e.g.,* Schaub v. Calder Van & Storage Co., 308 F.2d 835 (7th Cir. 1962); Anderson v. Southern Bell Tel. & Tel. Co., 209 F. Supp. 921 (M.D. Ga. 1962); Girardi v. Pennsylvania Power & Light Co., 174 F. Supp. 813 (E.D. Pa. 1959). Each of these cases involved interpretations of state statutes by state case law. The question raised was whether federal courts were bound by such determinations in diversity cases. Each court cited the *Byrd* decision, used the magic words "special relationship," found none existing, and decided each case in terms of its own concept of federal law.

17. The five propositions are derived from federal courts of appeals and one district court. The last section of the note discusses recent decisions of the United States Supreme Court.

18. 211 F. Supp. 253 (E.D. Pa. 1962).

19. The cause of action in the *Wirtz* case was based on a federal statute which gives both the federal government and labor unions the right to bring an action in federal district court for unfair practices. The statute involved was the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 402(b) (1959).

to jury trial. The court was forced to interpret the situation in terms of other guidelines. The reasoning employed resulted in an interpretation of the right to jury trial in terms of previous federal case law and the United States Constitution. The court stated that since the cause of action involved in the *Wirtz* case was not contemplated by the framers of the Constitution, the seventh amendment guarantee did not prevail. This kind of reasoning often appears in opinions where no case law exists, and a constitution alone provides no solution. Petitioner was thus denied his right to jury trial because *no* precedent existed.

The unusual thing about the *Wirtz* case is the fact that the *Byrd* decision was relied upon in reaching a conclusion. The *Wirtz* case was ultimately disposed of on other grounds, but the unique and summary manner in which the *Byrd* case was cited shows that the court misunderstood the holding of the decision. Indeed, to cite a case which held that a party was entitled to a jury trial, as the court did in the *Wirtz* case, and then to decide that the party is *not* entitled to a jury trial without relying upon any criteria is truly disturbing.

It must be remembered that in the *Wirtz* case, jurisdiction was grounded entirely on a federal statute. Obviously, when a federal statute is involved, the Constitution is readily available as a source of authority. That is, the seventh amendment, if applicable according to case law and the Constitution, applies directly. However, a diversity situation presents a different problem because state law, which may be contrary to federal law, is involved.

In fact, the opinion of the *Byrd* case was quite explicit in explaining that the decision to allow a jury trial in a diversity case was one of policy under the *influence* of the seventh amendment. This conclusion was not enunciated until it had first been determined that the judicial disposition of employer immunity in South Carolina was merely a "form and mode" of trial, not having the effect of substantive law. Diversity actions were distinguished from those based on federal statutes.[20] It is clear that the *Byrd* case did not intend to apply the seventh amendment *guarantee* to diversity cases. Yet the court in the *Wirtz* opinion cited the *Byrd* case for that proposition.

Byrd v. Blue Ridge: Right to Jury Trial is Procedural — Rand v. Underwriters at Lloyd's[21]

Second, it has been stated that the decision in the *Byrd* case stands for the proposition that the right to jury trial in diversity suits is wholly

20. 356 U.S. at 530. Obviously, the Court in the *Byrd* case was quite aware of this important distinction. Nevertheless, subsequent courts have taken this opinion and have truly destroyed its intent. See text *infra* at 783.

21. 295 F.2d 342 (2d Cir. 1961).

procedural, whether or not state statutes, case law, or constitutions are involved. Concluding that the right to jury trial is procedural is presumably based on federal policy, but grounded on an interpretation of the *Byrd* case in terms of the *Erie* test.

Rand v. Underwriters at Lloyd's,[22] a diversity suit, involved the adjudication of two consolidated insurance claims. One of the questions raised on appeal was whether the judge or jury should decide the issue of adequate notice to the insurer. Under New York case law, previous decisions had held the matter was one for the judge to decide; if federal law were to control, the issue presumably would be tried by a jury. The court analyzed the various New York opinions and, relying upon the *Byrd* opinion, concluded that the issue was clearly one of procedure. Thus, petitioner was entitled to a jury trial of the issue involved.

