

2011 HUGH R. JONES MEMORIAL LECTURE

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I am honored to be given the opportunity to deliver a lecture named after one of my dearest friends, Hugh R. Jones. We became fast friends when we were both nominated for the Court of Appeals back in 1972. We ran together -- in those days we had to run in a state wide election - and we were both elected. I was privileged to serve with him on the New York Court of Appeals for a decade.

Although I am aware of the fact that none of us is perfect, I can say, without equivocation that Hugh was as close to being a perfect human being as anyone I have ever met. Remembering the fact that I served on the New York Court of Appeals for twenty years with more than twenty four Judges of the Court, and under three Chief Judges, I can also say that he was one of the best judges with whom I ever served. His mathematical training endowed him with the mind of a logician; this coupled with his vast knowledge of the law, his profound understanding of the human condition, and his worldly experiences equipped him to add an unequalled dimension and profound wisdom to our court.

On a very personal level, when I was in the throes of despair, Hugh drove from Utica to Long Island through a blizzard to spend two days with me. His strength helped me to endure as did our friendship.

I visited with Hugh frequently after I left the Court and was with him shortly before he died. He was severely disabled living in an assisted living facility, but he still brimmed over with his characteristic brilliance, enthusiasm for life, and spirituality. I miss him more than words can say: as a legal scholar, a beloved colleague, and most of all as a dear friend,

FEDERALISM IS ALIVE AND WELL AND LIVING IN NEW YORK

New York State was reluctant to ratify the United States Constitution. New York's reluctance was, in no small measure, due to its unwillingness to cede its state sovereignty to a federal government which, it feared, would take power away from the individual citizen as well the state. Governor George Clinton of New York was an anti-Federalist who stood in strong opposition to the ratification of the Constitution. After all, In New York we had a strong state government and had crafted a unique court system. Our law Chancellor was the brilliant Robert Livingstone, who later swore in George Washington as President of the United States and our first Chief Judge was John Jay who later was to become the first Chief Justice of the United States Supreme Court. We felt no need to place our state or our judicial process into the hands of a federal government,

When the Bill of Rights was added to the Constitution, particularly the 10th Amendment which guaranteed the integrity of state governments, New York's fear of federal government encroachment was mollified. That is until 1801 when John Marshall became the Chief Justice of the United States. Justice Marshall, who had been a leader of the Federalist Party in Virginia, dominated the Supreme Court for over three decades and elevated the federal judiciary to its position as an independent and influential third branch of government.

The Marshall Court was responsible for several important decisions affecting the balance of power between the federal government and the states, repeatedly confirming the supremacy of federal law over state law through an expansive reading of the powers constitutionally vested in the federal government. Although the Jeffersonian Republicans favored stronger state governments, the Federalist Party, with the assistance of the Marshall Court, furthered the cause of building a strong federal government at the expense of the states.

The Depression of the 1930's provided the impetus for an even greater dominance of the federal courts with a strengthening of Supreme Court judicial review, the broad interpretation of the commerce clause, and the application of the Bill of Rights to the states through the Fourteenth Amendment. Nevertheless, there still was a recognition of the state's role in establishing its own common law which the federal courts were constrained to follow. – but just barely.

For example, in 1842, under the case of *Swift v. Tyson*, the United States Supreme Court held that the federal courts were obligated to follow state law *but only to the extent* that those laws related to local matters. These “local matters” were characterized by *Moore's Federal Practice* as falling into such broad categories as personal property, real estate, taxes imposed by municipalities, water rights, and domestic relations. In other areas, the federal courts were free to fashion their own common law.

Under this formulation, the federal courts found it difficult to determine when they had to apply state law. There was inevitable confusion as to whether a particular case implicated general law, subject to the federal “common law,” or if the law to be applied was the state “local law.” Recognizing this difficulty, the Supreme Court, in the 1938 case of *Erie Railroad v. Tompkins*,

observed “the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law”

The Supreme Court sought to eliminate this confusion by the overruling of *Swift* and by deciding, in the *Erie Railroad* case that, except in matters involving the United States Constitution or acts of Congress, federal courts *must* apply state common law to resolve all substantive law issues. The *Erie* court also noted that this decision to defer to state law was consistent with the United States Constitutional principles of federalism as embraced by the 10th Amendment.

Although identifying state law as the law to be applied by the federal courts seemed to resolve the problem, there arose the question as to where that state law was to be found. *Erie* answered by saying that it was to be found in the state law: “declared by its Legislature in a statute or by its highest court.” And if there were no statute or relevant precedence from the state’s highest court from which the federal courts could glean the mandate of state law? The Supreme Court did not answer that question in *Erie*; however, subsequent decisional law from the various federal Circuit Courts of Appeal made it clear that the federal courts must do whatever possible in studying state court precedence, even lower court state opinions and dicta from the high court, in order to make, as one circuit wrote, an “informed prophecy” of how the state’s high court would rule. (*Moores v Greenberg* 834 F2d 1105, 1112.)

