CONFLICT OF LAWS—WHERE JURISDICTION IS BASED ON DIVERSITY OF CITIZENSHIP, FEDERAL COURTS FACED WITH QUESTIONABLE STATE PRECEDENT MAY MAKE ANTICIPATORY PRONOUNCEMENTS OF STATE LAW. *Riess v. Murchison* (9th. Cir. 1967).

In June of 1955 Mr. and Mrs. Riess, residents of California, contracted to sell to G. W. Murchison, a resident of Texas, a three and one-half acre parcel of land located in Ventura County, California. After a downpayment, the rate of the remaining payments was to be determined by the amount of water that could be produced from the purchased property. Similarly, the amount and sufficiency of the water on the land was to be the determining factor controlling the buyer's duty to construct a reservoir and install a pipeline on the land. In the event of a disagreement as to the sufficiency of the water, the question was to be submitted to arbitration. After fifteen months of compliance with the terms of the agreement, the buyer refused to make further monthly payments, alleging among other things,[1] that because the water on the purchased property was insufficient, his duty to build and install the reservoir and pipeline did not arise. Alleging a breach by repudiation, the seller-plaintiffs brought an action in the federal district court, jurisdiction being based on the diversity of citizenship of the parties. Plaintiffs maintained that, since the buyers had repudiated the contract, arbitration could not properly be allowed under California law[2] and that the federal court was bound by that state's precedent. After extended litigation,[3] however, the district court ordered the issue of sufficiency of the water submitted to arbitration. On appeal to the Ninth Circuit Court of Ap-

[1] The buyers also alleged that they had made certain "voluntary payments" in advance, and were not behind in their payments because the advance payments should have been credited against the balance which accrued during the period of the dispute. There were two defendants because Murchison assigned the contract to Simi Valley Development Co. before the suit was brought.

[2] Hanes v. Coffee, 212 Cal. 777, 300 P. 963 (1931).

[3] At the intial trial in the district court, it was found that the defendant's duty to build the reservoir was absolute, so that the question of sufficiency of water, and thus arbitration of that question was not relevant. On a subsequent appeal by both sides, the salient portion of the circuit court's decision was to the effect that the sufficiency of the water on the purchased property was quite material to the case. The circuit court further held that "[*i*]*f* the present case is one which is otherwise proper for arbitration the buyers are entitled to have the question of sufficiency settled by arbitration." Riess v. Murchison, 329 F.2d 635, 644 (9th Cir. 1964). Notwithstanding seller's allegations of total repudiation by buyers, the circuit court pointed out that the district court had held on remand that the buyers were not "in default or otherwise precluded from proceeding with arbitration," and that the case was "otherwise proper for arbitration." 384 F.2d 727, 731 (9th Cir. 1967).

peals, *held*, order requiring arbitration sustained: The question of repudiation is irrelevant to the propriety of arbitration because California courts *would*, if confronted with this situation, disregard precedent and require arbitration. *Riess v. Murchison*, 384 F.2d 727 (9th Cir. 1967).

In rendering this decision, the circuit court was confronted with a problem that has been in the background of our federal-state judicial system since the celebrated case of *Erie v. Tompkins*.[4] Under *Erie* and its progeny,[5] the task of a federal judge in diversity cases is to act as a state court judge in applying substantive law. Writing for a unanimous Court in *Fidelity Union Trust Co. v. Field*,[6] Mr. Chief Justice Hughes affirmed this proposition by declaring that it was unacceptable "that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts . . . ."[7] Under the *Erie* doctrine it is clear that, in diversity cases, the substantive aspects of the case are to be determined according to the law of the forum state.

The question raised by *Riess*, and not authoritatively answered by *Erie* and its descendants, is: How, and from what source does the federal court judge glean the state law which *Erie* requires to be applied? With reference to the facts of the *Riess* case, more particularly the question is whether a federal court can anticipate a change in state law which has not yet been declared by the state court?

Before examining how *Riess* and other cases have dealt with this problem, it should be pointed out that however the question is decided, the answer may still produce the proclivity to forum shop which *Erie* sought to prevent. If a federal court is of the opinion that the law of the state may be determined only by viewing existing state precedent, no matter what the vintage, "[the] lawyer whose case is dependent on an old or shaky state court decision which might no longer be followed within the state, or not obtain the approval of the highest court of the state, will have a strong incentive to maneuver the case into a federal court . . ."[8] where the antiquated precedent will be mechanically applied. The net result of this change in

[4] 304 U.S. 64 (1938).
[5] Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
[6] 311 U.S. 169 (1940).
[7] *Id.* at 180.
[8] C. WRIGHT, FEDERAL COURTS § 58, at 205 (1963).

forums is inequality in judicial administration, with its alleged attendant denial of equal protection of the law.[9]

An alternative, but one which leads to the same problem, is presented by the federal court which believes it can anticipate what state law *will* become. If the anticipatory pronouncement of state law is based on a clear judicial trend, and there appear to be no ambiguities or undercurrents of doubt existing in the state, the decision to disregard an antiquated precedent is probably the only correct one.[10] Clearly, however, the danger in federal predictions of state law lies in the possibility that they may never be adopted by the state. Thus, although opposite in approach from the strict, mechanical method outlined above, the result will be just as inimical to the goals of the *Erie* doctrine.

