NOTES AND COMMENTS

CONFLICTS OF LAW

ERIE RAILROAD V. TOMPKINS AND THE CONFLICT OF LAWS

In *Erie Railroad v. Tompkins*[1] the Supreme Court of the United States held that federal courts are not free to exercise an independent judgment on matters of general, substantive law, but must follow the decisions of the courts of the state in which they sit. The significance of the decision is becoming more apparent as the doctrine is applied to varied situations.[2] This adaptation, difficult enough at best,[3] becomes complex in cases involving the conflict of laws. It has been predicted that the mandate of the *Tompkins* case would extend to the Conflicts area,[4] and as the rules of Conflicts comprise a part of the substantive common law of a state,[5] they would seem to fall properly within the holding of the case. Further, the moving consideration of *Erie Railroad v. Tompkins*, that divergent results between state and federal courts cannot be justified by the accident of diversity of citizenship, is as pertinent here as in other areas. A recent case, *Sampson* v. *Channell*,[6] supports this view, and furnishes an excellent example of the problems which confront a federal court seeking a solution to a conflicts question.

The action arose out of an automobile collision in Maine, the plaintiff instituting his suit in a federal district court in Massachusetts which had jurisdiction through diversity of citizenship. The question involving a choice of law was the incidence of the burden of proving contributory negligence. The district court ruled that this question involved a matter of substance governed by the *lex loci delicti*,[7] although the Massachusetts courts class it as procedural and consider it controlled by the *lex fori*.[8] In applying the Maine law,[9] the district court then put the burden of proof

[1] 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

[2] For a consideration of the instances in which the *Tompkins* case has been applied, see Dye, *Development of the Doctrine of Erie Railroad* v. *Tompkins* (1940) 5 Mo. L. REV. 193.

[3] Stearn, *Erie R. R.* v. *Tompkins: One Year After* (1940), 12 ROCKY MT. L. REV. 1.

[4] Dye, *supra*, note 2, at 202. And see: Note (1939) 52 HARV. L. REV. 1002.

[5] RESTATEMENT, CONFLICT OF LAWS (1934) sec. 5.

[6] 110 F. (2d) 754 (1940), *cert. denied* 60 Sup. Ct. 1009 (1940). See notes (1940) 20 B.U.L. REV. 566, (1940) 88 U. OF PA. L. REV. 1010, (1940) 63 HARV. L. REV. 1393.

[7] The report of the district court [27 F. Supp. 213 (1939)] does not disclose this ruling. See the report of the Circuit Court of Appeals, *supra*, note 6.

[8] Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919).

[9] Ward v. Maine Central R. R., 96 Me. 136, 51 Atl. 947 (1902).

on the plaintiff, requiring him to show the exercise of due care. Since by the Massachusetts rule the burden of proof would have rested with the defendant, the plaintiff appealed, contending that it was error to refuse to apply the Massachusetts rule on the choice of law. The Circuit Court of Appeals for the First Circuit reversed the cause with the instruction to charge according to the Massachusetts rule, although the Court considered the better view to be that the *lex loci delicti* should apply.[10]

Conceding that the history of this case demonstrates the propriety of applying the doctrine of *Erie Railroad* v. *Tompkins* to the decision of conflict of law questions, it will be seen that the federal court faces problems of considerable difficulty in the application. In the instant case the characterization [11] of the burden of proof question as substantive or procedural for the purpose of determining whether the *Tompkins* decision should apply was complicated by the fact that the Massachusetts court had considered the question procedural in making a choice of law. It was argued that the Massachusetts characterization of the question should prevail in the federal court, with the apparent support of *Francis* v. *Humphrey*. Furthermore, if the federal court in diversity cases is compelled by the *Tompkins* case to function as a court of the state in which it sits, the argument is strengthened. On the other hand, it is traditionally the function of the forum to make preliminary determinations in cases involving the conflict of laws.[13]

The question admits of three possible solutions. First, the federal court may consider the entire rule selection process to be itself procedural,[14] and so avoid the necessity of applying the *Tompkins* case. In rejecting this view, the court in the *Sampson* case points out that it would revive *Swift* v. *Tyson*[15] in the Conflicts area. The second solution

[10] Sampson v. Channell, *supra*, note 6, at 755, n. 2. *Accord*, that the burden of proof is substantive, Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 Sup. Ct. 201, 84 L. Ed. 185 (1939); Schoop v. Muller Dairies, Inc., 25 F. Supp. 50 (1938).