The difficulty in determining how the high court of a state would determine a question of law was largely eliminated by a process of inter-jurisdictional certification which would allow a federal court to obtain a definitive answer from a state’s highest court on an unsettled question of state law. This process, although lauded by the United States Supreme Court was slow to take hold in many states. In 1977, the American Bar Association strongly endorsed the certification process, but it wasn’t until the early 1980’s that New York began to seriously consider the certification process. A first year student at Albany Law School, John J. Halloran, Jr. who was working for Assemblyman Edward Griffith, worked on draft legislation to permit the certification process in New York.

However, New York had its own Constitution which, in Article VI, section 3, limited the jurisdiction of the Court of Appeals to certain law questions. Joseph Bellacosa, then the Clerk of the New York Court of Appeals reminded the Legislature that The State Constitution did not permit the answering of certified questions unless in the context of an appeal properly before the Court of Appeals. In addition to the Constitutional prohibition, I can recall the Court’s reluctance to assume an additional work load which the taking of certified questions from the federal courts would entail. In 1982 we had entertained 722 full appeals. In other words, both the New York State Constitution and our own agenda did not favor inter-jurisdictional certification.

The subsequent role played by the persistence of Mr. Halloran, the work of Professor Maurice Rosenberg of the MacCrate Commission, Assemblyman Griffith, Steven Flanders , Circuit Executive of the U.S. Court of Appeals for the 2nd Circuit (who was also extremely helpful in establishing the National State Federal Judicial Council) and Joseph Bellacosa , the former Court Clerk and now my Administrative Judge (later to become a Judge on the Court of Appeals) and others, is excellently chronicled by former Chief Judge Judith S. Kaye and Kenneth I. Weissman (*Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373 (2000)). All played a major role in the ultimate passage of a Constitutional Amendment. But let me share with you some personal recollections.

At that time we were working on the inter-jurisdictional certification process, there was some friction between the state and federal judges. Many law schools pride themselves as “national law schools” and their students are taught federal cases on an almost exclusive basis. Even New York law schools would teach those federal cases which applied New York law as if the federal case were the jurisprudential predicate for the law being applied. During my years as a trial judge, there were countless times when federal cases were cited by attorneys as having established New York tort law or commercial law which, in fact, was part of New York’s legal legacy before the 2nd Circuit was even founded.

State judges, who presided over cases of general jurisdiction, did not appreciate being cited to federal cases when it was the state law which was to be applied. There was a sense that the attorney arguing the case felt that the federal law was somehow superior and more persuasive than the state law. And in areas where the law was not settled, and a conflict existed between the state and federal law, there was a general confusion as to which law should be applied.

In 1982 , my friend and neighbor Federal Judge Jack Weinstein wrote a law review article in which he described the state and federal courts as “two independent systems whose interplay often perplexes the citizen as well as the theorist visualizing the law as an integrated whole.” At or about the same time, I was lecturing a law school class on a point of law relating to a state common law decision just rendered by the New York Ct of Appeals. One of the students asked me the question: “But wasn’t that decision just overruled by the Eastern District of New York?”

Here was a senior law student who felt that the New York Court of Appeals, on a state law question, was inferior to a federal district court. I quickly called Judge Weinstein, who was then Chief Judge of the Eastern District of New York, and told him we had to talk. From that humorous exchange was born the idea of forming the New York State-Federal Judicial Council which I co-chaired along with Judge Weinstein. During the first meeting of the Council we discussed the need for inter-jurisdictional certification. I was persuaded by Judge Weinstein of the necessity for the process and I, in turn, urged the members of my Court to look favorably on a Constitutional Amendment which would expand our Court’s jurisdiction.

I subsequently met with the Majority Leader of the NY State Senate and the Speaker of the Assembly telling them of the sentiments of the State-Federal Judicial Council and the NY Court of Appeals in urging the consideration of their respective legislative houses to enact the appropriate legislation, which, after a second passage, would be followed by a state wide referendum to enact the Constitutional Amendment.

The final form of the Amendment was enacted on January 1, 1986, and was signed by Governor Cuomo in front of a small group – very small. Just the two of us. Article VI, section 3 (b), clause 9, reads:

The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of new York.

After the bill signing the first one I called was Judge Weinstein who was disappointed that the federal district courts could not certify questions to the Court of Appeals. (New York is somewhat unique in this respect.) “It looks as though the Eastern District of New York will have to continue to overrule your Court,” he quipped.