A brief survey of the cases indicates that there is no unanimity of opinion in the federal courts as to the permissible scope of a federal judge's inquiry so as to ascertain the current status of state law. In *Turnknett v. Keaton*,[11] the appellant asked the Fifth Circuit to disregard two Texas decisions handed down 16 and 24 years earlier that had denied a cause of action for injuries to an unborn child. The appellant contended that the trend of modern decisions in other jurisdictions was toward a more liberal rule and requested the circuit court to hold that the Texas judiciary would adopt the modern decisions. The circuit court held that the *Erie* principle prevented it from taking cognizance of the trend, and, instead, followed the existing Texas opinions.[12] The Fifth Circuit reached a like conclusion in the case of *Polk County v. Lincoln Nat'l Life Ins. Co.*[13] There, Polk County sought to recover premiums it had paid the appellee insurance company to provide workmen's compensation coverage for county employees. Appellant contended that a 32-year-old opinion of the

[9] Although the *Erie* decision has been cited for the proposition that reaching different results on the same question of law in federal and state courts is a denial of equal protection of the law (*see* Hanna v. Plumer, 380 U.S. 460, 468 (1965)), the opinion has been expressed in many quarters that there was not sufficient basis for reaching the result based upon the equal protection clause. *See* C. WRIGHT, FEDERAL COURTS § 56, at 197 (1963).

Whether the constitutional underpinning of the *Erie* rule should be the equal protection clause or some other part of the Constitution, *e.g.*, the residuary clause of the 10th amendment, the goal of the *Erie* doctrine remains the same; the same outcome whether suit be brought in the federal or state courts.

[10] Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 205 (1956) (Frankfurter, J., concurring).

[11] 266 F.2d 572 (5th Cir. 1959).

[12] *Id.*

[13] 262 F.2d 486 (5th Cir. 1959).

Georgia Supreme Court[14] prohibited such payments by counties. Appellee, on the other hand, asserted that the present weight of authority would allow such payments, and the district court, citing several intermediate Georgia court cases,[15] agreed. Denouncing this approach by the district court as an attempt "to psychoanalyze state court judges rather than to rationalize state court decisions,"[16] the circuit held:

> We are not permitted to overrule a decision of the Supreme Court of Georgia on any theory that the Georgia Supreme Court, as presently constituted, would not be bound by what it had said when differently constituted some years ago. Nor can we apply, in diversity cases, a rule of stare decisis which permits us to weigh the degree of authority . . . with the spirit of the times. The Georgia courts can overrule their prior decisions. The Federal Courts cannot do so.[17]

Contrary to this reasoning, federal courts in other circuits have indicated that they *do* have the power to disregard state supreme court decisions which apparently have been ignored in subsequent opinions in the state or, though never expressly overruled,[18] have become discredited by recent dictum. In *Mason v. American Emery Wheel Works*[19] the district court, sitting in Rhode Island, came to the "reluctant" conclusion that it was bound by a Mississippi decision made 29 years before which required privity of contract between manufacturer and user before the latter could recover for harm caused by the former's negligence.[20] In reversing the district court, the First Circuit observed:

> Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction.[21]

After noting that the Mississippi Supreme Court was cognizant of the present trend to disregard privity, the federal court held that if

14 Floyd County v. Scoggins, 164 Ga. 485, 139 S.E. 11 (1927).
15 262 F.2d 486, 489.
16 *Id.*
17 *Id.* at 490. For instances of similar reasoning by federal courts see Smithey v. St. Louis S.W. Ry., 237 F.2d 637 (8th Cir. 1956); Barlow v. De Vilbiss Co., 214 F. Supp. 540, 543 (E.D. Wis. 1963); Bailey v. Erie R.R., 143 F. Supp. 351 (N.D. Ohio 1956).
18 *See* C. WRIGHT, FEDERAL COURTS § 58, at 204 (1963).
19 241 F.2d 906 (1st Cir. 1957).
20 *Id.* at 908.
21 *Id.* at 909.

this case were to come before the Mississippi court, "Mississippi [would] declare itself in agreement with the more enlightened and generally accepted modern doctrine."[22]

In another recent case[23] involving the determination of a state's current choice of law rules in connection with the law governing the performance of a contract, a federal court again anticipated the outcome of a future state supreme court decision. Holding that the Alabama Supreme Court would abandon its earlier choice of law rule, the district court indicated that "[t]here is no *Erie* . . . obligation to follow the prior decisions of the supreme court where there is some assurance that the court would now decide otherwise."[24]

Without explicitly discussing the problem of prognosticating state law, the circuit court in *Riess* followed a similar reasoning process in attempting to ascertain the present status of California law with respect to arbitration. In its study of California law, the circuit court was faced with a decision[25] directly in point that had been rendered by the Supreme Court of California 36 years previously and never overruled. In that case the Supreme Court of California ruled that one who repudiates a contract which contains an arbitration agreement may not invoke the arbitration section of the contract in subsequent litigation. Faced with this antiquated pronouncement which had apparently been contradicted by recent analogous decisions toward the utilization of arbitration, the Ninth Circuit sought to determine how the Supreme Court of California would currently answer the same question. After a well documented search[26] of the current au-

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22 *Id.* at 910.