[11] "Characterization" or "Qualification" in the Conflict of Laws is the process of defining a question according to the nature of the legal ideas involved, and of the selection of the rules applicable to those ideas. This definition may consist of determining, for example, whether the question is one of contract or tort, or, within these concepts, of capacity, domicile and the like. It may also involve a determination whether the question is of a matter of substance or procedure. See Robertson, *A Survey of the Characterization Problem in the Conflict of Laws* (1939) 52 HARV. L. REV. 747; Falconbridge, *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235; Lorenzen, *Theory of Qualifications and the Conflict of Laws*, (1920) 20 COL. L. REV. 247. The discussion introduced by this footnote deals with the characterization of the burden of proof question as substantive or procedural. For other aspects of the characterization problem, see *infra*, p. 66 ff.

[12] 25 F. Supp. 1, 4 (1938).

[13] RESTATEMENT, CONFLICT OF LAWS (1934) sec. 7.

[14] *Ibid.*

[15] 16 Pet. (U.S.) 1, 10 L. Ed. 865 (1842),

is for the federal court to refer to state determination of the proper characterization, as suggested above, and to follow out the application of the *Tompkins* doctrine on the basis of that determination. Still the result of the case in the federal court may differ from that which the state court would have reached, had it had the problem before it. For example, suppose on the facts of the *Sampson* case that the state rule placed burden of proving contributory negligence on the plaintiff, as does Maine. Suppose further that the state court characterized the question as procedural. It would then apply its own law, the law of the forum,[16] and the burden of proof would be on the plaintiff. But the federal court, having found that the state court characterized the problem as procedural, would be relieved of the necessity of applying the *Tompkins* rule, as that rule extends only to matters of substance. It would then select its own rule, which puts the burden on the defendant,[17] even though the court might consider the question to involve a matter of substance.

This result might be said to demonstrate only that the characterization of the question as procedural by the state court is erroneous, a matter of no concern to the federal court following it under the *Tompkins* rule.[18] Nevertheless, is this not one of the situations sought to be corrected by that decision, and would not such a solution defeat the purpose of the Supreme Court in establishing its rule?

This possibility points to the third solution, which was adopted by the court in the principal case. In this approach, the court retains the function of characterization, using the motivation of the *Tompkins* case as a test of the characterization. It should be recognized that state and federal courts make this characterization for different purposes: the former to determine whether its own or the law of another state is applicable, the latter to find whether the *Tompkins* rule demands that it apply the law of the state in which it sits.

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[16] RESTATEMENT, CONFLICT OF LAWS (1934) sec. 585.

[17] Central Vt. Ry. v. White, 238 U.S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B (1916). The new Federal Rules seem to approve the rule of the *White* case, yet this is only by inference, as is pointed in the *Sampson* case. The Court said, at p. 757: "Rule 8 (c) [Federal Rules of Civil Procedure, enacted by the U. S. Supreme Court under authority of the Act of June 19, 1934, 48 Stat. 1064] speaks of contributory negligence as an 'affirmative defense,' a phrase implying that the burden of proof is on the defendant. . . . Yet the only rule laid down is one of *pleading;* the defendant must affirmatively plead contributory negligence. It is not inconsistent to require the defendant to plead contributory negligence if he wants to raise the issue, and yet to put the burden of proof on the plaintiff if the issue is raised." Usually, however, the burden of proof follows the burden of pleading. VI WIGMORE, EVIDENCE (3d ed.) sec. 2486.

[18] But see Stearn *supra* note 3, who suggests that the federal courts are not bound by the *Erie* decision to follow clearly erroneous state decisions.

[19] See Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333; Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad* v. *Tompkins* (1939) 34 ILL. L. REV. 271; McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933.

But if the federal court is to characterize the problem, what is the test of a substantive matter? For instance, the question of burden of proof is neither clearly substantive nor procedural. As Judge Magruder pointed out in the *Sampson* case, there is no "intrinsic compulsion" in the question. If the outcome of the litigation is likely to be affected by the characterization of the problem, the question should be classed as "substantive" within the meaning of *Erie Railroad* v. *Tompkins*, although the state court, for the purpose of solving a Conflicts problem, calls it "procedural."