The first case certified to us came from the 2nd Circuit, *Kidney v. Kolmar*, a case which required the interpretation of a New York Statute. After answering the question the 2nd Circuit noted that the certification process was a “valuable device for securing prompt and authoritative resolution of unsettled questions of state law.” Both our Court and the 2nd Circuit were very pleased.

And then came some rough spots. The case of *Rufino v. United States* dealt with the question of whether “loss of enjoyment of life” can be an element of damages in a tort action. Inasmuch as a state case was working its way through the New York courts, we felt that the question would be best resolved in the state case in the normal appellate process. We refused to accept the certified question.

A year later, the case of *Retail Software Inc. v. Lashlee* which involved the dismissal of an action for lack of personal jurisdiction and implicated the New York Franchise Sales Act was certified to our Court. After accepting jurisdiction, and on further examination, it appeared that answering the certified question would not determine the action inasmuch if we found that the statute did not provide a basis for jurisdiction, the long-arm statute would nevertheless subject the defendants to suit in New York. We ultimately declined jurisdiction for the reason that a condition precedent to our accepting a case was that our answer to the certified question would

necessarily determine the action pending in the circuit court. Our rejection of the certified question invited a phone call to me from Chief Judge Irving Kauffman of the 2nd Circuit.

When I explained to him that answering the question would not have determined the action, his response was a curt: “so what? ***there is a question whether the service made was good under your Franchise Act.” I pointed out to him that if we said it was not good, service could still be appropriate under the long-arm statute and therefore our answer would be meaningless. He then, in most agitated fashion, informed me that the case would be decided by the 2nd Circuit and that he didn’t need the New York Court of Appeals. I believe that Judge Kaufman felt that despite our Constitutional limitation, the New York Court of Appeals should be in the business of answering hypothetical questions. After we declined certification, the 2nd Circuit decided that service was good under the long-arm statute. That being the determination, as it turned out, there was no necessity for us to resolve the certified question and we were correct in not accepting it.

I have no need to detail the high and low points of certification – Judge Kaye and Mr. Weissman have given an excellent reprise of those cases in the Fordham Law Review Article to which I referred; however, I would like note that despite some rough patches, much to the credit of the 2nd Circuit Court of Appeals and the New York Court of Appeals, the process has worked remarkably well.

Of course, there were disruptions. One case where the 2nd Circuit *did not* certify a question comes to mind. In 1967 the New York State Appellate Division, first department, decided the case of *Menzel v. List* which involved a painting by the noted artist Marc Chagall – a painting which was lost to the Nazis in 1940. A New York Art Gallery, the bona fide purchaser of the painting, sought to preclude the victims of the Nazis from recovering the painting. In a brief memo the AD 1st Dept said:

“The precedents in this State suggest that with respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner. If that be so, then the Statute of Limitations did not begin to run until demand and refusal.” (Breitel, Eager, Botein, Steur) “

With only that New York State precedence in hand, Judge Broderick of the Southern District was confronted with the case of *DeWeerth v. Baldinger* which concerned a dispute over ownership of a painting by Claude Monet that disappeared from Germany at the end of World War II and was in the possession of a good-faith purchaser for the last 30 years. The primary issue on appeal was whether current New York law was properly articulated by *Menzel v. List* to wit: that due diligence was not required to postpone the running of the statute of limitations against a good faith purchaser, and that the statute “did not begin to run until demand and refusal.” (quoting *Menzel*.)

When *DeWeerth v. Baldinger*, came to the 2nd Circuit in 1987, rather than rely on *Menzel v. List*, as did Judge Broderick in the District Court, or certify a question to the New York Court of Appeals as the law

now permitted it to do, it took another route. It decided it would *become* the New York Court of Appeals for that case. It decided:

“The circuit court's role in exercising its diversity jurisdiction is to sit as another court of the state. When presented with an absence of controlling state authority, the court must make an estimate of what the state's highest court would rule to be its law. The court believes that the New York courts would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified.”

At the time we wondered why, if the 2nd Circuit was not going to rely on the New York Appellate Division decision in *Menzel*, rather than overrule why it didn't at least certify a question to the New York Court of Appeals?

