Missouri Law Review

Volume 5
Issue 2 *April 1940*

Article 3

1940

Development of the Doctrine of Erie Railroad v. Tompkins

Sherman C. Dye

DEVELOPMENT OF THE DOCTRINE OF ERIE RAILROAD V. TOMPKINS

C. SHERMAN DYE*

"The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson*[1] shall now be disapproved." Thus, Mr. Justice Brandeis, in *Erie Railroad v. Tompkins*,[2] set the stage for one of the most far-reaching decisions handed down by the Supreme Court in recent years—the overruling of a decision which has been a center of controversy for nearly a century.

Stated concisely, the rejected doctrine was that in diversity of citizenship cases the federal courts were not bound to follow the decisions of the state courts as to matters of general jurisprudence. In the case of *Swift v. Tyson* the Court took it upon itself to construe Section 34 of the Judiciary Act of 1789,[3] which read as follows:

> "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 decision in trials at common law, in the courts of the United States, in cases where they apply."

Mr. Justice Story, speaking for a majority of the court, interpreted the word "laws" to include only statutory law and decisions as to matters local in nature. As to matters of general law, the federal courts were, Story said, free to exercise their own independent judgment.

The doctrine, though not without defenders, became the subject of much bitter criticism both by occupants of the bench and by members of the bar.[4] Yet it persisted and, at the time when the *Tompkins* case arose,

---

*Third year student, Western Reserve University School of Law. A.B., Oberlin College, 1937.

1. 16 Pet. 1 (U. S. 1842).
2. 304 U. S. 64 (1938).
3. REV. STAT. § 721 (1875), 28 U. S. C. § 725 (1934), taken from the Act of Sept. 24, 1789, c. 20, § 34, 1 STAT. 92.
4. Citations to the leading articles and comment both *pro* and *con* are included in the extensive footnotes to Mr. Justice Brandeis' opinion in the Tompkins case.

even its most bitter critics were of the opinion that it was too late for judicial self-correction.[5]

Harry J. Tompkins, a citizen of Pennsylvania, while walking along the Erie Railroad Company's right of way at Hughestown, Pennsylvania, was severely injured by a passing train. He brought suit against the railroad company, a New York corporation, in the District Court for the Southern District of New York. Jurisdiction was based on diversity of citizenship. The plaintiff maintained that he was on the premises as a licensee. Defendant argued that Tompkins was a mere trespasser by virtue of a Pennsylvania rule, as declared by its highest court. As so often happened under the *Swift v. Tyson* doctrine, the disputed question was whether the matter was one of local or general law. The district court and the circuit court of appeals[6] accepted the argument of the plaintiff, ignored the Pennsylvania rule, applied the general law, and held the company liable. The Supreme Court granted *certiorari.*[7]

After elaboration of the doctrine of *Swift v. Tyson* and its history, Mr. Justice Brandeis, speaking for the majority of the court, concluded:

> "*Third.* Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."[8]

The case was remanded to the circuit court of appeals for proceed-

---

5. Professor Dobie of the University of Virginia alone seems to have forecast the overrulings in his article *Seven Implications of Swift v. Tyson* (1930) 16 Va. L. Rev. 225. On the other hand, such authorities as Mr. Justice Frankfurter, then professor at Harvard Law School, were convinced that the court would not overrule its earlier decisions. Frankfurter, *Distribution of Judicial Power Between Federal and State Courts* (1928) 13 Corn. L. Q. 499. See also the dissenting opinions of Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 371 (1910), and Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U. S. 518, 535 (1928).

6. Tompkins v. Erie R. R., 90 F. (2d) 603 (C. C. A. 2d, 1937). Neither party to the case argued the validity of the doctrine of Swift v. Tyson but rather argued as to its applicability. Yet the Court, as suggested by the above quotation, treated the case as though that were the sole issue.

7. Erie Railroad v. Tompkins, 302 U. S. 671 (1937).

8. Erie Railroad v. Tompkins, 304 U. S. 64, 78 (1937).

ings consistent with the opinion. Applying Pennsylvania law the court absolved the company of liability because Tompkins was a trespasser.[9]

The theoretical problem underlying these decisions is one which arises out of our federal system of government under which two sets of partially co-ordinate courts exist. Since state courts base jurisdiction largely upon the presence of the parties within the state's boundaries, the jurisdiction of federal courts over certain persons, without regard to the nature of the dispute, results in an overlapping of the jurisdictions of state and federal courts. Thus, in each of forty-eight geographical areas there are two systems of courts deciding the same questions of law.

One problem raised by this situation is that of policy in determining whether the two kinds of courts shall decide the questions in the same manner. It was hoped that the *Swift v. Tyson* doctrine of permitting the federal courts to exercise an independent judgment would promote uniformity of decision in the state courts because of an expected tendency on the part of the latter to follow the federal rules. The decision did not promote uniformity in the way that it was expected. Instead it often resulted in the development of two sets of rules within a single area. To quote Mr. Justice Brandeis:

> "It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.[10] Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State."[11]

The *Tompkins* case represents a reversal of policy on the fundamental problem arising from our dual system of courts.[12] Its policy is to create

---

9. Tompkins v. Erie R. R., 98 F. (2d) 49 (C. C. A. 2d, 1938). Rehearing was denied by the Supreme Court, 305 U. S. 637 (1938).

10. This statement is not entirely true since a resident as well as a non-resident may have original access to the federal courts. However, once the action has started in a state court only the non-resident defendant may remove it to a federal court. Act of May 14, 1934, c. 283, § 1, 48 STAT. 775, Act of Aug. 21, 1937, c. 726, § 1, 50 STAT. 738, 28 U. S. C. § 41 (1934).

11. Erie Railroad v. Tompkins, 304 U. S. 64, 74 (1937).

12. Mr. Justice Brandeis in the majority opinion bases this change of policy on constitutional grounds. There has been so much comment on the problems raised by this determination that it is unnecessary to discuss it at this time. Mr. Justice Butler in a dissenting opinion, in which he was joined by Mr. Justice McReynolds, criticised this basis for the decision. Mr. Justice Reed concurred in the result but not in the portion of the opinion which based

conformity within each of the states. The method adopted is to have the federal court yield to the state court.

The practical significance of the change of doctrine is illustrated by the fact that different results were reached at the two hearings before the circuit court of appeals of the *Tompkins* case. This is an example of what can be expected in all of the many fields to which *Swift v. Tyson* had been expanded and in the fields to which the *Tompkins* case may be expanded in the future. The entire body of "general laws" which had been built up in the federal courts since 1842 has now been discarded. It will be years before all of the effects can be determined, but there has already been a sufficient number of cases decided on the basis of the *Tompkins* case to give some indication of the course which future developments may take. The analysis here undertaken will include those decisions of the Supreme Court and other federal courts reported prior to February 1, 1940, which have explicitly relied on the *Tompkins* decision.

The most far-reaching expansion of *Erie Railroad v. Tompkins* came the week following that decision when the Supreme Court held it to be applicable in equitable, as well as legal, actions.[13] The New York Life

---

the decision on constitutional grounds. For further discussion of the decision as to the constitutionality issue and other issues as well see: Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson* (1938) 18 B. U. L. REV. 659; Jackson, *The Rise and Fall of Swift v. Tyson* (1938) 24 A. B. A. J. 609; Grant, *The Search for Uniformity of Law* (1938) 32 AM. POL. SCI. REV. 1082; Long, *A Warning Signal For Municipal Bond Holders: Some Implications of Erie Railroad v. Tompkins* (1939) 37 MICH. L. REV. 589; McCormick & Hewins, *The Collapse of "General Law" in the Federal Courts* (1938) 33 ILL. L. REV. 126; Miller, *Swift v. Tyson and Some Considerations of Philosophy in American Law* (1939) 11 MISS. L. J. 243; Rooks, *Effect of the United States Supreme Court Decision in Erie Railroad v. Tompkins* (1938) 9 MO. BAR J. 108; Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 24 A. B. A. J. 421; Stimson, *Swift v. Tyson—What Remains?* (1938) 24 CORN. L. Q. 54, (1939) 7 J. KAN. BAR ASSN. 242, (1939) 62 N. J. L. J. 93; Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins* (1939) 34 ILL. L. REV. 271.

Notes (1938) 38 COL. L. REV. 1472, (1939) 52 HARV. L. REV. 1002, (1938) 36 MICH. L. REV. 1312, (1939) 37 MICH. L. REV. 1249, (1938) 22 MINN. L. REV. 885, (1939) 18 NEB. L. REV. 59, (1939) 13 ST. JOHN'S L. REV. 71, (1938) 12 TEMP. L. Q. 486, (1938) 24 VA. L. REV. 895, (1938) 3 FED. BAR ASSN. J. 217, (1938) 7 GEO. WASH. L. REV. 257, (1938) 16 N. Y. U. L. Q. REV. 144, (1938) 86 U. OF PA. L. REV. 896, (1938) 11 SO. CALIF. L. REV. 498, 511, (1938) 23 WASH. U. L. Q. 568.

13. Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938). Two weeks later the Supreme Court twice reaffirmed the expansion of the doctrine of the Tompkins case to actions in equity and held that interpretation should have been in accordance with state court decisions. Each case involved an attemut to cancel the reinstatement of an insurance policy. Jurisdiction was based upon diversity of citizenship in all three cases, Rosenthal v. New York Life Ins. Co., 304 U. S. 263 (1938); New York Life Ins. Co. v. Jackson, 304 U. S. 261 (1938).

Insurance Co. brought an action in equity to rescind the permanent disability and double indemnity provisions of the defendant's life insurance policy on the ground that they were obtained by fraud. The precise question involved was a construction of the incontestability clause of the insurance contract. Mr. Justice Reed delivered the opinion of the court, pointing out that:

> "The doctrine [of the Tompkins case] applies though the question of construction arises not in an action of law, but in a suit in equity. Compare *Mason v. United States*, 260 U. S. 545, 557, 558."[14]

This wording covers only the question of legal principles applicable in an equitable action.[15] It is to be noted that the principles involved were in essence legal, *i.e.*, questions of contract law in the interpretation of the insurance policies. Therefore, the holding left open the question whether the *Tompkins* case would be expanded to include the application of state principles of equity jurisprudence. Doubt was dispelled, however, by the Supreme Court in *Wichita Royalty Co. v. City National Bank.*[16] Although the action itself was legal, a suit on a promissory note with counterclaim for participation in breach of trust, the principles applied were essentially equitable. The questions on which Texas decisions were held applicable involved trust doctrines.[17]

Other types of purely equitable problems in which local rules have been

---

14. Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 205 (1938). In Mason v. United States, 260 U. S. 545 (1923), it was stated that in purely local matters state equitable principles should govern.

15. A number of writers have expressed doubts as to the extent of this decision. Bowman, *supra* note 12, at 879, n. 51, McCormick and Hewins, *supra* note 12, at 140, n. 62, Schweppe, *supra* note 12, at 421 *et seq. Cf.* Tunks, *supra* note 12, at 284.

The discussion at this point involves the whole question of whether there is any substantive body of equity rules or whether equity is merely procedural and remedial. The discussion here goes on the assumption that there are substantive rules of equity as well as rules of equitable jurisdiction and procedure. Such an assumption seems quite justifiable in light of the fact that under the new Federal Rules (Rules of Civil Procedure for the District Courts of the United States, Rule 2) equity has become almost entirely a matter of substance determining the relief to be had on a given set of facts. *Cf.* Cook, *The Place of Equity in Our Legal System* (1912) 3 AM. LAW SCHOOL REV. 173, and discussion by Schofield, *id.* 178; Hohfeld, *The Relation Between Equity and Law* (1913) 11 MICH. L. REV. 537, and supplemental note (1917) 26 YALE L. J. 767.

16. 306 U. S. 103 (1939). In reaching the conclusion that the equity problem has not been decided, Tunks, *supra* note 12, apparently overlooks this case.

17. Aetna Casualty & Surety Co. v. Catskill National Bank & Trust Co., 102 F. (2d) 527 (C. C. A. 2d, 1939), involves a similar problem, *i.e.*, the standard of care to be exercised by a depositary of trust funds.

held applicable[18] have involved: determination of whether a certain clause in a trust instrument was void as against public policy;[19] attempts to have the court declare the existence of a constructive trust;[20] and an attempt to force specific performance by a holding company of a contract to purchase stock of a subsidiary.[21]

As a result of the above cases the rule of the *Tompkins* case can be said to apply to actions either in law or in equity,[22] and no further attempt will be made to distinguish in this discussion between legal and equitable actions.

A large number of the diversity cases, wherein there has been little hesitancy in applying the *Tompkins* case, have involved questions of insurance law.[23] Even before the *Tompkins* case the Supreme Court had

---

18. *Cf.* Baltimore Trust Co. v. Interocean Oil Co., 29 F. Supp. 269 (D. Md. 1939).

19. Jenkins v. First National Bank, 26 F. Supp. 312 (N. D. Tex. 1939).

20. Bruun v. Hanson, 103 F. (2d) 685 (C. C. A. 9th, 1939); Reno National Bank v. Seaborn, 99 F. (2d) 482 (C. C. A. 9th, 1938).

21. Murphy v. North American Light & Power Co., 24 F. Supp. 471 (S. D. N. Y. 1938).

22. In applying the Tompkins case to cases in equity the federal courts will undoubtedly continue to be subject to the constitutional limitations set forth in such cases as Scott v. Neely, 140 U. S. 106 (1891); Cates v. Allen, 149 U. S. 451 (1893); Whitehead v. Shattuck, 138 U. S. 146 (1891); Mississippi Mills v. Cohn, 150 U. S. 202 (1893); Guffey v. Smith, 237 U. S. 101 (1915); Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923); Henrietta Mills v. Rutherford County, 281 U. S. 121 (1930). Under the Tompkins case the same problems will probably now arise as to state decisions which arose in the above cases as to state statutes. The effect on these problems of the union of law and equity under the new Federal Rules is, of course, as yet undetermined.