The *Rand* case raises several significant questions. First, in relation to the *Rand* decision itself, the court did not give any logical reason to support its conclusion that the right to jury trial is procedural. This is quite disheartening in light of the fact that the decision was based on an application of the *Erie* test. Second, with regard to the *Byrd* case, the court only cited the portion of that case which spoke in terms of the *Erie* test, but then justified a trial by jury based upon the strong federal policy argument used by the Court in the *Byrd* case in connection with its analysis of the "outcome" test. Thus, the *Rand* case also presents the question raised previously: Was it necessary for the Court in the *Byrd* case to analyze its fact situation in terms of the "outcome" test? For if the court in the *Rand* decision could find a federal policy favoring a right to jury trial based *solely* on *Erie R.R. v. Tompkins*,[23] then either the decision in the *Rand* case is wrong, or federal policy is stronger than either the *Erie* or "outcome" tests. It is submitted that the *Rand* case indicates the federal policy prevails regardless of whether the *Erie* test or "outcome" test is employed.[24]

Finally, the *Wirtz* and *Rand* cases are incompatible because the former involved a diversity situation, while in the latter, jurisdiction was based on a federal statute. In the *Rand* case, once the asserted right to

22. *Ibid.*

23. 304 U.S. 64 (1938).

24. Another point of concern in the *Rand* case is the fact that no state statute was involved. In *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.* the magic words "special relationship," "form and mode of trial" and the like were used to interpret a state statute in connection with state court opinions. Thus, the use of the special words in the *Byrd* decision really discussed the relationship of the state statute to the court opinions. The court in *Rand v. Underwriters at Lloyd's*, however, embraced the words to find a relationship between the asserted right to jury trial and the state court decision. Perhaps the distinction is academic because the result reached in both cases was the same. On the other hand, to cite *Byrd v. Blue Ridge* and its use of words, and apply them to a distinguishable situation can only lead to confusion in the future. Thus, *Rand v. Underwriters at Lloyd's* is an example of what can occur when a court indiscriminately adopts catchy words and phrases of a previous decision.

a jury trial of the issue was found to be procedural, the jury trial could be justified in terms of federal policy.

The court in the *Wirtz* case, on the other hand, did not have to first decide whether the right was substantive or procedural because of the basis of jurisdiction. Federal law controlled the entire proceedings, and the court could have gone directly to the Constitution to justify its conclusion, instead of incorrectly relying on the *Byrd* case. There is a significant difference between the policy decision in the *Byrd* opinion and a decision based on a federal statute. The former must first consider state law on the subject while the latter does not even concern state law.

Extension of Byrd v. Blue Ridge —
Safeway Stores v. Fannan[25]

Third, the *Byrd* case has been extended beyond the issue of right to a jury trial of legal issues in a diversity case. It has been applied to the question of which law, state or federal, controls the sufficiency of evidence for the jury's consideration.

In the *Safeway* case, the Ninth Circuit Court of Appeals analogized the holding in the *Byrd* case to the situation in which a party must present evidence sufficient for the court to turn the case over to the jury. Prior to the *Erie, Guaranty,* and *Byrd* cases, it was held that a salient distinction existed between proving the *elements* of a cause of action and the adequacy or weight of the evidence.[26] Courts sitting in diversity cases decided that under the *Erie* test the sufficiency of evidence presented was a procedural matter and, therefore, was controlled by federal law.[27] The same courts found the *elements* of a cause of action were governed by state substantive law.