The solution of this problem in the *Sampson* case suggests the manner in which the *Tompkins* case may be applied to questions arising in the conflict of laws that have not yet been considered by the federal courts. The process of qualification or of characterization incident to a choice of law consists of three steps or stages, of which the first, characterization of the nature of legal ideas involved, has been considered in one of its aspects, the substance-procedure characterization. Selection of the proper law, and application of that law complete the process.[20] In each of these stages there is a variation in decision from court to court,[21] and in each a departure of the federal court from state decisions may influence the outcome of the litigation, thus invoking the application of the *Tompkins* rule. While the technique of applying the rule may vary according to the purpose to be served, the pragmatic test of the *Sampson* case will be consistent throughout the rule-selection process. For example, in the substance or procedure characterization problem that court applied the test and found it necessary to retain control of the characterization in order that the case might resolve as it would have in the state court. Yet in the initial phase of characterization (that is, in determining whether the question is one of the contract, tort, domicile, or the like) it is essential to the same end that the court adopt the characterization of the state court. A given fact situation may present an issue capable of different characterizations, and the litigation may determine one way or the other depending upon which of several possible views the court takes.[22] If some guide is available, the federal court should accept the

[20] Robertson, *A Survey of the Characterization Problem in the Conflict of Laws* (1939) 52 HARV. L. REV. 747; Falconbridge, *Characterization in the Conflict of Laws* (1937) 53 L. Q. REV. 235; Lorenzen, *Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247.

[21] Falconbridge, *supra*, note 20, at 237.

[22] In *New England Mutual Life Insurance Co.* v. *Spence*, 104 F. (2d) 665 (1939), the court divided on the question of characterization, the majority considering the problem to be one of the validity of an involuntary transfer of a chose in action, while the dissenting judge characterized it as a question of the essential validity of the contract. The Court referred to the New York law to determine liability. Since the plaintiff would have recovered under the New York Conflicts rule of determining the validity of the contract, but lost under the New York rule of selection applicable to the assignment question, the result of the case hinged upon the solution of the preliminary characterization. See: Note (1940) 24 MINN. L. REV. 685.

state court's view. In many instances direct authority will be difficult to find, if available at all. It may be thought, too, that no court will go so far as to relinquish its independent judgment on this problem. Still, *Erie Railroad* v. *Tompkins* would seem to furnish a cogent reason for deferring to the state court's determination.

That the rule-selection process is a substantive matter within the rule of the *Tompkins* case may be further demonstrated in the next stage, the selection of the proper law. For instance, suppose the federal court accepts the state court's view that the problem before it is a question of capacity to contract for the sale of land. The state may consider that the question is controlled by the law of the situs. The federal court may think it governed by the law of the place of contracting.[23] Here again, if the *Tompkins* principle is to be effective, the federal court should surrender its independent judgment.

To summarize the point, it is concluded that there is a proper application of the doctrine of *Erie Railroad* v. *Tompkins* in the Conflict of Laws area, but that a successful application involves a constant testing of the problem against the motive of that decision, rather than a mechanical application of proconceived notions of "substance" and "procedure."

There is a second major aspect of the problem which is not apparent in other fields. This is the restraint of Constitutional limitation operating in some Conflicts cases. Although ordinarily the Supreme Court has not intervened in cases involving what it considered mistaken application of Conflicts principles,[24] in some few it has felt that the erroneous choice has violated a Constitutional guaranty. The due process clause of the Fourteenth Amendment has been invoked where the Conflicts decision has resulted in the application of a state statute to rights which the Supreme Court thought were created and limited in another jurisdiction.[25] And where the state courts have failed, by a choice of law thought to be mistaken, to give effect to a statute of another state, the full faith and credit clause has been used.[26] On occasion other Consti-

[23] See Polson v. Stewart, 167 Mass. 211, 45 N.E. 737, 36 L.R.A. 711, 57 Am. St. Rep. 452 (1897).

[24] Kryger v. Wilson, 242 U.S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229 (1916); Penna. R. R. v. Hughes, 191 U.S. 477, 24 Sup. Ct. 132, 84 L. Ed. 268 (1903); Allen v. Alleghany Co., 196 U.S. 458, 25 Sup. Ct. 311, 49 L. Ed. 551 (1905).

[25] Hartford Ind. Co. v. Delta and Pine Land Co., 292 U.S. 143, 54 Sup. Ct. 634, 78 L. Ed. 1178 (1934); Home Insurance Co. v. Dick, 281 U.S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926, 74 A.L.R. 701 (1931); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 38 Sup. Ct. 376, 62 L. Ed. 772, Ann. Cas. 1918E 593 (1918). An earlier case, N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 34 Sup. Ct. 879, 58 L. Ed. 1259 (1914), similar on its facts to the *Dodge* case, was decided on the full faith and credit clause. And *cf.* Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 45 Sup. Ct. 129, 69 L. Ed. 1089 (1915).

