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FEDERAL COURTS - SUBSTANCE AND PROCEDURE - EFFECT OF ERIE RAILROAD V. TOMPKINS AND RULE 8 (c) OF THE FEDERAL RULES OF CIVIL PROCEDURE UPON BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE

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FEDERAL COURTS — SUBSTANCE AND PROCEDURE — EFFECT OF ERIE RAILROAD V. TOMPKINS AND RULE 8 (C) OF THE FEDERAL RULES OF CIVIL PROCEDURE UPON BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE—The case of *Erie Railroad v. Tompkins*[1] has wrought a great change in the relationship between the state and federal courts. Prior to its decision, the federal courts under the rule of *Swift v. Tyson*[2] did not have to apply the state non-statutory law.[3] They could apply their own notions as to what the law was in matters of general law relating to substance. The Conformity Act[4] compelled the federal

[1] 304 U. S. 64, 58 S. Ct. 817, 114 A. L. R. 1487 at 1500 (1938).
[2] 16 Pet. (41 U. S.) 1 (1842).
[3] 1 MOORE, FEDERAL PRACTICE 102 (1938).
[4] 17 Stat. L. 197, § 5 (1872), 28 U. S. C. (1934), § 724.

courts to follow the practice, pleading, and forms and modes of proceeding in like causes in the courts of the state within which the federal district courts were held. In other words, under the Conformity Act and the rule of *Swift v. Tyson*, the federal courts in matters not covered by statute were free to apply their own rules as to substantive law, but had to follow the state courts in procedural matters.[5]

It would seem, however, that by the decision of the Supreme Court in the case of *Erie Railroad v. Tompkins* and the new federal rules of civil procedure[6] adopted by the Court at the same time the situation has been completely reversed. The rules were adopted in accordance with a federal statute which declares

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge nor modify the substantive right of any litigant. They shall take effect six months after the promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."[7]

Thus, when the rules were promulgated by the Supreme Court and took effect in 1938, they superseded the procedure under the Conformity Act and established a uniform procedure for the district courts independent of and unrelated to the procedure in the courts of record of the state in which each district court was situated.

On April 25, 1938, the Supreme Court rendered its opinion in *Erie Railroad v. Tompkins*, in which it expressly overruled *Swift v. Tyson* and laid down the rule that the federal district courts must apply the substantive law of the state in which they sit. The courts are not free to exercise an independent judgment as to what the common law of the state should be. The law of the state is to be applied whether declared by its legislature in a statute or by its highest court in a decision. "There is no federal general common law."[8] Thus, as stated by Judge Wham in *Francis v. Humphrey*,[9] this decision has "legally

[5] Cook, " 'Substance' and 'Procedure' in the Conflict of Laws," 42 YALE L. J. 333 at 342, note 37 (1933).

[6] The Rules of Civil Procedure for the District Courts of the United States, effective Sept. 16, 1938, have been published, among other places, as a supplement to the United States Code Annotated following title 28, § 723c, and in a separate edition by the Commerce Clearing House.

[7] 48 Stat. L. 1064 (1934), 28 U. S. C. (1934), § 723b.

[8] Erie Railroad v. Tompkins, 304 U. S. 64 at 78, 58 S. Ct. 817 (1938).

[9] (D. C. Ill. 1938) 25 F. Supp. 1 at 3.

speaking 'turned the world upside down.'" While the federal courts may apply their own rules of procedure, they are bound to follow the substantive law of the states in which the court is located.

The problem immediately arises as to what, for the purpose of the application of this rule, is a matter of procedure and what is one of substance; to further limit the scope of investigation for this comment, what is the nature of a state rule which declares that in an action for damages for injuries caused by the negligence of another the plaintiff in addition to showing that the defendant was negligent must also allege and prove that he, the plaintiff, was exercising ordinary care? Is this a rule of substantive law of a state so that the federal court situated therein must apply it, or is it merely a rule of procedure so that the court may ignore it and apply its own rule on the matter?

The Federal Rules of Civil Procedure seem to indicate that this question of who must allege and prove contributory negligence or its absence is a rule of procedure inasmuch as rule 8 (c) declares that "In pleading to a preceding pleading, a party shall set forth affirmatively . . . contributory negligence . . . and any other matter constituting an avoidance or affirmative defense."[10] The Court thus seems to put the burden upon the defendant, and, by including such a rule in its rules of procedure which are to be followed by the federal courts, it appears that the Court must have considered the question one of procedure. The statute providing that the Court should draw the rules did not permit it to modify the substantive rights of either of the parties.[11]

However, when we come to consider cases decided by the Supreme Court under the old rule of *Swift v. Tyson* and the Conformity Act, we find that, for the purposes of the Federal Employers' Liability Act, the Supreme Court, in *Central Vermont Railway v. White*,[12] held that the question of the burden of proof on contributory negligence was not a mere matter of state procedure which under the Conformity Act the federal courts would have been bound to follow but was one of substance concerning which it was free to follow its own rule. That case decided that as a matter of general law the burden of proving contributory negligence was on the defendant. Thus it would appear that the Supreme Court has defined the question as one of substance, but this was under circumstances in which such a decision would permit

[10] Rules of Civil Procedure, rule 8(c).

[11] 48 Stat. L. 1064 (1934), 28 U. S. C. (1934), § 723b.