The court in the *Safeway* case followed this general rule, but relied on the *Byrd* opinion to justify its decision. Signficantly, the court recognized that the *Byrd* case involved a different factual and procedural situation, yet it was held that the *Byrd* decision "reached the same result."[28] Assuming that the conclusion in the *Safeway* case was valid, it is difficult to understand why the *Byrd* decision was cited at all. Certainly there existed extensive authority more directly in point.[29] Furthermore, to say that the *Byrd* case reached the same result, even though the *Byrd* and *Safeway* cases dealt with different factual and procedural situations, is completely disarming.

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25. 308 F.2d 94 (9th Cir. 1962).
26. See 2 MOORE, FEDERAL PRACTICE ¶ 38.10 (2d ed. 1951) and cases cited therein.
27. *Ibid.*
28. Safeway Stores Co. v. Fannan, 308 F.2d 94, 97 (9th Cir. 1962).
29. MOORE, *op. cit. supra* note 26.

To suggest the court in the *Safeway* case was justified in citing the *Byrd* case would involve an extension of the federal policy decision portion of the *Byrd* opinion to situations not manifested in that opinion. If federal policy supposedly embraces many facets, of which the right to jury trial and sufficiency of evidence are only parts, then the "hidden" reasoning in the *Safeway* case is valid. But even a most thorough reading of that decision shows no significant policy argument, especially when compared with the policy argument of the Court in the *Byrd* decision. It is possible that both cases may be cited for the same proposition; that the sufficiency of evidence in diversity cases is a matter of federal policy. This would be a regrettable and unnecessary result.

Extension of the Influence of Strong Federal Policy — Kern v. Hettinger.[30]

Fourth, it has been held that the *Byrd* case stands for the proposition that a federal court should determine and control the scope of its own judgment in diversity cases. This conclusion has been reached without relying upon either the *Erie* test or the "outcome" test.

In *Kern v. Hettinger,*[31] a diversity suit for libel and slander, the court was faced with the issue of state or federal law governing the dismissal of a case. Citing the *Byrd* decision, the Sixth Circuit Court of Appeals held that federal courts should have control over their own trials. Because the case was brought in federal court, the court determined that the strong federal policy evinced in the *Byrd* decision applied and, therefore, federal law controlled. Essentially, it was said that to hold otherwise would result in the control of diversity suits by state courts.

The significant point of the *Kern* case is the fact that it expressly denied the applicability of the test employed in the *Erie* case and did not mention the "outcome" test.[32] This is one of the few decisions in which a federal policy decision in a diversity suit is *not* so grounded. The federal policy is thus seen in full bloom and evidence of its strength is great. Still, the following question is raised: Is federal policy in diversity cases so strong that there are no limits upon it? If justification is unnecessary under the criteria established in either the *Erie, Guaranty,* or *Byrd* cases, is it reasonable to assume a return to the doctrine of *Swift v. Tyson*[33] looms in the near future?

Admittedly, the dismissal of a diversity case and its extraterritorial effect are clearly procedural matters under the *Erie* test and, undoubt-

30. 303 F.2d 333 (2d Cir. 1962).
31. *Ibid.*
32. Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962).
33. 41 U.S. (16 Pet.) 1 (1842).

edly, state law would not be applied under the "outcome" test. Nevertheless, does such a policy decision relate to the right or non-right to jury trial in diversity cases? On the basis of the *Kern* decision, can a federal court resolve the issue of jury trial solely on federal policy, without using either the *Erie* test or the "outcome" test? If this is the intention of the court in the *Kern* case, it is in conflict with the *Byrd* decision because the Court in the *Byrd* case expressly established standards (though admittedly muddled) under which the right to jury trial could be determined. In that case, it was first necessary to determine the right (in terms of either the *Erie* or *Guaranty* tests), and then apply federal policy if the right was under federal law.[34] The court in the *Kern* case "jumps" this intermediate stage of determination and decides the issue on the basis of policy alone.

Confusion: Conflict in Circuit Courts —

Dill v. Scuka[35]

Fifth, a single decision has held that the effect of the *Byrd* case has precipitated a conflict in the federal courts of appeals which should be resolved.