In Hollingsworth v. General Petroleum Corp., 26 F. Supp. 917 (D. Ore. 1939), it was held that in applying the Seventh Amendment federal courts are not bound by state decisions as to what constitute equitable defense.

23. New York Life Ins. Co. v. Ruhlin, 25 F. Supp. 65 (W. D. Pa. 1938), 106 F. (2d) 921 (C. C. A. 3rd, 1939) (effect of incontestability clause); Rosenthal v. New York Life Ins. Co., 99 F. (2d) 578 (C. C. A. 8th, 1938) (effect of incontestability clause, also whether insurance company barred by laches or waiver); New York Life Ins. Co. v. Jackson, 98 F. (2d) 950 (C. C. A. 7th, 1938) (ambiguities in policy construed); Ostroff v. New York Life Ins. C , 23 F. Supp. 724 (S. D. Calif. 1938), *rev'd*, 104 F. (2d) 986 (C. C. A. 9th, 1939), *cert. denied*, 60 Sup. Ct. 122 (U. S. 1939) (interpretation of incontestability clause); Malloy v. New York Life Ins. Co., 103 F. (2d) 439 (C. C. A. 1st, 1939) (interpretation of incontestability clause); New York Life Ins. Co. v. Waterman, 104 F. (2d) 990 (C. C. A. 9th, 1939) (interpretation of incontestability clause); Bowie v. Bankers Life Co., 105 F. (2d) 806 (C. C. A. 10th, 1939) (reinstatement); Profit v. Seaboard Mutual Casualty Co., 28 F. Supp. 202 (D. Md. 1939) (cancellation); American National Ins. Co. v. Belch, 100 F. (2d) 48 (C. C. A. 4th, 1938) (death by accidental means); Pope v. Lincoln National Life Ins. Co., 103 F. (2d) 265 (C. C. A. 8th, 1939) (death by accidental means); Denton v. Travelers Ins. Co., 25 F. Supp. 556 (D. Md. 1938) (death by accidental means); Mangol v. Metropolitan Life Ins. Co., 103 F. (2d) 14 (C. C. A. 7th, 1939) (whether death within exception to accident policy); Jones v. New York Casualty Co., 23 F. Supp. 932 (E. D. Va. 1938) (additional insured under automobile policy); Preferred Accident Ins. Co. v. Barker, 104 F. (2d) 424 (C. C. A. 6th,

decided in *Mutual Insurance Co. v. Johnson, Adm'r.*,[24] to follow the ruling of the Virginia court since there was no general principle of the law of contracts of insurance involved. The problem was one of construction of a condition in the policy sued upon. Many of the cases decided since the *Tompkins* case have presented problems no broader than that decided in the *Johnson* case. In the *Johnson* case, however, the court indicated that its determination to follow state law was based on expediency rather than on the absence of power to exercise an independent judgment. The *Tompkins* case and those following it go a step further and say that federal courts are without power to exercise an independent judgment in the interpretation of contracts of insurance and in the determination of applicable principles of insurance law.

1939) (additional insured); Shanks v. Travelers' Ins. Co., 25 F. Supp. 740 (N. D. Okla. 1938) (time of expiration of group policy); Penn Mutual Life Ins. Co. v. Forcier, 103 F. (2d) 166 (C. C. A. 8th, 1939) (expiration of contract of insurance); McGogney v. Mutual Life Ins. Co., 103 F. (2d) 649 (C. C. A. 3rd, 1939) (lapse of policy); Dorman v. John Hancock Mutual Life Ins. Co., 25 F. Supp. 889 (S. D. Calif. 1939) (status of director as employee under group policy); North American Accident Ins. Co. v. Anderson, 100 F. (2d) 452 (C. C. A. 10th, 1938) (more hazardous occupation); Mutual Benefit, Health and Accident Ass'n v. Bowman, 304 U. S. 549 (1938), 99 F. (2d) 856 (C. C. A. 8th, 1938) ("participating in aeronautics"); Myers v. Ocean Accident and Guaranty Corp., 99 F. (2d) 485 (C. C. A. 4th, 1938) (persons being carried for hire); Jensen v. Canadian Indemnity Co., 98 F. (2d) 469 (C. C. A. 9th, 1938) (carrying passengers for compensation); Turner v. New York Life Ins. Co., 100 F. (2d) 193 (C. C. A. 8th, 1938) (payment of premium); Lyon v. Mutual Benefit, Health and Accident Ass'n, 305 U. S. 484 (1939) (payment in advance); State Mutual Life Assur. Co. v. Briscoe, 107 F. (2d) 977 (C. C. A. 6th, 1939) (failure to pay premiums); Fox v. Mutual Benefit Life Ins. Co., 107 F. (2d) 715 (C. C. A. 8th, 1939) (failure to pay premiums, forfeiture); New England Mutual Life Ins. Co. v. Spence, 25 F. Supp. 633 (W. D. N. Y. 1938), *rev'd*, 104 F. (2d) 665 (C. C. A. 2d, 1939) (status, as beneficiary, of divorced wife); Metropolitan Life Ins. Co. v. Richardson, 27 F. Supp. 791 (W. D. La. 1939) (divorced wife); Toomey v. Toomey, 98 F. (2d) 736 (C. C. A. 7th, 1938) (rights as beneficiaries); Fireman's Fund Indemnity Co. v. Kennedy, 97 F. (2d) 882 (C. C. A. 9th, 1938) (notice to insurer); Fidelity & Guaranty Fire Corp. v. Bilquist, 99 F. (2d) 333 (C. C. A. 9th, 1938) (estoppel to set up breach of warranty); Manufacturers Casualty Ins. Co. v. Roach, 25 F. Supp. 852 (D. Md. 1939) (waiver); Traveler's Indemnity Co. v. Plymouth Box & Panel Co., 99 F. (2d) 218 (C. C. A. 4th, 1938) (amount of damages); Colorado Life Co. v. Steele, 101 F. (2d) 448 (C. C. A. 8th, 1939) (total disability); Aetna Life Ins. Co. v. Conway, 102 F. (2d) 743 (C. C. A. 10th, 1939) (double indemnity clause); Aetna Life Ins. Co. v. Young, 103 F. (2d) 839 (C. C. A. 3rd, 1939) (double indemnity, predisposing causes); Paddleford v. Fidelity & Casualty Co., 100 F. (2d) 606 (C. C. A. 7th, 1939) (exception to liability of insurance company); New York Life Ins. Co. v. McCurdy, 106 F. (2d) 181 (C. C. A. 10th, 1939) (false statements in application); Guardian Life Ins. Co. v. Clum, 106 F. (2d) 592 (C. C. A. 3rd, 1939) (false statements in application); Pacific Indemnity Co. v. McDonald, 107 F. (2d) 446 (C. C. A. 9th, 1939) (false statements following accident); Hartford Fire Ins. Co. v. Logan Grain Co., 105 F. (2d) 699 (C. C. A. 8th, 1939) (forfeiture clause fire policy).

24. 293 U. S. 335 (1934).

Erie Railroad v. Tompkins was itself a tort case. Therefore, there has been no doubt but that it applies in tort cases.[25] The courts have experienced little difficulty in determining that they should be disposed of in accordance with state decisions. The rule has likewise been adhered to

25. Tompkins v. Erie R. R., 98 F. (2d) 49 (C. C. A. 2d, 1938); Ells v. Scandrett, 28 F. Supp. 16 (D. Idaho 1938) (children playing on track); Delaware & H. R. R. v. Bonzik, 105 F. (2d) 341 (C. C. A. 3rd, 1939) (boys riding train); Chicago, G. W. R. R. v. Robinson, 101 F. (2d) 994 (C. C. A. 8th, 1939) (rights of pedestrian crossing railroad tracks); Bash v. Baltimore & Ohio R. R., 102 F. (2d) 48 (C. C. A. 3rd, 1939) (grade crossing accident); Thomson v. Stevens, 106 F. (2d) 739 (C. C. A. 8th, 1939) (grade crossing accident); Gaede v. Union Pacific R. R., 28 F. Supp. 396 (D. Colo. 1939) (grade crossing accident, imputed contributory negligence); Moore v. Chicago, B. & Q. R. R., 28 F. Supp. 804 (W. D. Mo. 1939) (grade crossing accident); Zentz v. Buchman, 103 F. (2d) 850 (C. C. A. 3rd, 1938) (auto accident); Demers v. Railway Express Agency, 108 F. (2d) 107 (C. C. A. 1st, 1939) (children playing around truck); Baskin v. Montgomery Ward & Co., 104 F. (2d) 531 (C. C. A. 4th, 1939) (negligence); Taylor v. McCowat-Mercer Printing Co., 27 F. Supp. 880 (W. D. Pa. 1939) (negligence, licensee, invitee); Krier v. Muschel, 29 F. Supp. 482 (S. D. N. Y. 1939) (negligence); Hudson v. Moonier, 304 U. S. 397 (1938) (operation of a truck with improper equipment); Egan Chevrolet Co. v. Bruner, 102 F. (2d) 373 (C. C. A. 8th, 1939) (sale of truck with defective steering equipment); Harris v. Traglio, 24 F. Supp. 402 (D. Ore. 1938), *aff'd*, 104 F. (2d) 439 (C. C. A. 9th, 1939) (refuse to impute contributory negligence of husband to wife); Luhman v. Hoover, 100 F. (2d) 127 (C. C. A. 6th, 1938) (boy injured by dynamite caps negligently kept); Kansas Gas & Electric Co. v. Evans, 100 F. (2d) 549 (C. C. A. 10th, 1938) (standard of care); Wunderlich v. Franklin, 100 F. (2d) 164 (C. C. A. 5th, 1938) (wanton negligence); Coca-Cola Bottling Co. v. Munn, 99 F. (2d) 190 (C. C. A. 4th, 1938) (deleterious substance in bottled beverage); Bissonette v. National Biscuit Co., 100 F. (2d) 1003 (C. C. A. 2d, 1939) (bread contained glass); DeLape v. Liggett & Meyers Tobacco Co., 25 F. Supp. 1006 (S. D. Calif. 1939) (defective cigarette); Hagan & Cushing Co. v. Washington Water Power Co., 99 F. (2d) 614 (C. C. A. 9th, 1938) (effect of intervening cause on doctrince of *res ipsa losuitur*); Kelly v. Duke Power Co., 97 F. (2d) 529 (C. C. A. 4th, 1938) (contributory negligence as a matter of law); Boal v. Electric Storage Battery Co., 98 F. (2d) 815 (C. C. A. 3rd, 1938) (industrial disease); Maty v. Grasselli Chemical Co., 98 F. (2d) 877 (C. C. A. 3rd, 1938) (industrial disease); Allison v. Great Atlantic & Pacific Tea Co., 99 F. (2d) 507 (C. C. A. 4th, 1938) (rights and duties in employer-employee relationship); Brabham v. Mississippi, 97 F. (2d) 251 (C. C. A. 5th, 1938), *cert. denied*, 305 U. S. 636 (1938) (punitive damages); White v. Pacific Telephone & Telegraph Co., 24 F. Supp. 871 (D. Ore. 1938), *aff'd*, 104 F. (2d) 923 (C. C. A. 9th, 1939) (liability of corporation for punitive damages for assault and battery); Schopp v. Muller Dairies, 25 F. Supp. 50 (E. D. N. Y. 1938) (burden of proving freedom from contributory negligence); Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938) (burden of alleging and proving freedom from contributory negligence); Sunkist Drinks, Inc. v. California Fruit Growers Exchange, 25 F. Supp. 400 (S. D. N. Y. 1938) (malicious prosecution); American Optometric Ass'n v. Ritholz, 101 F. (2d) 883 (C. C. A. 7th, 1939) (may damages be recovered in suit to enjoin malicious prosecutions); Interstate Transit Lines v. Crane, 100 F. (2d) 857 (C. C. A. 10th, 1938) (malice necessary to overcome privilege in suit for libel); Brennan v. Lumbermen's Mutual Casualty Co., 26 F. Supp. 305 (D. Mass. 1938) (slander); Mau v. Rio Grande Oil, 28 F. Supp. 845 (N. D. Calif. 1939) (right of privacy); Norfolk & Western Ry. v. Riggs, Riggs v. Norfolk & Western Ry., 98 F. (2d) 612 (C. C. A. 6th, 1938) (comparative negligence doctrine); Deslauriers Steel Mould Co. v. Gangaway, 97 F. (2d) 78 (C. C. A. 3rd, 1938) (contribution among joint tort-feasors); Marcus v. Hinck, 28 F. Supp. 945 (S. D. N. Y. 1939) (release of joint tort-feasor); Tulsa City Lines v. Mains, 107 F. (2d) 377 (C. C. A. 10th, 1939) (validity of release); *cf.* Albert Miller & Co. v. Corte, 107 F. (2d) 432 (C. C. A. 5th, 1939) (libel).

in cases involving the law of contracts,[26] agency,[27] and other fields of general substantive law,[28] and evidence.[29]

---

26. Cream of Wheat Corp. v. Moundridge Milling Co., 24 F. Supp. 998 (D. Kan. 1938), *rev'd by reason of change in state law*, 105 F. (2d) 366 (C. C. A. 10th, 1939) (contract for purchase of wheat); General Petroleum Corp. v. Seaboard Terminals Corp., 23 F. Supp. 137 (D. Md. 1938) (sealed instrument); Dunham v. Omaha & C. B. St. Ry., 25 F. Supp. 287 (S. D. N. Y. 1938), *rev'd on application of state law*, 106 F. (2d) 1 (C. C. A. 2d, 1939) (whether bond holder limited to remedy under mortgage); Oxnard Theatres v. Paramount Pictures, 24 F. Supp. 44 (S. D. Calif. 1938) (fraud in formation of the contract); Rachlin v. Libby-Owens-Ford Glass Co., 96 F. (2d) 597 (C. C. A. 2d, 1938) (breach of warranty); Texarkana v. Arkansas Louisiana Gas Co., 306 U. S. 188 (1939) (franchise contract); Gray & Co. v. Western Borax Co., 99 F. (2d) 239 (C. C. A. 9th, 1938) (anticipatory breach, exclusive agency); Williams v. Mutual Benefit, Health and Accident Ass'n, 100 F. (2d) 264 (C. C. A. 5th, 1938) (anticipatory breach); Panama City v. Federal Reserve Bank, 97 F. (2d) 499 (C. C. A. 5th, 1938) (set-off); Wunderlich v. National Surety Co., 24 F. Supp. 640 (D. Minn. 1938) (accord and satisfaction); Reconstruction Finance Corp. v. Maryland Casualty Co., 23 F. Supp. 1008 (D. Md. 1938) (subrogation); Turner v. New York Life Ins. Co., 100 F. (2d) 193 (C. C. A. 8th, 1938) (payment); Murphy v. North American Light & Power Co., 24 F. Supp. 471 (S. D. N. Y. 1938) (specific performance of a contract to purchase stock); Carter Oil Co. v. Mitchell, 100 F. (2d) 945 (C. C. A. 10th, 1939) (implied covenant to reasonably develop oil lease); American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 26 F. Supp. 954 (S. D. N. Y. 1939) (validity of agreement to pay interest on overdue coupons of notes); First National Bank v. Mayor and City Counsel, 27 F. Supp. 444 (D. Md. 1939) (negotiability, assignment); Women's Catholic Order of Foresters v. Special School District of North Little Rock, 105 F. (2d) 716 (C. C. A. 8th, 1939) (interpretation); *Cf.* Coos Bay Lumber Co. v. Collier, 104 F. (2d) 722 (C. C. A. 9th, 1939) (accord and satisfaction).