That question is answered by the 2nd Circuit in its footnote in their DeWeerth decision:

“We have elected not to submit the unresolved state law issue in this appeal to the New York Court of Appeals pursuant to the recently authorized procedure permitting that Court to answer questions certified to it by the United States Supreme Court, a United States Court of Appeals, or a court of last resort of any state. Though the issue presented by this appeal is interesting, we do not think it will recur with sufficient frequency to warrant use of the certification procedure. “

Our Court answered that footnote in a later decided case (*Guggenheim v. Lubell*). In authoring that footnote, I tried hard not to display pique. I'm afraid I did not succeed. We wrote:

“Although the court acknowledged that the question posed by the case was an open one, it declined to certify it to this Court stating that it "[would] recur with sufficient frequency to warrant use of the certification procedure" (836 F2d, at 108, n 5). Actually, the issue has recurred several times in the three years since DeWeerth was decided (citing cases) including the case now before us. We have reexamined the relevant New York case law and we conclude that the 2nd Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.”

It wasn't until 1991 in the *Guggenheim* case that the New York Court of Appeals was able to discharge its constitutional mandate to declare what the New York Law is, and to tell the 2nd Circuit that their prediction was a failed one. And so Mr. DeWeerth went back to court. A motion was made before Judge Broderick, in light of *Guggenheim*, to give the painting to DeWeerth the person whom the “painting belonged.” Judge Broderick again held in favor of DeWeerth. In a sense he overruled the 2nd Circuit which, he rightly felt, had decided the case contrary to New York Law. When the case went back to the 2nd circuit, it had one more opportunity, to make poor Mr. DeWeerth whole, but it decided that:

“While acknowledging that Judge Broderick engaged in a scholarly and thorough discussion of the issues, we think that his decision inappropriately disturbed a final judgment in a case that had been fully litigated and was long since closed. In our view, when deciding a diversity case does

not mean that a subsequent change in the law of the state will provide grounds for relief under Rule 60(b)(6).”

Of course, the 2nd Circuit erred when it said that we changed the law of the state. The fact is that the 2nd Circuit “prophesized” incorrectly with respect to the law of New York State, but that fact did not get Mr. DeWeerth’s painting back to him. At the time it occurred to me that if our courts are really set to do ultimate justice, perhaps it would be only fitting that the Chagall Guash, which was the subject of *Guggenheim v. Lubell*, be given to the estate of Mr DeWeerth, which, because of the 2nd Circuit’s failure to certify a question of law , was forever lost to the rightful owner.

Again, the early days of certification were not nearly as smooth and as trouble free as they are today. It would appear that any reluctance to use the process, or resistance on the part of either of the Courts of Appeal, has been replaced by a synergy which has developed between these two Courts exceeding the expectations of those who brought the certification process into being.

A perfect illustration of this synergy is demonstrated by two cases, one certified and decided during my last months on the Court, and the other certified and decided just last June by the present NY Court of Appeals. The first, was *Banque Worms v. BankAmerica Int’l* where the 2nd Circuit was faced with a problem which would have a profound effect on the banking industry in this State. Although New York, as the center of international commerce had a fine tuned Debtor and Creditor Law, it had never addressed Section 14 (1) of the *Restatement of the Law of Restitution*. This section deals with recovery of money paid under mistake. Nor had it dealt with the implications of wire transfers of funds where such mistakes are more likely to be made.

The 2nd Circuit finding insufficient New York precedent, elected to certify the question to the New York Court of Appeals. In so doing, it noted that the need to certify a question: “*** was further supported by our recognition that the holding in the present case will undoubtedly have a significant impact on banks and financial institutions operating in New York State and have serious repercussions for New York's banking community. Consequently, New York has a strong interest in deciding the issue ***”

So the 2nd Circuit wisely left it to New York to formulate its own common law rather than relying on its ability to articulate its own view of the *Restatement* which it was certainly free to do. As it turned out, The New York Court of Appeals embraced this section of the *Restatement of the Law of Restitution* and, quoting from an earlier of its cases noted that: "to permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear".

More recently, this Spring, in the context of a decision on a certified question from the 2nd Circuit, in the case of *Commodities Future Trading Commission v. Walsh*, the New York Court of Appeals was again able to flesh out New York's common law in this area. In a case relating to the proceeds of a Ponzi scheme in weighing the entitlement to the fraudulently acquired funds, the NY Court of Appeals held: "At its core, our rule favoring innocent transferees of stolen funds over defrauded ones is rooted in New York's concern for finality in business transactions."

And so, the New York Court of Appeals, working in tandem with the 2nd Circuit Court of Appeals is fashioning a consistent and reliable body of law. And let us not forget an unintended but very important collateral result of the implementation of the certification process. It has brought a level of cooperation and friendship between the state and federal judiciary that had never existed before. The State-Federal Judicial Council did not enable the inter-jurisdictional certification process, the need for the certification process enabled the State-Federal Judicial Council.

The close working relationship between the state and federal courts was sparked by the certification process issue, but it has had a beneficial spillover into many other areas of law and matters important to the judiciary. It was an idea whose time had come, and New York courts, both state and federal, are much the better for it.