

basis for its decision: that under the Rules of Decision Act²⁰ the federal courts must, at a given moment, apply the then controlling decision of the highest state court. If this is true, what has happened to the doctrine of the *Gelpcke* case,²¹ the so-called "contract exception," which is the rule in many states as well as in the federal courts?²²

Although the Court attempted in the instant case to resolve the confusion in the federal cases, the opinion actually added to it by stating two distinct grounds for the holding, since the choice of one or the other rationale may impel opposite holdings in particular cases. A sounder view would seem to be that a state's rule as to retrospective application of overruling decisions is a part of its substantive law within the rule of the *Erie* case and, as such, must be followed by the federal courts in diversity cases. This view would be in harmony with the effort of the Court in the *Erie* case to eliminate substantial disparities between the state courts and federal courts sitting in matters governed by state law. M. D. C.

FEDERAL PROCEDURE—AVOIDING FEDERAL JURISDICTION—ASSIGNMENT TO PREVENT DIVERSITY OF CITIZENSHIP—[Federal].—A policy of insurance was issued by defendant company, an English corporation. For the sole purpose of keeping an action on the policy in the Missouri courts, the heirs of the beneficiary assigned their rights to plaintiff, a citizen of England and a resident of Missouri. By the terms of the assignment, the assignee was to file suit or otherwise compromise the claim under the policy, receive any money that might be paid on the claim, pay expenses incurred in the collection of the money, and hold the residue of any money thus received in trust for the heirs. Suit was therefore filed in the state court, which granted defendant's petition for removal to the federal court on the ground that there was diversity of citizenship between the heirs and the corporation and that the assignment was a sham to prevent removal. Plaintiff moved to remand. *Held*: Motion granted. The practice of avoiding the jurisdiction of federal courts by an assignment to prevent diversity of citizenship is recognized and approved. *Daddy v. The Ocean Accident and Guarantee Corp.*¹

By the Judiciary Act of 1875,² the federal courts are compelled to dismiss or remand a case if it appears that a colorable assignment or joinder has been made for the purpose of giving them jurisdiction. The Supreme Court has, however, established the general rule that a colorable assignment for the purpose of keeping an action *out* of the federal courts may

20. 28 U. S. C. A. (1928) sec. 725: "Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States 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."

21. See cases cited *supra* note 14.

22. See cases cited *supra* note 4.

1. (D. C. E. D. Mo. 1941) unreported.

2. Act of March 3, (1875) 18 Stat. 470, c. 137, 28 U. S. C. A. (1928) sec. 80.

not be questioned.³ The colorable nature of the assignment in the latter situation cannot be pleaded in the federal court, but can only be shown as a defense to the action in the state court. However, the overwhelming weight of authority in the state courts allows the holder of the bare legal title to bring an action under "real party in interest" statutes.⁴ The result of the application of this state rule is that actions involving colorable assignments are determined on their merits in the state court.

The instant case squarely overrules *Phoenix Mutual Life Insurance Co. v. England*,⁵ decided by the same judge in 1938. The court, in the *Phoenix* case, attempted to engraft upon the general rule the *dictum* in *Ex parte Nebraska*.⁶ The plaintiffs in the *Nebraska* case attempted to prevent removal to the federal courts on the ground that the state of Nebraska had been joined as a party plaintiff.⁷ It does not appear, however, whether the joinder had been purposely made to prevent the jurisdiction of the federal court from attaching. The Supreme Court, in that case, indicated that the federal court must look behind appearances to discover interest or lack of it on the part of the parties to the suit and thus determine the real parties to the controversy.⁸ This *dictum* was based on the general rule that the jurisdiction of the federal courts cannot be defeated by joining formal, nominal, or uninterested parties.⁹ On the strength of the *dictum* in the *Nebraska* case concerning joinder, the court refused in the *Phoenix* case to remand a case involving a colorable assignment.

Hence, if a colorable assignment is made to keep a cause in the state court and the suit is brought in the state court, the cause is not removable to the federal court. However, if the purpose of the colorable assignment is to give the federal court jurisdiction, the federal court cannot take jurisdiction. If, on the other hand, an attempt is made to give jurisdiction to

3. *Provident Saving Life Assur. Soc. v. Ford* (1885) 114 U. S. 635; *Oakley v. Goodnow* (1886) 118 U. S. 43; *Leather Manufacturers' Nat'l Bank v. Cooper* (1887) 120 U. S. 778; *Mecom v. Fitzsimmons Drilling Co.* (1931) 284 U. S. 183.