[26] Sovereign Camp W. O. W. v. Bolin, 305 U.S. 66, 59 Sup. Ct. 35, 83 L. Ed. 45 (1938); Modern Woodmen v. Mixer, 267 U.S. 544, 45 Sup. Ct. 389, 69 L. Ed. 783, 41 A.L.R. 1384 (1925); Royal Arcanum v. Green, 237 U.S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089 (1915).

tutional bases have been found, such as the commerce clause.[27] It has been suggested that these clauses may be expanded so that the Supreme Court may become the court of last resort in all Conflicts cases.[28] This result, if it is to follow, is not yet apparent. The extent of the use of the due process clause would seem to be reached in the concept of extra territoriality.[29] The full faith and credit clause, although more often used, seems to be limited to those situations in which a statute, a decision construing a statute, or a judgment *inter partes* is involved.[30] The question of the exact limits of these concepts is beyond the scope of this comment.[31] But it is significant that precedents exist, since diversity of citizenship—if the *Sampson* case stands—no longer offers a means of escape from the rule of the state court.[32]

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[27] *See* Western Union Telegraph Co. v. Brown, 234 U. S. 542, 34 Sup. Cit. 955, 58 L. Ed. 1457 (1914).

[28] *See* Comments: (1928) 28 COL. L. REV. 619, 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW, 381 (1934); 34 COL. L. REV. 891, 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW, 390; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926), 39 HARV. L. REV. 533; Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* (1931) 15 MINN. L. REV. 161.

[29] *See* Frick v. Commonwealth of Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1923); Hartford Ind. Co. v. Delta and Pine Land Co., *supra*, note 25.....

[30] *E.g.*, Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109 (1868).

[31] *See* Dodd, *op. cit.*, Ross, *op. cit.*, and comments *supra*, note 28.

[32] It has been predicted that the closing of this avenue by *Erie R.R. v. Tompkins* would induce a drive to expand the scope of the Constitutional guaranties. Shulman, *The Demise of Swift* v. *Tyson* (1938), 47 YALE L.J. 1336, at 1351. The extent of which this expansion occurs must depend upon whether the Supreme Court feels that uniformity among the states is more desirable on a particular question than the freedom of state courts, in determining Conflicts questions. Those instances in which the intervention of the Supreme Court has been successfully sought have been cases in which the rights or obligations of a class of persons were variously determined in the courts of several states; or in which the rights of an individual have been prejudiced by the inconsistency of decision among those jurisdictions to which he was subject. A notable instance is the construction of benefit society charters, Royal Arcanum v. Green, Modern Woodmen v. Mixer, Sovereign Camp W. O. W. v. Bolin, all *supra*, note 26; *but see* Boseman v. Conn. General Life Ins. Co., 301 U.S. 196, 57 Sup. Ct. 686, 81 L.Ed. 1036 (1937), where the existence of a federal question was denied. This case may indicate a change in attitude by the Court. Compare the interpretaton of insurance contracts, Hartford Ind. Co. v. Delta and Pine Land Co., Home Insurance Co. v. Dick, N.Y. Life Ins. Co. v. Dodge, N.Y. Life Ins. Co. v. Head, Aetna Life Ins. Co. v. Dunken, all *supra*, note 25, the collection of the double liability of holders of bank stock, Converse v. Hamilton, 224 U.S. 243, 32 Sup. Ct. 415, 56 L.Ed. 749 (1911), and the application of inheritance taxation. Frick v. Commonwealth of Pennsylvania, *supra*, note 29; Farmers Loan and Trust Co. v. Minnesota, 280 U.S. 204, 50 Sup. Ct. 98, 74 L.Ed. 371 (1929); Baldwin v. Missouri, 281 U.S. 586, 50 Sup. Ct. 436, 74 L.Ed. 1056 (1930); First National Bank v. Maine, 284 U.S. 312, 52 Sup. Ct. 174, 76 L.Ed. 313 (1932); Curry v. McCanless, 307 U.S. 357, 59 Sup. Ct. 900, 83 L.Ed. 1339 (1939); Graves v. Elliot, 307 U.S. 383, 59 Sup. Ct. 913, 83 L.Ed. 1356 (1939). It is ventured that it will require a longer step to reach a case like *Sampson v. Channell*, in which no such strong motive for intervention appears.