27. Dismang v. Western Union Telegraph Co., 24 F. Supp. 782 (N. D. Okla. 1938), *rev'd on other grounds*, 106 F. (2d) 362 (C. C. A. 10th, 1939) (presumption of agency, suit against corporation based on tort of servant); Gray, McFawn & Co. v. Hegarty, Conroy & Co., 27 F. Supp. 93 (S. D. N. Y. 1939) (joint venture); see dissent Federal Reserve Bank v. Algar, 100 F. (2d) 941, 942 (C. C. A. 3rd, 1938, on reargument Jan. 6, 1939) (agency to collect notes).

28. Washington Water Power Co. v. Couer D'Alene, 25 F. Supp. 795 (D. Idaho 1938) (power of municipal corporation to make contract); Keifer & Keifer v. Reconstruction Finance Corp., 97 F. (2d) 812 (C. C. A. 8th, 1938) (ability of bailee to contract out of liability for negligence); Panko v. Endicott Johnson Corp., 24 F. Supp. 678 (N. D. N. Y. 1938) (ability to sue); United States v. Durrance, 101 F. (2d) 109 (C. C. A. 5th, 1939) (ability to sue for wrongful death); Iser v. Brockway, 25 F. Supp. 221 (W. D. Pa. 1938) (validity of service of summons); Hack v. American Surety Co., 96 F. (2d) 939 (C. C. A. 7th, 1938), *cert. denied*, 305 U. S. 631 (1938), *rehearing denied*, 305 U. S. 671 (1938) (liability on surety bond); Alford v. McConnell, 27 F. Supp. 176 (N. D. Okla. 1939) (liability on sheriff's official bond); Missouri *ex rel.* Devault v. Fidelity & Casualty Co., 107 F. (2d) 343 (C. C. A. 8th, 1939) (sheriff's bond); First National Bank v. Aetna Casualty & Surety Co., 105 F. (2d) 339 (C. C. A. 3rd, 1939) (representations in application for surety bond); Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66 (W. D. Pa. 1939) (indemnity and contribution); National Automatic Tool Co. v. Goldie, 27 F. Supp. 399 (D. Minn. 1939) (right to garnishment); Kleinschmidt v. Brown, 28 F. Supp. 86 (E. D. Ark. 1939) (fixtures); Matthews v. Barker, 30 F. Supp. 464 (D. Idaho 1938) (property rights); Bailey v. Porter-Wadley Lumber Co., 28 F. Supp. 25 (W. D. La. 1939) (property rights); Pruitt v. Porter-Wadley Lumber Co., 28 F. Supp. 31 (W. D. La. 1939) (property rights); Carr v. United States, 28 F. Supp. 236 (W. D. Ky. 1939) (measure of damages); Lincoln Mines Operating Co. v. Huron Holding Corp., 27 F. Supp. 720 (D. Idaho 1939) (right to attachment); *contra:* New Port Richey v. Fidelity & Deposit Co., 105 F. (2d) 348 (C. C. A. 5th, 1939) (negotiable instruments). This last case seems clearly wrong.

29. Lyon v. Mutual Benefit, Health & Accident Ass'n, 305 U. S. 484 (1939);

Conflict of laws is among those fields of general substantive law in which the *Tompkins* case would seem applicable.[30] If, as is stated by Mr. Justice Brandeis, "There is no federal general common law," there can be no federal common law rules of conflict of laws, and state rules must determine what state law should govern.[31] The problem is not, however, as simple as it might seem. The suggestion has been made[32] of a possible interpretation of Section 34 of the Judiciary Act which would place emphasis on the last words of the section: "in cases where they apply." Such emphasis, it has been suggested, would permit the federal courts to make their own choice as to when the laws of a particular state should apply.[33] It has also been suggested that even without such emphasis the federal courts might as a matter of policy make their own selection of state law.[34]

Boal v. Electric Storage Battery Co., 98 F. (2d) 815 (C. C. A. 3rd, 1938) (standard of proof applied); Allison v. Great Atlantic & Pacific Tea Co., 99 F. (2d) 507 (C. C. A. 4th, 1938) (*res ipsa loquitur*); Coca-Cola Bottling Co. v. Munn, 99 F. (2d) 190 (C. C. A. 4th, 1938) (*res ipsa loquitur;* admissibility of evidence of injury to other people); Rosenthal v. New York Life Ins. Co., 99 F. (2d) 578 (C. C. A. 8th, 1938) (opinion evidence); Pollard v. Nicholls, 99 F. (2d) 955 (C. C. A. 5th, 1938) (non-expert testimony); Chicago, G. W. R. R. v. Robinson, 101 F. (2d) 994 (C. C. A. 8th, 1939) (admissibility of photographs); Norfolk & W. Ry. v. Riggs, 98 F. (2d) 612 (C. C. A. 6th, 1938) (ability of members of jury to impeach verdict); Equitable Life Assur. Soc. v. MacDonald, 96 F. (2d) 437 (C. C. A. 9th, 1938), *cert. denied,* 305 U. S. 624 (1938) (presumption, burden of proof); Dismang v. Western Union Telegraph Co., 24 F. Supp. 782 (N. D. Okla. 1938) (presumption); Chinn v. Llangollen Stables, 25 F. Supp. 389 (E. D. Ky. 1938) (parol evidence); *see also* Phillips v. Davidson, 24 F. Supp. 184, 185, 186 (E. D. S. C. 1938) (parol evidence); Hagan & Cushing Co. v. Washington Water Power Co., 99 F. (2d) 614, 616 (C. C. A. 9th, 1938) (*res ipsa loquitur*); *cf.* Egan Chevrolet Co. v. Bruner, 102 F. (2d) 373 (C. C. A. 8th, 1939); Cities Service Oil Co. v. Dunlap, 101 F. (2d) 314 (C. C. A. 5th, 1939); Aetna Life Ins. Co. v. Conway, 102 F. (2d) 743 (C. C. A. 10th, 1939). For a discussion of these cases as raising a problem in substance and procedure see *infra* p. 25.

30. Aside from problems as to what is substantive and what is procedural or remedial in conflicts of laws, the question might be raised as to whether or not the whole question of choice of law is substantive. See Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333.

31. Note, *Is There a Federal Law of Conflict of Laws?* (1939) 24 IOWA L. REV. 784. There is, of course, the as yet vague field of federal constitutional limitations on conflict of laws rules. For recent discussions of this problem see Smith, *The Constitution and Conflict of Laws* (1939) 27 GEO. L. J. 536; Hilpert & Cooley, *The Federal Constitution and the Choice of Law* (1939) 25 WASH. U. L. Q. 27.

32. Note, *Congress, the Tompkins Case, and the Conflict of Laws* (1939) 52 HARV. L. REV. 1002.

33. The last phrase probably was intended merely to mean that if there were any state law which might apply to the facts of the case it should be applied. The interpretation suggested is, however, a possible one, but it would be a considerable narrowing of the broad wording with which Mr. Justice Brandeis announces the constitutional basis of the Tompkins decision. As yet there is no basis in case law for saying that it will be so narrowed.

34. This interpretation seems inconsistent with the spirit of the Tompkins case since it might lead to the same discrimination between residents and non-residents which existed under Swift v. Tyson.

The Supreme Court in *Ruhlin v. New York Life Insurance Co.*, recognized the problem, but refused to comment on it.[35] In the lower federal courts it has arisen several times and different results have been reached. Some courts have felt themselves bound by state conflict of laws rules, and others have relied on federal precedents. In most instances it is impossible to tell why the particular law was chosen as being controlling, since no authorities are cited and both federal and state decisions would reach the same result.

Three of the six cases in which the federal courts have definitely based their choice of law on the choice of law rules of the state where the federal court was sitting, arose in the Ninth Circuit.[36] The others arose in the Southern District of New York in the Second Circuit, in the Western District of Oklahoma in the Tenth Circuit, and in the District of Maryland in the Fourth Circuit.[37] In none of these cases did it make any difference whether federal or state conflict of laws rules were followed.

The cases in which federal precedents are relied upon are also ones where there was no real choice of law, since all possibilities would lead to the same result.[38] The same is, of course, true in the cases where it is impossible to tell whether federal or state conflicts rules are being ap-

---

35. 304 U. S. 202, 208, n. 2: "Under the general doctrine the interpretation of an insurance contract depends on the law of the place where the policy is delivered. *Mutual Life Ins. Co. v. Johnson*, 293 U. S. at 339. We do not now determine which principle must be enforced if the Pennsylvania courts follow a different conflict of laws rule."

It is not clear what conflict of laws rule was applied by the circuit court of appeals after the case was remanded. Ruhlin v. New York Life Ins. Co., 106 F. (2d) 921 (C. C. A. 3rd, 1939).

36. Schram v. Poole, 97 F. (2d) 566 (C. C. A. 9th, 1938); Schram v. Smith, 97 F. (2d) 662 (C. C. A. 9th, 1938); Ostroff v. New York Life Ins. Co., 23 F. Supp. 724 (S. D. Calif. 1938), *rev'd on a construction of the policy without citation of the Tompkins case*, 104 F. (2d) 986 (C. C. A. 9th, 1939).

37. Cray, McFawn & Co. v. Hegarty, Conroy & Co., 27 F. Supp. 93 (S. D. N. Y. 1939); Monahan v. New York Life Ins. Co., Mutual Life Ins. Co. v. Monahan, 26 F. Supp. 859 (W. D. Okla. 1939); First National Bank v. Mayor and City Council, 27 F. Supp. 444 (D. Md. 1939).

At first glance the Monahan case would seem to be one in which it would make some difference which law was applied. A different result would be reached if the law of Arkansas, where the contract was made, were applied rather than the law of New York, where the contract was to be performed. However, the conflict of laws rule of neither Oklahoma, the forum, nor the federal courts would lead to an application of Arkansas law. In the Maryland case federal decisions are also cited.

38. Malloy v. New York Life Ins. Co., 103 F. (2d) 439 (C. C. A. 1st, 1939); Wunderlich v. National Surety Corp., 24 F. Supp. 640 (D. Minn. 1938); New York Life Ins. Co. v. Ruhlin, 25 F. Supp. 65 (W. D. Pa. 1938); Dorman v. John Hancock Mutual Life Ins. Co., 25 F. Supp. 889 (S. D. Calif. 1939). It is interesting that the same judge, Yankwich, J., wrote the opinions in the Dorman case and the Ostroff case, *supra* note 36. In one case he definitely relied on state conflicts rules and in the other he apparently relied on federal precedents.

plied.[39] We must await the determination of a case where it would make some difference whether the state or federal conflict of laws rule was applied. Until such a case arises it cannot be said that there is any definite authority on the problem of what choice of law rules are to govern.

Because *Swift v. Tyson* and *Erie Railroad v. Tompkins* were both diversity of citizenship cases, the doctrines which they established are generally referred to as having applicability only when the jurisdiction of the federal court is based on diversity of citizenship.[40] But is there any reason for so limiting the *Tompkins* case? Mr. Justice Brandeis in the majority opinion says:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law . . ."[41]

In view of this wording it would not seem that a particular issue, not in itself covered by the Federal Constitution or by an Act of Congress, should be decided in a manner at variance with state law simply because jurisdiction was based upon some federal statute. Regardless of what the basis of jurisdiction may be,[42] if there is no federal common law, the federal courts have no alternative but to apply the state law, where the Federal Constitution or Acts of Congress do not govern the precise problem. Thus, no reason appears for limiting the *Tompkins* doctrine to diversity cases, and the courts have not so limited it.

Several cases have arisen wherein the jurisdiction of the federal courts was based upon the fact that the proceeding was one for winding up the

---

39. Rachlin v. Libby-Owens-Ford Glass Co., 96 F. (2d) 597 (C. C. A. 2d, 1938); Sommer v. Nakdimen, 97 F. (2d) 715 (C. C. A. 8th, 1938); Myers v. Ocean Accident & Guarantee Corp., 99 F. (2d) 485 (C. C. A. 4th, 1938); Mutual Benefit, Health & Accident Ass'n v. Bowman, 99 F. (2d) 856 (C. C. A. 8th, 1938); Luhman v. Hoover, 100 F. (2d) 127 (C. C. A. 6th, 1938); Bissonette v. National Biscuit Co., 100 F. (2d) 1003 (C. C. A. 2d, 1939); Bruun v. Hanson, 103 F. (2d) 685 (C. C. A. 9th, 1939); General Petroleum Corp. v. Seaboard Terminals Corp., 23 F. Supp. 137 (D. Md. 1938).