Dill v. Scuka[36] was a malpractice action in which jurisdiction was based on diversity of citizenship. A major issue raised on appeal to the court of appeals was whether the federal court should follow state law when considering the sufficiency of evidence, a question similar to the one presented in *Safeway Stores Co. v. Fannan.*[37] Petitioner relied on the *Erie* and *Byrd* cases for the contention that the federal rules should apply. The court, however, recognized that the *Byrd* opinion did not expressly rule on that issue and had created a conflict in the circuits.

The court avoided deciding whether federal or state law applied by holding that the rules of evidence were the same in this situation. This hesitant approach differs substantially from the strong policy argument by the court in the *Kern* case. Thus, at least in these two cases, it would seem that a significant disagreement exists. In summary, it can be said that the *Byrd* case has caused many new problems in the area of diversity cases, and that *Dill v. Scuka*[38] is the only case reported in which the opinion recognizes the conflict created.

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34. See note 14 *supra.*
35. 279 F.2d 145 (3d Cir. 1960).
36. *Ibid.*
37. 308 F.2d 94 (9th Cir. 1962).
38. 279 F.2d 145 (3d Cir. 1960).

BYRD V. BLUE RIDGE — RECENT UNITED STATES SUPREME COURT CITATIONS

That the decision in the *Byrd* case has created a conflict in the circuit courts is apparent, if only based upon the cases commented on in this article. Nevertheless, the United States Supreme Court, in two recent decisions,[39] which necessarily involved the opinion in the *Byrd* case, ignored the conflict in the federal courts of appeals.

Atlantic & Gulf Coast Stevedores v. Ellerman Lines, Ltd.[40]

The *Atlantic & Gulf Coast Stevedores* case was before the Court in late 1962. There, it was stated that the right to jury trial in diversity jurisdiction cases is *guaranteed* by the seventh amendment. In reaching its conclusion, the Court relied heavily upon the decisions in *Byrd* and another case, *Dice v. Akron C. & Y. Ry.*[41] To understand the *Atlantic* case and its possible effect upon future cases, a discussion of the *Dice* case is first necessary.

Dice v. Akron C. & Y. Ry.[42] was an appeal to the Supreme Court under the Federal Employer's Liability Act.[43] The unique provisions of this statute state that actions alleging employer liability can be initially brought in the proper state court or in the federal district court, with ultimate appellate jurisdiction resting in the federal court system. At the outset, it is evident that a possibility of conflict between federal and state practices would exist. In the *Dice* case, the specific issue was whether Ohio or federal law would control the question of a fraudulently obtained release. In Ohio, that question is decided by the judge, while federal courts would obviously favor a jury trial determination because of the strong federal policy.

A previous F.E.L.A. case had held that a five-sixths jury verdict based on state law was permissible in an F.E.L.A. decision.[44] Respondent attempted to analogize these decisions to his own case, arguing that since the court had permitted a five-sixths verdict based on state law, then the jury trial could be denied completely if state practice so provided.

39. Simler v. Conner, 372 U.S. 221 (1963); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962).

40. 369 U.S. 355 (1962).

41. 342 U.S. 359 (1951).

42. *Ibid.*

43. 45 U.S.C. § 51 35 Stat. 65, 45 U.S.C. §§ 51-60 (1952).

44. Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916). The *Bombolis* case also presented the question of right to jury trial, but in a manner distinguishable from the subject of this article because a federal statute existed upon which jurisdiction was based. Nevertheless, the idea of a federal policy controlling the right to a jury trial in diversity cases has travelled a long road since 1916. In *Bombolis,* a five-sixth jury verdict was allowed to stand, despite the existence of the seventh amendment. *Quaere,* would the result be the same today in light of the Byrd case? Obviously it would not.

This argument failed. The Court in the *Dice* case decided that because of the federal statute's wording, the seventh amendment controlled and petitioner was entitled to a jury trial *and* a unanimous verdict.