4. *Bernblum v. Travelers Ins. Co.* (D. C. W. D. Mo. 1934) 9 F. Supp. 34; See Clark, *Code Pleading* (1928) p. 102, n. 40, 43. It is the rule in the majority of state courts that an assignee for collection only is the proper party to bring a suit under the same statutes. See 2 Moore, *Federal Practice Under the New Federal Rules* 2051, sec. 1708, n. 12.

5. (D. C. W. D. Mo. 1938) 22 F. Supp. 284.

6. (1907) 209 U. S. 436.

7. A suit in which a state is a party cannot be removed on the grounds of diverse citizenship. If the suit is one arising under the Constitution or laws of the United States or treaties made under their authority, it is removable even when the state is a party. U. S. Const. Amend. XI. See *Ames v. Kansas* (1884) 111 U. S. 449; *Stone v. South Carolina* (1886) 117 U. S. 430; *Postal Telegraph v. Alabama* (1894) 155 U. S. 482; *Chicago R. I. and P. Ry. v. State of Nebraska* (C. C. A. 8, 1918) 251 Fed. 279.

8. But the case was expressly decided on the ground that the remedy was by appeal and not by mandamus. *Ex parte Nebraska* (1907) 209 U. S. 436, 437.

9. *Walden v. Skinner* (1879) 101 U. S. 577. See: *Wilson v. Oswega Twp.* (1894) 151 U. S. 56; *Geer v. Mathieson Alkali Works* (1903) 190 U. S. 428; *Salem Trust Co. v. Manufacturers' Finance Co.* (1924) 264 U. S. 182.

the federal court or prevent the jurisdiction of the federal court from attaching by way of joinder rather than by assignment, the federal court, when called upon to hear a motion for removal from a state court, must strike formal, nominal, colorable, and uninterested parties. The same result follows when the action is first brought in the federal court. After striking, the court will determine whether it must take jurisdiction. S. F.

MANDAMUS—ISSUANCE TO LEGISLATIVE OFFICER—NATURE OF SPEAKER'S DUTY TO DECLARE ELECTION OF GOVERNOR—[Missouri].—The Constitution of Missouri provides that "The returns of every election" for governor "shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the House of Representatives, who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, * * *. The person having the highest number of votes" for the office of governor "shall be declared duly elected; * * *."¹ On the face of the returns of the election for governor in 1940, relator received a plurality of the votes cast for the office. Immediately after the organization of the House, the General Assembly, charging irregularity and fraud in the election, passed a resolution providing for an investigation. In accord with this resolution the speaker refused to open and publish the returns and to declare the election of relator, pending an inquiry into the legality of the votes. Relator sued for a writ of mandamus to compel the speaker to act. *Held*, that mandamus must issue because the Constitution of Missouri imposed a ministerial duty on the speaker, free from legislative control, to open, publish, and declare the results of the election. *State ex rel. Donnell v. Osburn.*²

Mandamus will ordinarily issue to compel the performance of a ministerial,³ as distinguished from discretionary,⁴ duty. The writ will not issue if the duty, though ministerial, rests upon the legislature,⁵ or upon a legis-

1. Mo. Const. art. V, sec. 3.

2. (Mo. 1941) 147 S. W. (2d) 1065.

3. *State ex rel. Register of Lands v. Secretary of State* (1863) 33 Mo. 293; *Dreyfus v. Lonergan* (1898) 73 Mo. App. 336; *State ex rel. Schade v. Russell* (1908) 131 Mo. App. 638, 110 S. W. 667; Note (1935) 20 ST. LOUIS LAW REVIEW 346, 355.

4. *State ex rel. Best v. Jones* (1900) 155 Mo. 570, 56 S. W. 307; *State ex rel. Clark v. West* (1917) 272 Mo. 304, 198 S. W. 1111. However mandamus will issue to compel the exercise of discretion though the court will not substitute its judgment for that of the recalcitrant officer. *State ex rel. Gehrig v. Medley* (1930) 28 S. W. (2d) 1040. Mandamus will also issue to correct an abuse of discretion. *State ex rel. Kelleher v. Public Schools* (1896) 134 Mo. 296, 35 S. W. 617; *State ex rel. Journal Printing Co. v. Dreyer* (1914) 183 Mo. App. 463, 167 S. W. 1123; *State ex rel. Farmers' Bank v. Township Board* (1915) 188 Mo. App. 266, 175 S. W. 139; Comment (1940) 26 WASHINGTON U. LAW QUARTERLY 134.

5. Mandamus will not issue against the legislature because of the respect accorded the co-ordinate branch and because of the unenforceability of the writ against that body. The cases indicate that under no circumstances will the writ lie. However, the decision might also be explained as concerning discretionary duties. *French v. State Senate* (1905) 146 Cal. 604, 80