40. Many of the articles written about Swift v. Tyson used it as an argument for revising or abolishing diversity jurisdiction. See especially Ball, *Revision of Federal Diversity Jurisdiction* (1933) 28 ILL. L. REV. 356; Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship* (1929) 78 U. OF PA. L. REV. 179; Campbell, *Is Swift vs. Tyson an Argument For or Against Abolishing Diversity of Citizenship Jurisdiction?* (1932) 18 A. B. A. J. 809; Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499; Parker, *The Federal Jurisdiction and Recent Attacks Upon It* (1932) 18 A. B. A. J. 433; Warren, *Corporations and Diversity of Citizenship* (1933) 19 VA. L. REV. 661; Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States* (1933) 19 A. B. A. J. 71.

41. Erie Railroad v. Tompkins, 304 U. S. 64, 78 (1937).

42. See Shulman, *supra* note 12, at 1350.

affairs of a national bank.[43] The leading decision was handed down by the Supreme Court in *Wichita Royalty Co. v. City National Bank.*[44] In a suit in state court by a solvent national bank on a promissory note, the defendant trust filed a cross-complaint seeking to impose liability on the bank for aiding a previous trustee in his violation of the trust. The Texas Supreme Court finally set out certain strict rules concerning the liability of the bank.[45] These rules were to be applied by the trial court after further findings of fact.

The bank having closed, the suit became in effect one to wind up the affairs of a national bank. The federal district court granted the petition of the bank for removal,[46] took jurisdiction, but refused to follow the Texas Supreme Court.[47] Instead it applied its own more lenient rules regarding the liability of the bank for aiding in the spoilation of the trust fund. The circuit court of appeals remanded the case for failure to comply with Equity Rule 70½.[48] It did, however, decide the law applicable.[49] After the decision in the *Tompkins* case the circuit court of appeals disavowed any intention not to be bound by the Texas rule,[50] but went on to point out that a case involving similar issues which had been heard at the same time by the Texas Supreme Court, had been reversed on rehearing.[51]

Certiorari was granted by the Supreme Court.[52] The Court unanimously held that, "It was the duty of the federal court to apply the law of Texas as declared by its court." The Court went on to point out that the Texas court in the later decision, which was relied upon by the

---

43. The federal courts are expressly given jurisdiction over suits for winding up the affairs of a national bank, 36 STAT. 1092 (1911), 28 U. S. C. § 41 (16) (1934). See Note, *The Applicability of State Laws to National Banks* (1935) 35 COL. L. REV. 416, for a discussion of the situation prior to the Tompkins case; also Willing v. Binenstock, 302 U. S. 272 (1937).

44. 306 U. S. 103 (1939).

45. 127 Tex. 158, 93 S. W. (2d) 143 (1936).

46. 18 F. Supp. 609 (N. D. Tex. 1937). Also appearing in this action is a new bank which had been formed to take over the best assets of the closed bank and to assume certain liabilities, not including the claim of the trust. New claims were filed by the trust attacking the sale of assets as an attempt to create a preference and seeking to have the assets in the hands of the new bank declared to be held on a constructive trust for the creditors of the old bank.

47. 18 F. Supp. 795 (N. D. Tex. 1937).

48. This rule provides for separate findings of fact and conclusions of law. This has been superceded by Rule 52 of the Rules of Civil Procedure.

49. 95 F. (2d) 671 (C. C. A. 5th, 1938).

50. 97 F. (2d) 249 (C. C. A. 5th, 1938).

51. Quanah, A. & P. Ry. v. Wichita State Bank & Trust Co., 127 Tex. 407, 93 S. W. (2d) 701 (1936).

52. 305 U. S. 587 (1938).

circuit court of appeals, had distinguished its own decision in the *Wichita* case, leaving it unimpaired as authority. For that reason the Supreme Court reversed the circuit court of appeals and remanded the case.

Thus, the word of the Supreme Court itself is authority for the proposition that the doctrine of *Erie Railroad v. Tompkins* is not limited to diversity of citizenship cases.

In a later case the Supreme Court, with Mr. Justice Stone again speaking for the majority, refused to apply the *Tompkins* doctrine to an action by a receiver of a closed national bank against a director.[53] The suit was brought on a promissory note given by the director to cover up an unlawful holding by the bank of its own stock. The director sought to show the true nature of the transaction and to set up an agreement that the note would not be enforced. In answer to the contention that state law should govern, the Court held that since the thing done was one enjoined by federal statute the result of that act was also a question of federal law. In so holding the Court did not overrule the *Wichita* case, but merely tacitly limited that case and the *Tompkins* case to non-federal questions.

The lower federal courts have split on the question of the applicability of state law in suits for winding up the affairs of a national bank. Some courts have said without hesitation that the *Tompkins* case has absolutely no effect in such actions.[54] The *Wichita* case indicates that such broad statements are incorrect. On the other hand, *Deitrick v. Greaney* makes it just as apparent that the rulings may be correct as to those particular cases.[55]

The constructive trust issue in the *Wichita* case was not discussed by the Supreme Court. However, there can be little doubt but that the

---

53. Deitrick v. Greaney, 60 Sup. Ct. 104 (U. S. 1940).

54. Downey v. Yonkers, 23 F. Supp. 1018, 1023 (S. D. N. Y. 1938), *aff'd*, 106 F. (2d) 69 (C. C. A. 2d, 1939), *cert. granted*, 60 Sup. Ct., 298 (U. S. 1940). The case was assigned for argument in the Supreme Court for the weeks of Feb. 26 and Mar. 4, 1940.

Bradford v. Chase National Bank, 24 F. Supp. 28 (S. D. N. Y. 1938). The Downey case involved the question of whether the receiver of a national bank could recover payments made under mistake of law, and the Bradford case of whether a constructive trust should be imposed on the sale of securities pledged, by the closed bank, to secure deposits of the Philippine government.

55. One case, in which the court refused to follow the Tompkins case, which may fall into this group is Atherton v. Anderson, 99 F. (2d) 883 (C. C. A. 6th, 1938). The suit was brought by the receiver of a national bank against the directors for damages by negligent management. The essential problem involved in both the Wichita and Atherton cases is one of standard of care. The decision was rendered upon the mandate of the Supreme Court, 302 U. S. 643 (1937), to determine the question of common law liability.

Court would have applied state law had it considered the question.[56] Whether or not a constructive trust, or, as in *Reno National Bank v. Seaborn*,[57] an implied in fact trust, exists is not governed by the Federal Constitution or by an Act of Congress. Therefore the case from the Southern District of New York, in which the court refuses to apply state rules in order to decide whether a trust existed as to the proceeds from the sale of wrongfully pledged assets, seems wrong.[58] The solution to the problem reached by the District Court for the District of Oregon seems to be a satisfactory one. That court, in *Bryant v. Linn County*,[59] drew a distinction between transactions which are in the normal course of its business, and relations arising out of insolvency.[60] To this solution, however, must be added the limitation implicit in *Deitrick v. Greaney*.[61]

---

56. This indicates one place where the Tompkins case may have unfortunate results. The federal courts have developed definite rules on the constructive trust problem, whereas the state decisions are in a state of confusion. See Townsend, *Constructive Trusts and Bank Collections* (1930) 39 YALE L. J. 980; Bogert, *Failed Banks, Collection Items, and Trust Preferences* (1931) 29 MICH. L. REV. 545. Apparently the federal precedents are to be discarded and the confusion of the state decisions is to govern. State decisions which hold that a trust, which did not previously exist, arises on insolvency probably will not be followed since that would create a preference contrary to federal statute. REV. STAT. § 5236 (1875), 12 U. S. C. § 194 (1934); Jennings v. United States Fidelity & Guaranty Co., 294 U. S. 216 (1935). See *infra* p. 14, Bryant v. Linn County.

57. 99 F. (2d) 482 (C. C. A. 9th, 1938). The question involved was whether an implied in fact trust had been created by refusal of a national bank to pay out funds on the demand of the receiver of the closed state bank for whom the funds were held on deposit. It was held that in the absence of federal statute the creditor rights of a depositor and the effect of the conduct of the bank were dependent on state law.

In this instance the Nevada rule was in accord with the federal decisions, and it was found that there was no trust. A simple debtor-creditor relationship existed and the mere refusal of the debtor to pay did not transform the funds in its hands into a trust *res*.

58. Bradford v. Chase National Bank, 24 F. Supp. 28 (S. D. N. Y. 1938).

59. 27 F. Supp. 562 (D. Ore. 1938). This is not a constructive trust case. However, the same principles are applicable.

60. Entirely consistent with this view is a prior decision by the same court in which it refused to apply state law in deciding whether interest should be allowed on unnecessary double liability payments made by stockholders. McCarty v. Gault, 24 F. Supp. 977 (D. Ore. 1938). See *infra* note 67. However, in the provision for repayment to stockholders of assessments paid in, nothing is said as to interest. 27 STAT. 345 (1893), 12 U. S. C. § 197 (1934). See *infra* note 67.

61. Other banking cases in which the courts have applied the Tompkins doctrine are: Reconstruction Finance Corp. v. O'Keefe, 98 F. (2d) 820 (C. C. A. 3rd, 1938) (New Jersey law was applied in deciding whether the pledgee of a note was entitled to the proceeds of security originally given to secure the note, but of which the pledgee had no knowledge at the time the note was taken. The security had been disposed of by the receiver of a closed national bank.); Schram v. Poole, 97 F. (2d) 566 (C. C. A. 9th, 1938); Schram v. Smith, 97 F. (2d) 662 (C. C. A. 9th, 1938). Diversity of citizenship was present in these cases in addition to the fact that they were suits to wind up the affairs of a national bank. Both were suits by the receiver of a national bank to recover against stockholders on the double liability provisions. Ordinarily such liability

The federal jurisdiction in bankruptcy is exclusive. For that reason there has been considerable question raised as to whether the *Tompkins* case would have any effect on the non-federal questions in bankruptcy. It is difficult, however, to see how the problem differs greatly from that present in the banking cases just discussed. The similarity is clearly pointed out by the case of *In re Kountze Bros.*,[62] which involved a failed private bank. The precise question was whether certain money deposited for the payment of bonds of the city of Los Angeles constituted a special deposit so as to entitle the city to a preferred claim. In accord with the general view state law was applied in determining that it was not a special deposit.[63] On the other hand, in *In re Koeppel*,[64] where a construction of the bankruptcy act was involved, the District Court for the Eastern District of New York refused to apply state law. Although there are statements in the latter which go too far in denying the applicability of the *Tompkins* case in bankruptcy proceedings, the cases do not seem to be in conflict.

In taxation there are a number of problems which may be affected by state law. One extremely interesting question arose in connection with the determination of capital gains for income tax purposes. It became necessary to find the value of a water company's property as of 1917 in order to establish a case for calculation of the amount of capital gain. The District Court for the Northern District of California held that since California includes in utility valuation an allowance for paving over mains, such an allowance was to be included for income tax purposes.[65] The

---

is purely statutory. The remedy to be pursued is the one provided by local law for collecting like claims. *Cf.* Pufahl v. Estate of Parks, 299 U. S. 217 (1936); Tobin v. Hymers, 99 F. (2d) 740 (C. C. A. 9th, 1938).

62. 103 F. (2d) 785 (C. C. A. 2d, 1939), *cert. denied*, 60 Sup. Ct. 110 (U. S. 1939).

63. Other bankruptcy cases in which state law has been applied are: *In re* Smith, 23 F. Supp. 174 (S. D. W. Va. 1938) (validity as an assignment of a letter offering to assign which was written more than four months before bankruptcy); Investors Syndicate v. Smith, 105 F. (2d) 611 (C. C. A. 9th, 1939) (right to rents as between trustee and mortgagee); *In re* Grodzins, 27 F. Supp. 521 (S. D. Calif. 1939) (homestead exemption); National Automatic Tool Co. v. Goldie, 27 F. Supp. 399 (D. Minn. 1939) (right to garnishee expected dividend in hands of trustee, state law as to whether can garnishee for this type of claim and this type of asset, federal law as to whether goods *custodia in legis* may be garnisheed); *Cf. In re* Wiegand, 27 F. Supp. 725 (S. D. Calif. 1939) (interpretation of state statute to determine validity of lien); Prudential Ins. Co. of America v. Land Estates, 27 F. Supp. 668 (S. D. N. Y. 1939) (right of mortgage holder to have claim allowed in full without deduction of security. State and federal rules the same); *In re* Pointer Brewing Co., 105 F. (2d) 478 (C. C. A. 8th, 1939) (validity of conditional sales contract).

64. 24 F. Supp. 703 (E. D. N. Y. 1938).

65. East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 (N. D. Calif.

Tompkins case was cited as authority for the proposition that California decisions were to determine the items to be included in the valuation.[66] The case is a troublesome one and just what place it will have in the development of *Erie Railroad v. Tompkins* is difficult to say.[67]

The possibility that the *Tompkins* case may have some effect on the general field of federal taxation and the specific subject of taxation of community property rights was recognized in *United States v. Goodyear*.[68] Likewise the possibility of some effect in the gift tax field was recognized

---

1938), appeal dismissed by stipulation of counsel, 104 F. (2d) 1016 (C. C. A. 9th, 1939).