Resultant Muddle

The *Atlantic* case, however, did not involve a federal statute, but was an action brought by a longshoreman for injuries purportedly sustained in the course of employment. Although plaintiff, as a longshoreman, had available to him several federal statutes on which the action could have been grounded, jurisdiction was based solely on diversity of citizenship.[45] The primary question raised on appeal was whether plaintiff had a right to a jury trial of the issues. The Court, combining the holdings of the *Byrd* and *Dice* cases, held that plaintiff's right was *guaranteed* by the seventh amendment.

By citing these two cases for the same proposition, however, the Court truly confuses the matter. The *Byrd* and *Dice* cases basically involved different questions. The *Byrd* case was concerned with a state statute, interpreting the relation of the statute to the state court opinions and diversity jurisdiction. The *Dice* case, however, dealt with a federal statute and its interpretation in relation to the United States Constitution. To say that these two cases when cited together justify or guarantee a party's right to jury trial in a diversity suit is to completely bastardize the holdings of both cases.

Simler v. Conners[46]

Citing the *Byrd* and *Dice* cases together presents the possibility of future conflict in which *either* case can be relied on by a court for the conclusion reached in the *Atlantic* case. This undesirable result has occurred in the recent holding of *Simler v. Conners*.[47] There, the United States Supreme Court, faced with a long history of Oklahoma court decisions favoring a judge determination of the issues presented, boldly stated that the right to a jury trial in diversity suits is *guaranteed* by the Constitution. The *Byrd* case, but not the *Dice* decision, was relied on for such a conclusion. Although the Court in the *Byrd* case expressly stated that its

45. The Court mentioned several available alternative remedies. Atlantic & Gulf Coast Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 359 (1962). First, as a longshoreman, petitioner could have sued on the stevedoring contract, either in admiralty or federal civil court under 33 U.S.C. § 905 (1927). Second, the petitioner could have instituted proceedings in federal civil court under the provisions of the Jones Act, 46 U.S.C. § 688 (1920). Third, the cause of action could have been brought in admiralty court. See American Stevedores, Inc. v. Porello, 330 U.S. 446 (1947).

46. 372 U.S. 221 (1963).

47. *Ibid.*

holding was a policy decision under the *influence, not* the command of the seventh amendment, it is now cited for guaranteeing the right.

CONCLUSION

Ostensibly, both the *Erie* and "outcome" tests are still the law of the land because neither have been expressly overruled. True, the federal courts take much time delineating substantive and procedural matters in diversity cases, or reasoning that the outcome of a diversity case would be no different than that in a state court. But do these two tests have any real meaning in light of the *Byrd, Atlantic,* and *Simler* cases? Regarding an asserted right to a jury trial of legal issues in a diversity suit, the answer seems to be: apparently not. The use of the words "guaranteed by the seventh amendment," employed in connection with the often used phrase "this is a federal policy decision," is indicative of an express denial of both tests. Indeed, why should a federal court in the future feel bound to apply the *Erie* or "outcome" tests when faced with the strong federal policy (once influencing) now guaranteeing the right to a jury trial in a diversity case? For if the United States Supreme Court thinks federal policy is more important than applying the tests of the past, then certainly the lower federal courts should not feel obligated either.

But the problem involves more than an asserted right to jury trial. Examples of expanding the meaning and strength of federal policy to other quasi substantive or quasi procedural situations has occurred in cases subsequent to the *Byrd* decision. And with the added impact of the *Atlantic* and *Simler* cases it can be expected to continue expanding. Perhaps in the future the Court will finally overrule the *Erie* and "outcome" tests and relative peace and order will be restored, except for a multitude of comment by law professors, lawyers, and law students. At present, however, it must be submitted that federal policy decisions in diversity cases represent, in effect, federal substantive law, which suggests a return to *Swift v. Tyson.*[48]

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48. 41 U.S. (16 Pet.) 1 (1842).