23 Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 251 F. Supp. 3 (N.D. Ala. 1966).

24 *Id.* at 8, n.7 (citations omitted). This case is indicative of the uncertainity of the federal courts in this area, since the Alabama District Court lies within the Fifth Circuit (a circuit that has been earlier cited for a strict approach). Consistency with previous statements by the Fifth Circuit would probably have compelled reversal if the case had been appealed.

For a striking example of federal judges division on the permissible scope of their freedom to ascertain state law, compare Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 251 F. Supp. 3 (N.D. Ala. 1966), with Barlow v. De Vilbiss Co., 214 F. Supp. 540 (E.D. Wis. 1963).

25 Hanes v. Coffee, 212 Cal. 777, 300 P. 963 (1931).

26 The court cited several cases which demonstrated that it has long been California policy to enforce arbitration agreements: Posner v. Grundwald-Marx, Inc., 56 Cal. 2d 169, 363 P.2d 313, 14 Cal. Rptr. 297 (1961); Utah Constr. Co. v. Western Pac. R.R., 174 Cal. 156, 162 P. 631 (1916); Myers v. Richfield Oil Corp., 98 Cal. App. 2d 667, 220 P.2d 973 (1950). *Accord*, Heyman v. Darwins, Ltd., [1942] A.C. 356. Although by itself this English case would be merely persuasive authority, it was pointed out that the *Heyman* decision has been indorsed by several American courts.

thorities and developments, the *Riess* court concluded, "the California courts—which have gained a justified reputation for progressive legal craftmanship—would resolve this difficult question by reaffirming the language of their more recent decisions . . ."[27] and, therefore, held that the question of repudiation is immaterial to the availability of arbitration.

Conceding that these federal predictions of state law have probably not deviated from what the state courts would actually decide, this hit-and-miss method of determining state law remains unacceptable. When federal court judges delve into the amorphous "might-be" law of the state, there is no assurance that the particular finding will actually become state law. On the other hand, the opposite result is certainly unfair to litigants who happen to find themselves in federal courts which rigidly apply judicially enunciated state law, no matter how antiquated.

Inasmuch as the equal protection clause of the Constitution and *Erie* compel the equal administration of the law, and conceding that the current methods used by the federal courts fall short of this goal, it would seem that some method of accurately ascertaining state law is necessary.[28] The problem is not insoluble.

The simple and probably only sure solution, where state law appears to be in flux, or where existing precedent is old and unreliable, would be to certify the question before the federal trial court to the state supreme court for an authoritative answer. Such a procedure has been adopted by Florida[29] and endorsed by the United States Supreme Court in the case of *Clay v. Sun Insurance Office Ltd.*[30] Faced with an unresolved question of state law (which the Supreme Court has traditionally attempted to decide before adjudicating con-

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27 384 F.2d at 735.

28 *See* discussion note 9 *supra.*

29 FLA. STAT. ANN. § 25.031 (1961).
Supreme court authorized to receive and answer certificates as to state law from federal appellate courts:
The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

30 363 U.S. 207 (1960).

stitutional questions) the case was remanded so that the question might be certified to the Supreme Court of Florida for an answer. Extolling the virtues of Florida's certification procedure, Justice Frankfurter stated that:

> The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.[31]

Two disadvantages of a certification system have been suggested.[32] First, is the fear that the necessary minimization of the question of law involved would compel the state supreme court to consider the issue without sufficient background to come to a proper conclusion. It would seem that this problem could be obviated by securing from the litigants their respective points and authorities on the specific question. This, coupled with the federal court's finding of facts, would seem to give the state supreme court an adequate background. Secondly, certification would add delay to what is probably already lengthy litigation.[33] Through the use of the litigant's points and authorities, and by requiring in the certification statute that the question be answered within 60 days, this objection could be diminished.

Without a system of certification it seems clear that there is no accurate and authoritative system whereby doubtful questions of state law can be resolved. As long as federal courts are unable to determine with accuracy what the current state law is, the problem of unequal administration of the law will remain. If equal protection and equal administration of the law are to be afforded in the federal-state system, then a certification procedure to accurately determine state law would seem to be mandatory.

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31 *Id.* at 212.
32 Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 646 (1951).
33 *Id.*