66. The problem presented by this ruling is, of course, entirely different from that presented in the ordinary utilities rate case. In a rate case the problem is what items must the state commission include in order to meet the requirements of "due process." But, having met the requirements of the Fourteenth Amendment, the state may include additional items in the valuation. The East Bay Water Co. case holds that where valuation is necessary in federal court the state law is to be applied to determine what additional items over and above the requirements of due process must be included in the valuation. *Cf.* Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655 (1912); Des Moines Gas Co. v. Des Moines, 238 U. S. 153 (1915).

67. One problem presented is whether the case means that words used, but not defined, in a federal act are to be interpreted in each case in light of the state decisions of the forum. For example, does the case mean that the word "value" in the Federal Estate Tax, § 302, which the Treasury Department has interpreted to mean fair market value (Reg. 80, Art. 10 (a), p. 28), is to be modified by varying state decisions as to what shall constitute "fair market value"? It is doubtful that the East Bay Water Co. case, if upheld and followed, will be carried that far. Certainly the constitutional basis of the Tompkins decision does not require such a holding. It can be safely said that if Congress has power to pass an act, the federal courts have power to construe that act. (*Cf.* the discussion *infra* p. 37 as to state court interpretation of state statutes.) The problem is in determining when the court stops construing the statute and begins applying common law principles not in accord with the common law principles of the state in question, a thing which the Tompkins case says is beyond the federal power. This is a problem which only the Supreme Court can answer and on which its answer will be final. A case which suggests this problem in the national banking field is McCarty v. Gault, 24 F. Supp. 977 (D. Ore. 1938). A higher federal court might easily find that the district court in that case in allowing interest on excess assessments paid in by stockholders, had gone beyond the point of statutory interpretation and was applying common law principles. The policy basis of the Tompkins decision requires only that the line be drawn definitely so that the possibility of different results in the same jurisdiction in the same type of case will be reduced to a minimum. That is if the line is drawn definitely and it is said that a certain matter is interpretation then the federal courts can force the states into line by use of the right to appeal on a substantial federal question. See *infra* note 77.

68. 99 F. (2d) 523 (C. C. A. 9th, 1938). Speaking of the statement in Burnet v. Harmel, 287 U. S. 103, 110 (1932), that "State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law," the circuit court of appeals in a footnote to the Goodyear case said, "The effect of Erie Railroad Co. v. Tompkins . . . [citation] and Ruhlin v. New York Life Ins. Co. . . . [citation] . . ., if any, on this rule is yet to be determined." The question as to community property rights is answered by Lang v. Commissioner, 304 U. S. 264 (1938), where it was held that state community property law is applicable in determining the amount of the gross estate. Poe v. Seaborn, 282 U. S. 101 (1930), answers the question as to income tax.

in *Hughes v. Commissioner of Internal Revenue.*[69] The *Tompkins* case has been relied upon by the Circuit Court of Appeals for the First Circuit in determining what was the nature of the decedent's interest for estate tax purposes,[70] and by the District Court for the Southern District of California in determining what are proper charges and expenses against the estate.[71] It is doubtful whether these cases go any further than the previous rules as to applicability of local rules of property in federal taxation.[72] However, there is the suggestion that the *Tompkins* case may have some effect. As yet it is too early to tell just what the effect will be.

Since the *Tompkins* case is not to be limited to diversity cases, the problem of what will be the effect on other types of federal jurisdiction[73] such as admiralty,[74] patents, copyrights,[75] etc.,[76] presents itself. The answer would seem to be that state law is to govern non-federal questions in the federal courts regardless of the basis of jurisdiction. The difficult problem of determining what are federal and what are non-federal questions remains, but this does not mean that the situation of *Swift v. Tyson,* where it was necessary what was "general" and what was "local" law, has been recreated. Rather it is a question of determining whether state law is not to govern the precise question because, "the Constitution, treaties, or statutes of the United States otherwise provide." All other questions are to be governed by state law, decisional or statutory.

The line of demarcation between federal and non-federal questions is

---

69. 104 F. (2d) 144 (C. C. A. 9th, 1939).

70. Page v. Hoxie, 104 F. (2d) 918 (C. C. A. 1st, 1939).

71. United States v. Security-First Nat. Bank, 30 F. Supp. 113 (S. D. Calif. 1939).

72. The field of local rules of property in federal taxation is one which is in great confusion and as yet nothing satisfactory has been written in it. *Cf.* such cases as, Crooks v. Harrelson, 282 U. S. 55 (1930); Tyler v. United States, 281 U. S. 497 (1930); Lyeth v. Hoey, 305 U. S. 188 (1938).

73. One type of federal jurisdiction to which it might be said that the doctrine has been expanded is appeal from territorial courts. In Waialua Agricultural Co. v. Christian, 305 U. S. 91 (1938), the Court refused to reverse a decision of the Supreme Court of Hawaii unless it was manifestly erroneous. The situation is not the same, of course, because it is a direct appeal and the court does have the power to reverse. Compare Carscadden v. Territory of Alaska, 105 F. (2d) 377 (C. C. A. 9th, 1939), which reaches a different result in the case of an appeal from the District Court for Alaska.

74. See McCormick & Hewins, *supra* note 12, at 141, 142, for a discussion of the possible effect on admiralty. At least one admiralty case has come before the Supreme Court since the Tompkins case with no mention of the problem. Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424 (1939). The applicability of local law was urged, but denied in Barndt v. Det Bergenske Dampskibsselskab, 28 F. Supp. 815 (S. D. N. Y. 1938).

75. *Cf.* Century Distilling Co. v. Continental Distilling Co., 106 F. (2d) 486 (C. C. A. 3rd, 1939) (trade marks).

76. The jurisdiction of the district courts is set out in Judicial Code, Sec. 24, amended, 28 U. S. C. § 41 (1934).

as yet not clearly drawn.[77] Thus far we have dealt in the main with cases in which the courts have considered the questions to be non-federal and have applied the doctrine. But it is just as important to consider those cases where the doctrine has been asserted and rejected.

The cases in which the *Tompkins* case has been rejected are rather scattered, and, for the most part, not of a type from which satisfactory generalizations can be drawn. Reasons given for refusing to apply state decisions have been that the particular problem was procedural and not substantive,[78] and that the question was strictly federal. At present, in attempting to draw the line between federal and non-federal questions, we are interested particularly in the latter group of cases. The substantive-procedural questions will be discussed later.[79]

As mentioned previously, the *Tompkins* case has been said by some courts to be inapplicable in national banking[80] and in bankruptcy cases.[81] The reason given in those cases was that the *jurisdiction* was exclusively federal. Since, as has been suggested, the exclusiveness of the federal courts' jurisdiction is not a valid test, it is apparent that those cases are of no assistance in determining what *questions* are federal.

Of course, the question of federal jurisdiction is itself a federal question.[82] In addition it has been held that the right of a federal grand jury to indict, after a previous jury had refused to do so, is not effected by a New York rule against resubmittal.[83] The court said that since the grand jury which found the indictment was one set up under federal law, its powers were to be construed by interpreting that federal law. Similar-

---

77. Although the problem here is not exactly the same as that of determining what is a federal question for purposes of appeal from decisions of the highest court of a state to the United States Supreme Court under Judicial Code, Sec. 237, amended, 43 STAT. 937 (1925), 28 U. S. C. 344 (1934), those cases may be of some help here. A recent case on that problem is Lovell v. Griffin, 303 U. S. 444 (1938), decided less than a month before the Tompkins case. The court there held that what is a federal question is itself a federal question. For a recent discussion of that field see Rubin and Willner, *Obligatory Jurisdiction of the Supreme Court: Appeals from State Courts under Section 237(a) of the Judicial Code* (1939) 37 MICH. L. REV. 540.

78. Summers v. Hearst, 23 F. Supp. 986 (S. D. N. Y. 1938); F. & M. Skirt Co. v. A. Wimpfheimer & Bro., 25 F. Supp. 898 (D. Mass. 1939); Cities Service Oil Co. v. Dunlap, 101 F. (2d) 314 (C. C. A. 5th, 1939).

79. *Infra* p. 19, *et seq.*

80. Downey v. Yonkers, 23 F. Supp. 1018 (S. D. N. Y. 1938); Bradford v. Chase National Bank, 24 F. Supp. 28 (S. D. N. Y. 1938); McCarty v. Gault, 24 F. Supp. 977 (D. Ore. 1938).

81. *In re* Koeppel, 24 F. Supp. 703 (E. D. N. Y. 1938).

82. Neirbo Co. v. Bethlehem Shipbuilding Corp., 103 F. (2d) 765 (C. C. A. 2d, 1939), *rev'd on other grounds*, 60 Sup. Ct. 153 (U. S. 1939); *Cf.* Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 60 Sup. Ct. 215 (U. S. 1939).

83. United States v. Warren, 26 F. Supp. 333 (E. D. N. Y. 1939).

ly, it has been held that in applying the Seventh Amendment guaranteeing trial by jury in suits at common law, federal courts are not bound by state decisions as to what constitute legal actions.[84] The problem whether a corporation is doing business within a state, so as to make service of summons on an officer valid as against the corporation, has been held to involve federal questions and to be one on which federal courts are not bound by state decisions.[85] Nor is the United States, suing on behalf of an Indian ward to recover taxes paid, bound by a special state statute of limitations for tax claims.[86] The reason given was that the federal control over Indian lands is exclusive and supreme. Federal courts, in determining what is a "controversy" under the Federal Declaratory Judgment Act,[87] need not consider state decisions,[88] and, finally, it has been held that the doctrine has no effect on orders of the Federal Trade Commission.[89] These cases are of small assistance in drawing the line, but it is by just such cases as these that, over a period of years, the line between federal and non-federal questions will be marked out.

Since the *Tompkins* case is said to apply only to matters of substantive law,[90] one of the most important problems raised is the distinction between substance and procedure. As has been pointed out by Professor W. W. Cook, "substance" and "procedure" may have different meanings for

---

84. Hollingsworth v. General Petroleum Corp., 26 F. Supp. 917 (D. Ore. 1939).

85. Pioneer Utilities Corp. v. Scott-Newcomb, Inc., 26 F. Supp. 616 (E. D. N. Y. 1939); Hedrick v. Canadian Pacific Ry., 28 F. Supp. 257 (S. D. Ohio 1939).

86. Board of Commissioners v. United States, 100 F. (2d) 929 (C. C. A. 10th, 1938), *rev'd on other grounds*, 60 Sup. Ct. 285 (U. S. 1939). Mr. Justice Frankfurter takes the view that the Tompkins case is inapplicable since the case arises under a treaty of the United States.

87. 48 STAT. 955 (1934), 49 STAT. 1027 (1935), 28 U. S. C. § 400 (Supp. 1938).

88. United States Fidelity & Guaranty Co. v. Koch, 102 F. (2d) 288 (C. C. A. 3rd, 1939).

89. National Candy Co. v. Federal Trade Commission, 104 F. (2d) 999 (C. C. A. 7th, 1939).

90. This statement is supported by the wording of the majority opinion in the Tompkins case. It says, ". . . Congress has no power to declare substantive rules of common law applicable in a State . . ." The concurring opinion of Mr. Justice Reed, 304 U. S. 64, 90, 92 (1937), states that no one doubts the federal power over procedure. He justifies his statement on the basis of the necessary and proper clause of Art. 1, Sec. 8 of the Constitution. This view is further supported by the fact that the Court has adopted the Rules of Civil Procedure and since the Tompkins case has not withdrawn them as it has power to do. The view is taken by the leading writers on the subject, see particularly Note (1938) 38 COL. L. REV. 1472; Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins* (1938) 16 TEX. L. REV. 512; Shulman, *supra*, note 12, at 1351; Comment (1939) 37 MICH. L. REV. 1249; Tunks, *supra*, note 12.

different purposes.[91] Between the extremes of matters which clearly fall into one group or the other, there is a field in which classification is dependent upon the purpose for which it is desired. Since the purpose of the *Tompkins* case, as indicated by the wording of the opinion and the criticisms which it makes of *Swift v. Tyson,* is to promote conformity of results within the geographical area of each state,[92] it would seem that all matters should be classified as substantive which might bring about a result in federal court different from that which would be reached on the same facts in state court. On the other hand, matters which are not likely to affect the result but which are concerned with the mere mechanics of getting the issues before the court, should be classified as procedural. Of course, the line between substance and procedure for the purpose of the *Tompkins* case will have to be drawn by the courts over a period of years. Nevertheless, the classification above may serve as a useful tool for determining whether the cases thus far decided fall into any orderly pattern, or whether they are hopelessly in conflict.

At the very time that the Supreme Court declared that federal courts were bound to follow state rules of substantive law, there was in existence, waiting to become effective, a set of procedural rules which would free the federal courts from conformity to state procedure. One of the first problems which must be discussed under the topic substance and procedure, is the possibility of conflict between the new Rules of Civil Procedure[93] and the doctrine of the *Tompkins* case.[94] Theoretically there should be no such conflict, since the Act of June 19, 1934, which empowers the Supreme Court to prescribe the rules, states that:

---

91. Cook, *supra* note 30.

92. Of course, the decision in the Tompkins case is based on two grounds, Constitutional power and policy. That is, the decision is based first on the proposition that the federal government is without constitutional power to declare rules of decisions applicable within a state, and second on the proposition that, as a matter of policy, it is a good thing to promote uniformity within a state. It is submitted that there is nothing in the constitutional basis which should compel the courts to draw the line between substance and procedure in a manner different from that required by the policy which the case adopts. The argument might be set forth that the constitutional basis of the decision requires that substance and procedure be defined as they were in 1789. It seems doubtful that the Court will take such a narrow view.

93. Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States pursuant to 48 STAT. 1064, 28 U. S. C. § 723b, 723c. (1934).

94. It is suggested in 38 COL. L. REV. at 1474, that there is a latent conflict between the policy of the Tompkins case and the policy of the Rules. Prior to writing the opinion in the Tompkins case, Mr. Justice Brandeis had refused to concur in the adoption of the Federal Rules. The possibility of a connection between the two is a matter upon which there might be considerable speculation.

"Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[95]

However, a possibility of conflict presents itself in Rule 8(c) which sets forth a list of defenses to be affirmatively pleaded. Among the defenses so listed is contributory negligence. In some states, however, alleging and proving freedom from contributory negligence is made a part of the plaintiff's case.[96]

The contributory negligence problem came before the District Court for the Eastern District of Illinois.[97] Defendant entered a motion to dismiss plaintiff's petition for insufficiency. He reasoned that under the *Tompkins* case Illinois law should govern and that the petition did not contain an allegation of freedom from contributory negligence such as is required by Illinois law. The plaintiff contended that the question was a procedural one to be governed by Rule 8(c). The court relied on earlier cases wherein the federal courts[98] had refused to follow state rules as to contributory negligence. Since the cases relied upon were decided while the Conformity Act[99] was in effect, the court felt that they were authority for the proposition that the matter was substantive and not procedural. The court, therefore, held that the Illinois rule rather than Rule 8(c) should govern.

One writer has expressed the view that it is carrying the *Tompkins* case to unnecessary lengths to conclude that pleading is a matter of substance in this instance.[100] This criticism of *Francis v. Humphrey* seems a justifiable one. Rules as to which party should raise a certain issue are mere rules governing the mechanics of getting the issues before the court and will not bring a different result in federal court. Therefore, the *Tompkins* case gives no basis for saying that state rules must govern matters of pleading in this instance.

In *Schopp v. Muller Dairies*,[101] the contributory negligence problem

95. Act of June 19, 1934, c. 651, § 1, 48 STAT. 1064, 28 U. S. C. § 723b (1934).

96. For a discussion of this problem see Comment (1939) 37 MICH. L. REV. 1249. The author there lists Illinois, Connecticut, Iowa, Maine, New York, Vermont and Michigan as among the states which have this rule in varying forms. See also, Notes (1939) 27 GEO. L. J. 375, (1939) 24 IOWA L. REV. 609, (1939) 6 U. OF CHI. L. REV. 510.

97. Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938).

98. Central Vermont Ry. v. White, 238 U. S. 507 (1915), and cases there cited.

99. REV. STAT. § 914 (1875), 28 U. S. C. § 724 (1934).

100. Note (1938) 38 COL. L. REV. 1472, 1478.

101. 25 F. Supp. 50 (E. D. N. Y. 1938). The decision was handed down after the effective date (Sept. 16, 1938) of the Rules of Civil Procedure, but there was no discussion of them.

arose, not as a question of pleading,[102] but as a question of burden of proof. The court held that the question was one of substantive law to be governed by state rules. This conclusion is not open to the same attack which has been leveled against the *Humphrey* case. Placing the burden of proof on the plaintiff rather than on the defendant is more than a mere matter of mechanics. Application in federal court of a rule different from the state rule might very easily bring about a different result on the same set of facts.[103]

The burden of proving, in a suit to quiet title, that the plaintiff is or is not a *bona fide* purchaser, has been held by the Supreme Court to be a matter of substance and hence within the scope of the *Tompkins* case.[104] Similarly it has been held that the question whether the burden of proof, as to intent to deceive, is shifted by raising a presumption of fraudulent intent, is to be governed by state law.[105] The line between substance and procedure seems to be drawn in a manner in keeping with the spirit of the *Tompkins* case in these two cases.

Closely akin to the question of burden of proof is the question of presumptions. The doctrine of *res ipsa loquitur* is often in effect a presumption. Since application or non-application of the doctrine might have an effect on the substantive rights of the parties, it was held in the Fourth Circuit that state law should govern.[106] The court points out, however,

---

102. Among the other things which Rule 8(c) lists as affirmative defenses are accord and satisfaction and set-off. Before the effective date of the Rules these two came up, but, likewise, not as matters of pleading. In Panama City v. Federal Reserve Bank of Atlanta, 97 F. (2d) 499 (C. C. A. 5th, 1938), Florida decisions were applied to determine whether the assigned claim was subject to a set-off, and in Wunderlich v. National Surety Corp., 24 F. Supp. 640 (D. Minn. 1938), state rules were applied to determine whether there had been an accord and satisfaction. *Cf.* Coos Bay Lumber Co. v. Collier, 104 F. (2d) 722 (C. C. A. 9th, 1939), as to accord and satisfaction. The Coos Bay case also raises but does not decide the question whether *res judicata* is a matter of substantive law. On the *res judicata* point *cf.* Matthews v. Barker, 30 F. Supp. 464 (D. Idaho 1938).

103. The determination to follow state decisions in this field may serve to lighten the load of the federal courts considerably in those states where the burden is placed on the plaintiff. One big reason why plaintiffs in negligence actions were anxious to get into federal court has now been eliminated.

104. Cities Service Oil Co. v. Dunlap, 60 Sup. Ct. 201 (U. S. 1939), *rev'g*, 101 F. (2d) 314 (C. C. A. 5th, 1939). In this connection an interesting statement appears in Guardian Life Ins. Co. of America v. Clum, 106 F. (2d) 592 (C. C. A. 3rd, 1939). After receiving judgment on the question whether the Tompkins case should have any application to the entering of directed verdicts and judgments *non obstante veredicto*, the court said, "A cogent argument for putting the exercise of the *n. o. v.* power in a category with *res ipsa loquitur*, presumptions and burden of proof might be made. Such an argument leads to its consideration as a procedure rather than a substantive question. . . ."

105. Equitable Life Assur. Soc. v. MacDonald, 96 F. (2d) 437 (C. C. A. 9th, 1938).

106. Coca-Cola Bottling Co. v. Mansfield, 99 F. (2d) 190 (C. C. A. 4th, 1938).

that even if they were to take the view that the matter was procedural, state rules would apply.[107]

As to the presumption of correctness of the lower courts opinion and the weight of evidence necessary for a reversal, the Eighth Circuit in *Egan Chevrolet Co. v. Bruner*,[108] relied solely on federal precedents.[109] This case might seem to be out of line with the other presumption cases, but in reality the problem is of an entirely different nature. The court is merely setting up a rule of court as a guidepost for determination of fact questions. The opinion of the lower court is, in effect, one bit of evidence which will be considered by the reviewing court, and the reviewing court is entitled to decide for itself what weight it will give to that evidence.

If rules as to admissibility of evidence are found to be substantive within the *Tompkins* case, another possibility of conflict with the Rules of Civil Procedure suggests itself. Rule 43(a) reads as follows:

> ". . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

If these matters of the law of evidence are held to be substantive, the clash will come when it is sought by reason of Rule 43(a) to introduce evidence not admissible under state rules. There has been no occasion for such a clash as yet since the cases which have relied upon the *Tompkins* case have all been ones in which the evidence has been admissible under state rules. Most of these cases were decided prior to the effective date of the Rules, and none have mentioned the Rules.

Although the Supreme Court in *Lyon v. Mutual Benefit Health &*

For a more complete discussion of the theory of this case see Note (1938) 38 COL. L. REV. 1472, 1475. *Cf.* Allison v. Great Atlantic & Pacific Tea Co., 99 F. (2d) 507 (C. C. A. 4th, 1938).

107. 99 F. (2d) 190, 193 (C. C. A. 4th, 1938).

108. 102 F. (2d) 373 (C. C. A. 8th, 1939).

109. Similarly, federal cases were relied upon to determine whether it was error to refuse to give an instruction which, though for the most part correct, was not exactly correct. Chicago, G. W. R. R. v. Robinson, 101 F. (2d) 994 (C. C. A. 8th, 1939). In the Robinson case the state rule was the same as the federal and it is impossible to tell from the opinion which the court considered to be controlling.

Accident Ass'n,[110] cited the Conformity Act as authority for the fact that state rules should govern the admissibility of evidence, it also referred to the *Tompkins* case and cases holding that under Section 34 of the Judiciary Act state rules as to admissibility of evidence should govern.[111] From the references made it is apparent that the court recognized a possibility that the matter might be substantive and therefore within the rule of the *Tompkins* case.

Cases in which lower federal courts have held state rules to govern have involved the admissibility:[112] of parol evidence,[113] of non-expert testimony,[114] of photographs,[115] of evidence challenged as being irrelevent,[116] and of testimony of members of a jury to impeach its verdict.[117] In at least one instance federal cases have been relied upon as to the proper scope of cross-examination.[118] In none of these cases is there any mention of the Conformity Act.

With the possible exception of the last one, these cases are consistent in the view that rules as to admissibility of evidence are, for purposes of the *Tompkins* case, substantive. This view seems to be in accord with the tentative classification of "*Tompkins* substance" as including matters which might effect different results on the same fact. There can be no doubt that the admissibility or non-admissibility of certain evidence may very easily mean the difference between a judgment for the plaintiff and a judgment for the defendant. The effect, if any, on the results of a law suit of rules setting the limits of cross-examination is probably more remote.[119] Yet the problem cannot be said to concern only the mechanics of getting the facts before the court.

In *Moore v. Chicago, B. & Q. R. R.*,[120] the question arose as to wheth-

---

110. 305 U. S. 484 (1939).
111. 305 U. S. at 489, notes 4 & 5.
112. *Cf.* Anglo California Nat. Bank v. Lazard, 106 F. (2d) 693 (C. C. A. 9th, 1939), weight to be given certain evidence.
113. Chinn v. Llangollen Stables, 25 F. Supp. 389 (E. D. Ky. 1938); see Phillips v. Davidson, 24 F. Supp. 184 (E. D. S. C. 1938).
114. Pollard v. Nicholls, 99 F. (2d) 955 (C. C. A. 5th, 1938).
115. Chicago, G. W. R. R. v. Robinson, 101 F. (2d) 994 (C. C. A. 8th, 1939).
116. Coca-Cola Bottling Co. v. Munn, 99 F. (2d) 190 (C. C. A. 4th, 1938).
117. Norfolk & W. Ry. v. Riggs, 98 F. (2d) 612 (C. C. A. 6th, 1938). Reference is also made to federal decisions on the question.
118. Aetna Life Ins. Co. v. Conway, 102 F. (2d) 743 (C. C. A. 10th, 1939).
119. The evidence which is excluded as being beyond the proper scope of cross-examination may be brought in by other means although at the expense of such things as the right to impeach the witness or to ask leading questions. As to the situation where a matter is admitted under federal rules which could not have been introduced on cross-examination under state rules, a similar argument may be used in the reverse.
120. 28 F. Supp. 804 (W. D. Mo. 1939), noted in (1940) 26 VA. L. REV. 375.

er the action should be dismissed because plaintiff's only evidence was contrary to common knowledge. After distinguishing the state decision relied upon, the court went on to say that although it would be bound by the rule that evidence contrary to common knowledge is inadmissible it would not be bound by state determinations as to what was contrary to common knowledge. The court is in effect saying that judicial notice is procedural. In reaching such a conclusion the court is making it possible for different results to be reached on exactly the same facts in federal and state court. This is clearly inconsistent with the spirit and policy of the *Tompkins* case.

Although there might be some discussion as to whether rules governing limitation of actions should be included in "*Tompkins* substance" or in "*Tompkins* procedure," there is no real problem involved. The federal courts have no choice but to follow state rules.[121] If it is procedure, it is procedure not covered by the Rules of Civil Procedure and hence is governed by the Conformity Act. If it is substance, the *Tompkins* case brings no change, since the rules are all statutory and within Section 34 of the Judiciary Act even as it was interpreted in *Swift v. Tyson.*[122]

Since the equitable doctrine of laches is one which may effect the result of a suit, it will tentatively be placed in the category of "*Tompkins* substance." However, in light of the almost universal American conflict of laws rule that limitations of actions is procedural, laches would seem by analogy to be procedural.[123] On a first hearing of *Rosenthal v. New York Life Ins. Co.*,[124] the circuit court applied its own rules as to laches. After the case had been remanded by the Supreme Court,[125] Missouri decisions relating to the doctrine of laches were applied, indicating that the court

---

121. The only choice is as to what state rule shall be followed. That is a problem in conflict of laws substance and procedure. For general discussions of limitation of actions and the conflict of laws see, Ailes, *Limitation of Actions and the Conflict of Laws* (1933) 31 MICH. L. REV. 474; Notes (1919) 28 YALE L. J. 492, (1931) 79 U. OF PA. L. REV. 1112, (1933) 47 HARV. L. REV. 315.

122. Cases, since the Tompkins case, which have cited it along with other cases as authority for the proposition that state limitations should govern are: Kansas Gas & Electric Co. v. Evans, 100 F. (2d) 549 (C. C. A. 10th, 1938); Sommer v. Nakdimen, 97 F. (2d) 715 (C. C. A. 8th, 1938); Cooper v. Ohio Oil Co., 25 F. Supp. 304 (D. Wyo. 1938); Pardue v. United Gas Public Service Co., 28 F. Supp. 847 (W. D. La. 1939); *Cf.* Gallagher v. Carroll, 27 F. Supp. 568 (E. D. N. Y. 1939). On the other hand, there is the fair possibility that nothing remains of the Conformity Act whatsoever.

123. This analogy is not entirely proper since laches involves more than a mere lapse of time.

124. 94 F. (2d) 675 (C. C. A. 8th, 1938).

125. 304 U. S. 263 (1938).

considered the matter substantive.[126] The result reached on the two occasions was the same. Both the statute of limitations and laches were pleaded as defenses in a single suit in equity for an accounting and to recover damages for improper operation of the plaintiff's oil property.[127] The Wyoming Statute of Limitations was applied, but only federal decisions were cited in deciding that the plaintiff was guilty of laches. The doubt expressed by the court as to how far the *Tompkins* case should apply in suits of this character, greatly weakens the case as authority for the proposition that laches is procedural.

Closely akin to laches but more clearly substantive are the questions of whether notice has been given within a reasonable time under the terms of an insurance policy[128] and whether there has been a waiver of a condition in a policy.[129] In both instances state decisions have been applied.

In an action on an injunction bond, the question arose as to whether attorney's fees could be included as an item of damages. State decisions allowed such fees to be recovered in a suit on the bond, but the federal district court refused to include them in the damages.[130] It based its conclusion on the argument that the bond was a condition imposed by the federal court and not a mere contract. Reliance was placed on an opinion of Chief Justice Taney in which he treated the matter as procedural.[131] Arguing in favor of the classification it might be said that the federal rule is not one which affects the result of the suit. It merely affects the extent of recovery. But, certainly, a difference in extent of recovery will be such an advantage that non-residents will seek to obtain injunctions in federal court rather than in state court. By so doing they will not be

126. 99 F. (2d) 578 (C. C. A. 8th, 1938). Consider this statement in Bryant v. Linn County, 27 F. Supp. 562 (D. Ore. 1938), *supra* n. 59, "Either on the ground of the construction of the federal statute or on the ground of equitable doctrine of laches *which is part of the substantive law of the State of Oregon*, the result is the same. (italics the author's)

127. Cooper v. Ohio Oil Co., 25 F. Supp. 304 (D. Wyo. 1938).

128. Fireman's Fund Indemnity Co. v. Kennedy, 97 F. (2d) 882 (C. C. A. 9th, 1938).

129. Manufacturers Casualty Ins. Co. v. Roach, 25 F. Supp. 852 (D. Md. 1939).

130. Travelers Mutual Casualty Co. v. Skeer, 24 F. Supp. 805 (W. D. Mo. 1938), appeal dismissed on stipulation of parties, 106 F. (2d) 1018 (C. C. A. 8th, 1939); Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 104 F. (2d) 105 (C. C. A. 2d, 1939); *Cf.* Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist., 106 F. (2d) 966 (C. C. A. 8th, 1939).

131. Bein v. Heath, 12 How. 168 (U. S. 1851). The court also relied on Tullock v. Mulvane, 184 U. S. 497 (1902).

liable to as great an extent should the court find that the preliminary injunction was improperly granted.

In *Summers v. Hearst*,[132] the District Court for the Southern District of New York refused to follow the state rule permitting a stockholder's derivative action to be brought by one who became a stockholder after the cause of action accrued. The matter was held to be procedural and covered by the Federal Equity Rules rather than by state decisions.[133] This decision does run contrary to the definition of "*Tompkins* substance," since it permits a different result in federal court.[134]

The applicability of state decisions to the questions of amendment of a pleading[135] and the right to use interrogatories for discovery of witnesses[136] has been denied. These matters concern only the method of getting the issues before the court and are rightly classified as "*Tompkins* procedure."[137]

The line between substance and procedure has just begun to be drawn, but it is apparent from the above cases that, for the most part, it is being drawn in keeping with the spirit of the *Tompkins* case.

---

132. 23 F. Supp. 986 (S. D. N. Y. 1938), Note (1938) 25 VA. L. REV. 100.

133. Federal Equity Rule 27. This rule has now been incorporated in the Rules of Civil Procedure as Rule 23 (b). For a discussion of the history of these two rules see, (1938) 38 COL. L. REV. at 1480.

134. An attempt to justify the decision might be made on the basis of a policy to prevent the trumping up of diversity jurisdiction. Such a policy seems hardly justifiable in this instance, however, when the fact is considered that the federal court actually takes jurisdiction to dismiss the action and thus in effect adjudicates the plaintiffs rights. Venner v. Great Northern Ry., 209 U. S. 24 (1908).

The Tompkins case has eliminated one of the main reasons for trumping up diversity jurisdiction. The rules to be applied are no longer different and hence the reason for the policy in Rule 23 (b) is of less importance. However, in this case an innocent stockholder is left entirely without a remedy unless the state of incorporation permits a suit by one who acquired his stock subsequent to the transaction in question. The matter is not *res judicata* and the resident corporation cannot defeat the action by removal to federal court since that right is open only to a non-resident. 36 STAT. 1094 (1910), 28 U. S. C. § 71 (1934).

135. Moore v. Illinois Central R. R., 24 F. Supp. 731 (S. D. Miss. 1938).

136. F. & M. Skirt Co. v. A. Wimpfheimer & Bro., 25 F. Supp. 898 (D. Mass. 1939).

137. The possibility of another problem in substance and procedure is suggested in Iser v. Brockway, 25 F. Supp. 221 (W. D. Pa. 1938). The general problem involved was whether proper service of summons had been made on a non-resident motorist. It is impossible to tell from the opinion whether the court considered the matter to be substantive or procedural. Both the Conformity Act and the Tompkins case are cited. Practically there is no problem as to substance and procedure involved since application of Rule 4(d) (1), (7) of the Rules of Civil Procedure, which state that service in accordance with state law is valid, would bring the same result which would be reached by declaring the matter to be substantive. The provision in Rule 4(d) (7) for service according to the statutes of the United States is one which would come within the exception to Sec. 34 of the Judiciary Act.

One further problem which remains is the determination of what is state decisional law. Mr. Justice Brandeis says:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its *highest court*[138] in a decision is not a matter of federal concern. There is no federal general common law . . ."[139]

What Mr. Justice Brandeis had in mind when he used the words "highest court" is the question.

It may be that he used the words merely as being symbolic of the usual method by which case law is finally established as the law of a state. But, if the federal courts have, as he goes on to say, ". . . no power to declare rules of common law applicable in a State . . .", they would not seem to be possessed of such a power simply because the highest court of the state has not spoken. Are lower court decisions to be ignored? True, they are often not binding even on the lower courts themselves, but quite often they are acquiesced in by the highest court or are indicative of what the highest court would decide were the problem presented to it. But, even though lower court decisions are not to be ignored, the situation may be presented where they are hopelessly in conflict or are entirely lacking. In such a situation the federal courts must of necessity exercise an independent judgment as to the law, guided, insofar as possible, by the general attitude of the courts of the particular state. The determination of the court meaning and significance of Mr. Justice Brandeis' use of the words "highest court" must await further judicial explanation.[140] It may be that they mean the highest court to which a litigant can go as a matter of right, or the highest court to which the particular problem has gone in the past. The natural meaning is the highest court which is set up by the constitution or statutes of the state in question, and it is in that sense that the words are used in the discussion which follows.

The cases which are of assistance in the solution of this problem fall roughly into three classes: those where the highest court has spoken, those

---

138. Italics inserted.
139. Erie Railroad v. Tompkins, 304 U. S. 64, 78 (1937).
140. The problem here is not to be confused with that of determining what is the highest court for purpose of appeal to federal courts as set up under what was Sec. 25 of the Judiciary Act of 1789 and now Sec. 237, amended, of the Judicial Code, 43 STAT. 937 (1925), 28 U. S. C. § 344 (1934), 45 STAT. 54 (1928), 28 U. S. C. 861a, 861b (Supp. 1939). However, the cases there decided may prove helpful in reaching a solution to the present problem. See 5 HUGHES, FEDERAL PRACTICE (1931) § 3214 *et seq. Cf. supra* note 72.

where the lower courts have spoken, and those where there are either conflicting views or no state decisions at all. The federal courts have had little trouble with the first class of cases, but decisions in the other two have varied.

It is unnecessary to discuss the great bulk of cases in which there was authority of the highest court upon which the federal court could rely. Some few of the cases do present problems worth discussing, however. For example, the Supreme Court in the previously discussed *Wichita Royalty* case,[141] made some remarks which cast considerable light on the position to be taken by the federal courts. That case had been before the Supreme Court of Texas where an opinion was rendered and the case remanded. After it was remanded, the case was removed to federal court and carried up to the Supreme Court. Mr. Justice Stone, speaking for the Court said:

> "In departing from the 'law of the case,' as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court. *Erie Railroad Co. v. Tompkins, supra.* But the case on the first appeal had not become *res judicata* . . . (citations) . . . And since the Supreme Court of Texas holds itself free upon reconsideration to modify or recede from its own opinions, see *Quanah, Acme & Pacific Ry. Co. v. Wichita State Bank & Trust Co.*,[142] *supra,* superceding 89 S. W. (2d) 385, the court below, in applying the local law, was likewise free to depart from the earlier rulings to the extent that examination of the later opinions of the Texas Supreme Court showed that it had modified its opinion on the first appeal. Hence the only question for our decision is whether the Court of Appeals rightly concluded that the state court had thus altered its opinion."[143]

The Court went on to find that the state court had not altered its opinion, but rather had distinguished the two cases. The Court continues in its opinion:

> "Even if we thought this distinction not well taken, nothing requires the state courts to adopt the rule which the federal or other courts may believe to be the better one, or to be consistent in their decisions if they do not choose to be . . ."[144]

---

141. 306 U. S. 103 (1939), *supra* pp. 6, 11.
142. 127 Tex. 407, 93 S. W. (2d) 701 (1936).
143. Wichita Royalty Co. v. City National Bank, 306 U. S. 103, 107 (1939).
144. *Id.* at 109. A similar statement appears in First Nat. Bank v. Aetna

It is not for the federal court to question the wisdom of state determinations. It must follow, regardless of its own views as to the correctness of the law announced by the state court.[145]

Like the *Wichita* case, *Moore v. Illinois Central R. R.*,[146] came before the highest court of the state prior to removal to federal court. The state court sustained a demurrer by the plaintiff to several of the defendant's pleas and overruled defendant's demurrer to plaintiff's answer to another plea. The district court held that the ruling of the Mississippi Supreme Court on the demurrers had established the law of the case.

Quite often there may be no decision of the highest court which is directly in point. The District Court for the Northern District of Oklahoma stated that it would accept *dictum* as being indicative of the views of the state supreme court. In *Shanks v. Travelers' Insurance Co.*,[147] the court said:

> "The Bean Case,[148] supra, probably could have been decided without the Supreme Court of Oklahoma construing the policy, but as one of the questions before it was the determining of the length of time the policy was in force, and as it determined that the policy was in effect thirty-one days after the termination of the employment, such a construction is binding upon this court."[149]

Other federal courts have attempted, where there was no state supreme court decision directly in point, to find what the attitude of the state court would be. The Circuit Court of Appeals for the Fourth Circuit, on a first hearing of *American National Insurance Co. v. Belch*,[150] found no Virginia case in point and, therefore, followed the ruling of the United States Supreme Court on the question.[151] On rehearing, the circuit court found a decision of the Supreme Court of Virginia[152] on an

---

Casualty & Surety Co., 105 F. (2d) 339 (C. C. A. 3rd, 1939), where the court followed a Pennsylvania rule which is "out of line with the general trend of the authorities."

145. In his article in 47 YALE L. J. at 1349, *supra* n. 12, Shulman points out that this does not mean that the federal courts are deprived of all freedom of decision. *Cf.* Worcester County Trust Co. v. Riley, 302 U. S. 292, 299 (1937).

146. 24 F. Supp. 731 (S. D. Miss. 1938).

147. 25 F. Supp. 740 (N. D. Okla. 1938); *cf.* Badger v. Hoidale, 88 F. (2d) 208 (C. C. A. 8th, 1937), Note 109 A. L. R. 805 (1937); *cf.* also this statement from Buder v. New York Trust Co., 107 F. (2d) 705 (C. C. A. 2d, 1939), "Dicta by a trial court justice . . . are not an authoritative declaration of the state law."

148. Bean v. Travelers' Ins. Co., 164 Okla. 135, 23 P. (2d) 216 (1933).

149. 25 F. Supp. at 743.

150. 100 F. (2d) 48 (C. C. A. 4th, 1938).

151. Landress v. Phoenix Mutual Life Ins. Co., 291 U. S. 491 (1934).

152. Ocean Accident & Guarantee Corp. v. Glover, 165 Va. 283, 182 S. E. 221 (1935).

allied point, in which the Virginia court discussed favorably an opinion written by Mr. Justice Cardozo while a member of the New York Court of Appeals.[153] In the New York case he expressed the same views given in his dissent to the United States Supreme Court decision which had been relied on by the circuit court of appeals at the first hearing. On the basis of this favorable discussion of the New York case, the court decided that Virginia would not follow the United States Supreme Court and, therefore, withdrew its previous opinion. A similar method was used by the Ninth Circuit in *Jensen v. Canadian Indemnity Co.*,[154] when it determined the law of California by reference to those cases from other jurisdictions, which the California Supreme Court, in a relevant case, had discussed with approval or disapproval.

In general it can be said that where the highest court of the state has spoken, the federal courts have taken the position of a state court and have proceeded to find the state law just as any state court would do it.[155] Of course, there is always the possibility that some controlling decision may be overlooked. That, however, is a possibility which may easily be eliminated by proper preparation by counsel. A more real difficulty is that the federal judges will give only lip service to the rule of the *Tompkins* case and, while purporting to follow state decisions, will exercise an independent judgment.[156]

If counsel and court are unable to find any relevant state decisions, the federal court must of necessity exercise an independent judgment.[157]

---

153. Lewis v. Ocean Accident & Guarantee Corp., 224 N. Y. 18, 120 N. E. 56 (1918).

154. 98 F. (2d) 469 (C. C. A. 9th, 1938).

155. For examples of how the federal courts proceed to find the state law, discussing both opinions of courts of last resort and intermediate courts, see Penn Mutual Life Ins. Co. v. Forcier, 103 F. (2d) 166 (C. C. A. 8th, 1939); American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 26 F. Supp. 954 (S. D. N. Y. 1939).

156. This is a matter which it is extremely difficult to put one's finger on. It cannot be definitely said that there have been any cases as yet in which the courts have done so.

This too may be checked somewhat by counsel through exercise of the right to appeal.

157. The attitude of the courts where no attempt is made by counsel to to show that the state law differs from the general law is shown in the following footnote to the opinion in Kellogg Co. v. National Biscuit Co., 305 U. S. 111 (1938). The court proceeds to apply its own rule after stating, "The federal jurisdiction rests on diversity of citizenship—National Biscuit Company being a New Jersey corporation and Kellogg Company a Delaware corporation. Most of the issues in the case involve questions of common law and hence are within the scope of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938). But no claim has been made that the local law is any different from the general law on the subject, and both parties have relied almost entirely on federal precedents."

The Circuit Court of Appeals for the Seventh Circuit, on hearing a case remanded to it by the Supreme Court,[158] said:

> "Since it appears that the precise question presented has never been presented to the Missouri Courts, we have no choice but to consider the question as we previously considered it, exercising an independent judgment with respect to the issues presented."[159]

Similar statements have been made by the Circuit Courts of Appeals for the First,[160] Eighth,[161] and Ninth Circuits.[162] The District Court for the Western District of Pennsylvania stated that in the absence of a ruling by an Ohio court it would accept, as an authoritative statement of the law of Ohio, a ruling by the Circuit Court of Appeals for the Sixth Circuit in a case arising from the Northern District of Ohio, Eastern Division.[163]

The real problem in determining what is state law comes when the only decisions on the precise point in issue are those of the lower courts. As yet the Supreme Court has said nothing which can be used as a guide when there are no decisions of the highest court. However, there is now pending before the court a motion for *certiorari* in a case which raises the problem. In *West v. American Telephone & Telegraph Co.*,[164] the Circuit Court of Appeals for the Sixth Circuit refused to treat a decision of the Court of Appeals for Cuyahoga County as stating the law of Ohio. The reason given was that the decision was not binding on any of the other courts of appeals within the state. By reason of the circuit court of appeals decision a conflict in the circuits is presented.

---

158. New York Life Ins. Co. v. Jackson, 304 U. S. 261 (1938).

159. New York Life Ins. Co. v. Jackson, 98 F. (2d) 950, 952 (C. C. A. 7th, 1938). In a later case when no state decision in point was found the court proceeded to make its own determination. Paddleford v. Fidelity & Casualty Co., 100 F. (2d) 606 (C. C. A. 7th, 1938).

160. Malloy v. New York Life Ins. Co., 103 F. (2d) 439 (C. C. A. 1st, 1939).

161. Mutual Benefit, Health & Accident Ass'n v. Bowman, 99 F. (2d) 856 (C. C. A. 8th, 1938).

162. Hagan & Cushing Co. v. Washington Water Power Co., 99 F. (2d) 614 (C. C. A. 9th, 1938).

163. New York Life Ins. Co. v. Ruhlin, 25 F. Supp. 65, 69 (W. D. Pa. 1938). For other examples of how the federal courts reach their decision when no state decisions are in point see also: Rachlin v. Libby-Owens-Ford Glass Co., 96 F. (2d) 597 (C. C. A. 2d, 1938); Fireman's Fund Indemnity Co. v. Kennedy, 97 F. (2d) 882 (C. C. A. 9th, 1938); Travelers Indemnity Co. v. Plymouth Box & Panel Co., 99 F. (2d) 218 (C. C. A. 4th, 1938); New England Mutual Life Ins. Co. v. Spence, 25 F. Supp. 633 (W. D. N. Y. 1938); Toomey v. Toomey, 98 F. (2d) 736 (C. C. A. 7th, 1938).

164. 108 F. (2d) 347 (C. C. A. 6th, 1939); *cf.* Field v. Fidelity Union Trust Co., 108 F. (2d) 521 (C. C. A. 3rd, 1939) (lower court interpretation of state statute); Buder v. New York Trust Co., 107 F. (2d) 705 (C. C. A. 2d, 1939); Hedrick v. Canadian Pacific Ry., 28 F. Supp. 257 (S. D. Ohio 1939).

Previously the Circuit Court of Appeals for the Seventh Circuit had said that it would accept, as authoritative, appellate court cases if they were not in conflict and were not modified or overruled by later decisions, either of the supreme court or of an intermediate court.[165] The District Court for the Western District of Pennsylvania had taken an equally strong stand. In *New York Life Insurance Co. v. Ruhlin*,[166] the latter court said:

> ". . . The Kramer Case,[167] as a decision of Pennsylvania, is binding on this court, even though it may have been by an intermediate court of appeals. See Blair v. Commissioner of Internal Revenue, 300 U. S. 5, 10, 57 S. Ct. 330, 332, 81 L. Ed. 465."[168]

Other courts had applied intermediate court decisions and treated them as though controlling without any discussion of the fact that they were so doing.[169]

On the other hand, the Eighth Circuit had taken a less firm stand. After citing a number of state cases on the point in issue the court said:

> ". . . All of these cases are Courts of Appeals cases and not in the Supreme Court of Missouri. Therefore, they cannot be finally accepted as stating the law of the State of Missouri. However, they are strongly persuasive."[170]

The court went on to point out that federal precedents would bring the same result.

In the cases thus far discussed an attempt has been made to note, through consideration of the expansion and application of the *Tompkins* case, the changes brought and the problems raised by it. As might be expected of a case which has been given so much publicity, it is frequently cited in places where state law has always governed. For example, in suits in which removability to federal courts is contested on the grounds

---

165. Hack v. American Surety Co., 96 F. (2d) 939 (C. C. A. 7th, 1938), *cert. denied*, 305 U. S. 631 (1938); American Optometric Ass'n v. Ritholz, 101 F. (2d) 883 (C. C. A. 7th, 1939); Mangol v. Metropolitan Life Ins. Co., 103 F. (2d) 14 (C. C. A. 7th, 1939).

166. 25 F. Supp. 65 (W. D. Pa. 1938), *aff'd*, 106 F. (2d) 921 (C. C. A. 3rd, 1939). The circuit court of appeals cites only Pennsylvania Supreme Court cases.

167. Kramer v. Mutual-Life Ins. Co., 130 Pa. Super. 85 (1938).

168. 25 F. Supp. at 69. The Blair case relied on by the court here is not as strong as the statement for which it is given as authority. That case involved an interpretation by a state appellate court of the *very* trust agreement under consideration in the suit in federal court. A statement similar to that quoted, though without mention of the Blair case, appears in Delaware & H. R. Corp. v. Bonzik, 105 F. (2d) 341 (C. C. A. 3rd, 1939).

169. Sunkist Drinks v. California Fruit Growers Exchange, 25 F. Supp. 400 (S. D. N. Y. 1938); Mau v. Rio Grande Oil, 28 F. Supp. 845 (N. D. Calif. 1939).

170. Turner v. New York Life Ins. Co., 100 F. (2d) 193, 194 (C. C. A. 8th, 1938. Rehearing denied Dec. 28, 1938).

that the controversy is not "wholly between citizens of different States,"[171] the *Tompkins* case has been cited as supporting the proposition that state decisions must be consulted to determine whether the controversy is a separable one.[172] Of course, to the extent that "separability" depends upon several rather than joint liability the case does support such a proposition and it is strictly in accord with its spirit and policy to apply state decisions in this situation. However, its effect is merely cumulative, since even before the *Tompkins* case state decisions were held to be controlling in determining whether an action brought against a citizen and a non-citizen of a state was joint so as to defeat diversity jurisdiction.[173]

The *Tompkins* case is also frequently cited as authority for the proposition that state statutes, and decisions interpreting those statutes, must be followed by federal courts in cases not governed by the Constitution, treaties or statutes of the United States.[174] Prior to the *Tompkins* case it was the general rule that state interpretation of statutes would be followed in federal court.[175] However, there were certain exceptions to the general rule and on these exceptions the *Tompkins* case will have some effect.

In *Norfolk & W. Ry. v. Riggs*,[176] the problem was not one of statutory

---

171. 36 STAT. 1094 (1911), 28 U. S. C. § 71 (1934).

172. Ervin v. Texas Co., 97 F. (2d) 806 (C. C. A. 8th, 1938); Phillips v. Davidson, 24 F. Supp. 184 (E. D. S. C. 1938); Jensen v. Safeway Stores, 24 F. Supp. 585 (D. Mont. 1938); Lawley v. Whiteis, 24 F. Supp. 698 (N. D. Okla. 1938).

173. Cincinnati, New Orleans & Texas Pacific Ry. v. Bohon, 200 U. S. 221 (1906); McFarland v. Goodrich Rubber Co., 47 F. (2d) 44 (C. C. A. 8th, 1931), and cases there cited; Norwalk v. Air-Way Electric Appliance Corp., 87 F. (2d) 317 (C. C. A. 2d, 1937). Notes (1936) 36 COL. L. REV. 794, (1937) 110 A. L. R. 188, 191, (1939) 25 VA. L. REV. 492. However, in Pullman Co. v. Jenkins, 305 U. S. 534 (1939), the Supreme Court apparently made its own determination as to whether a joint action was alleged. It is difficult to explain this seeming departure from the earlier line of decisions and from the spirit of the Tompkins case. Mr. Justice Black in a concurring opinion protested against the basis of the majority opinion. His only mention of the Tompkins case is in a footnote reference to Ervin v. Texas Co., *supra* note 172.

174. Norfolk & W. Ry. v. Riggs, 98 F. (2d) 612 (C. C. A. 6th, 1938); Perkins v. United States *ex rel.* Malesevic, 99 F. (2d) 255 (C. C. A. 3rd, 1938); Paul v. Craemer, 24 F. Supp. 353 (S. D. Calif. 1938); Futrell v. Branson, 104 F. (2d) 409 (C. C. A. 8th, 1939); *In re* Wiegand, 27 F. Supp. 725 (S. D. Calif. 1939); Rorick v. Board of Commissioners of Everglades Drainage District, 24 F. Supp. 458 (N. D. Fla. 1938); Rodgers v. Mabelvale Extension Road Improvement Dist., 103 F. (2d) 844 (C. C. A. 8th, 1939); Dolcater v. Manufacturers & Traders Trust Co., 25 F. Supp. 637 (W. D. N. Y. 1938), *appeal dismissed*, 106 F. (2d) 30 (C. C. A. 2d, 1939). In St. Louis v. Mississippi River Fuel Corp., 97 F. (2d) 726 (C. C. A. 8th, 1938), the Tompkins case was given as authority for the determination that Missouri decisions should govern the interpretation of a Missouri tax statute. *Cf.* Bacon & Sons v. Martin, 305 U. S. 380 (1939), and cases there cited.

175. For discussions of this proposition see Fordham, *Swift v. Tyson and the Construction of State Statutes* (1935) 41 W. VA. L. Q. 131, Notes (1927) 5 TEX. L. REV. 191, (1934) 48 HARV. L. REV. 132, (1936) 14 TEX. L. REV. 391.

176. 98 F. (2d) 612 (C. C. A. 6th, 1938). This is the only case since the Tompkins case which would not have come under the previous general rule.

interpretation, but whether the particular statute itself was applicable to suits in federal court. The statute in question provided that in suits against a railroad for injury to an employee, "all question of negligence and contributory negligence shall be for the jury."[177] This statute had previously been held inapplicable to suits in federal court,[178] but in the *Riggs* case the court held that on the basis of the *Tompkins* case it should be applied.[179] The case indicates that the exceptions to the rule that state statutes and interpretations of those statutes are binding of federal courts will be eliminated by the *Tompkins* case unless they can be justified as procedural or on some such basis.

To summarize briefly, the *Tompkins* case has had important expansions in two directions. It has been expanded to cover cases in equity, as well as in law, and to cover other than diversity of citizenship cases. Both of these expansions seem quite justifiable because the basis of jurisdiction, or the manner in which relief is sought, should not determine the rules of decision to be applied. Both expansions have been sanctioned by the Supreme Court. The former is perhaps of less importance than it would have been had not the Rules of Civil Procedure brought about the union of law and equity. The latter is of tremendous importance, but, as yet, there have not been enough cases to tell just how far the expansion to non-diversity cases will be carried. There are indications, however, that it may have far-reaching effects, particularly in the fields of banking and taxation.

The extent of the doctrine's effect in non-diversity cases is somewhat dependent on where the line is drawn between federal and non-federal questions. This distinction is itself one of the most difficult problems left by the *Tompkins* case. In its solution, however, the courts will not be given such latitude that the *Swift v. Tyson* problem of general and local law will be revived. As yet there has been little done toward drawing the line between federal and non-federal questions.

Another of the limits of the doctrine of *Erie Railroad v. Tompkins* has been placed at the point where substance and procedure meet. The location of that point should be determined in accordance with the policy of the *Tompkins* case to promote conformity of result within each state.

---

177. 99 Ohio Laws 25, § 2 (1908), Throckmorton's Ohio General Code, § 9018 (1936).

178. Nash v. Pennsylvania R. R., 60 F. (2d) 26 (C. C. A. 6th, 1932), *cf.* Herron v. Southern Pacific Co., 283 U. S. 91 (1931).

179. Norfolk & W. Ry. v. Riggs, 98 F. (2d) 612 (C. C. A. 6th, 1938).

For the most part substance has been defined broadly in accordance with that policy.

Determination of what law shall govern choice of law question and of what is state law will also help set the boundaries of the *Tompkins* doctrine. Although it seems clear that choice of law rules are a part of the substantive law of the state which should be followed by the federal courts, that problem is still unanswered. The problem of what is state law is also in part unanswered. Decisions of the highest court are clearly binding, but the status of appellate and lower court opinions is still in doubt.

Although for the most part the courts have recognized the problems[180] and attempted to solve them as they arose, in the period of nearly two years since the decisions they have been able to do little more than set the broad outlines of the doctrine and suggest some of the problems yet to be decided. It will be years before the problems will be solved and the full effect of *Erie Railroad v. Tompkins* can be known.

180. However compare this statement of Gardner, J., in Thompson v. Louisiana, 98 F. (2d) 108 (C. C. A. 8th, 1938), "Congress, of course, has no power to enact a state taxing measure. Erie Railroad Co. v. Tompkins . . . (citation) . . . Lowden v. State Corp. Comm., 42 N. M. 254."