[12] 238 U. S. 507, 35 S. Ct. 865, Ann. Cas. 1916B 252 at 255 (1915). See also, Hemmingway v. Illinois Cent. Ry., (C. C. A. 5th, 1902) 114 F. 843; Pokora v. Wabash Ry., 292 U. S. 98, 54 S. Ct. 580 (1934).

the Court to apply its own rule on the point and refuse to adopt that of the state court..

There have been several recent decisions on this point in the federal district courts. *Schopp v. Muller Dairies, Inc.*[13] held that under the decision of *Erie Railroad v. Tompkins* the federal courts must follow the substantive law of the state; and since the rule in New York is that in an automobile collision case the burden of proving freedom from contributory negligence is on the plaintiff, the federal court was bound to follow that rule. The decision that the rule was one of substance was based upon *Central Vermont Railway v. White* and no mention whatever was made of the new federal Rules of Civil Procedure. Another case, *Francis v. Humphrey*,[14] lays down a similar rule, relying upon *Erie Railroad v. Tompkins* and *Central Vermont Railway v. White*. The court declares that the Illinois rule that the plaintiff must plead and prove contributory negligence as part of his case is one of substantive law which the Supreme Court could not affect by a procedural rule without altering the substantive rights of the parties. The court declared that rule 8 (c) does not affect any matter named therein if by applicable substantive law it constitutes part of the substance of the plaintiff's case which he must allege and prove. The plaintiff's complaint was dismissed since it did not allege due care or freedom from negligence on the part of the plaintiff. This decision has been followed in the case of *Clark v. Cincinnati C. C. & St. Louis Ry.*[15] Here the judge declared that rule 8 (c) was illegal and void.

It is clear from the above decisions that unless the federal courts redefine the rule as to allegation and proof of due care as one of procedure only, they will be bound to follow the rule of the appropriate state court in this matter, and rule 8 (c) will apply only in those states where it is in accord with the state law.

On the basis of past decision and reasoning, it is difficult to see how the federal courts could construe the burden of proof of due care as a matter of procedure. The Illinois rule makes both allegation and proof of freedom from contributory negligence by the plaintiff an essential part of his cause of action. This rule that "in order to recover for injuries from negligence it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety,"[16] is categorically stated in many Illinois

[13] (D. C. N. Y. 1938) 25 F. Supp. 50.

[14] (D. C. Ill. 1938) 25 F. Supp. 1.

[15] Decided in April 1939 by the Federal District Court, Southern District of Illinois, not yet reported.

[16] Calumet Iron & Steel Co. v. Martin, 115 Ill. 358 at 368, 3 N. E. 456 (1885).

cases.[17] However, in most of these cases there was evidence of the contributory negligence of the plaintiff, which detracts from the authority for the court's statement.

However, in the case of *Chicago & Alton R. R. v. Crowder*[18] there was no evidence of the conduct of the deceased at the time he met his death. He had been ordered to attend to his duties as rear brakeman of a freight train, which required him to be upon the roof of the caboose. When last seen he was inside the caboose. His body was found beside the track so injured as to show that he had fallen from the train. It was impossible to tell from the evidence whether he had been knocked off by a nearby tank spout or had carelessly fallen off. Reversing a judgment for the plaintiff based on the negligence of the company in allowing the spout to hang so low that it would reach a brakeman on the roof, the court held that there was no proof of the exercise of due care upon the part of the deceased and that when the evidence is as consistent with carelessness as with the exercise of due care on the part of the person injured there is neither proof nor inference to justify a recovery.

> "It can not, therefore, be said that there is an absence of evidence of fault on part of the deceased from which an inference that he was exercising ordinary care might arise, and there being no proof as to his acts and conduct at the time of the accident, that he was acting with due care, can not be regarded as proven."[19]

In the case of *Kepperly v. Ramsden*[20] the plaintiff sued for injuries incurred when she fell into a hole on the defendant's land. She was walking in front of the building and stepped on the edge of the excavation, which gave way. The jury found the defendant guilty of negligence and awarded the plaintiff damages. The supreme court, reversing, declared,

> "Before any recovery can be had, it is incumbent on plaintiff to show she had herself been in the observance of due care for her personal safety. That being the law, the court ought to have given the third instruction asked by defendant, which declares, the burden of proving that fact was upon her. Other instructions given

[17] Imes v. Chicago B. & Q. Ry., 105 Ill. App. 37 (1902); Wilson v. Illinois Cent. Ry., 210 Ill. 603, 71 N. E. 398 (1904); Illinois Central Ry. v. Oswald, 338 Ill. 270, 170 N. E. 247 (1930); Munsen v. Illinois Northern Utilities Co., 258 Ill. App. 438 (1930); Dee v. City of Peru, 343 Ill. 36, 174 N. E. 901 (1931); Urban v. Pere Marquette R. R., 266 Ill. App. 152 (1932); Durbin v. McCully, 280 Ill. App. 81 (1935).

[18] 49 Ill. App. 154 (1893).

[19] Chicago & Alton R. R. v. Crowder, 49 Ill. App. 154 at 162 (1893).

[20] 83 Ill. 354 (1876).

state the proposition she was bound to observe due or ordinary care, but none of them declare as the law is, the burden of proving that fact is on the plaintiff." [21]

From these decisions it appears that allegation and proof of freedom from contributory negligence are essential elements of the plaintiff's cause of action in Illinois. It is not like an allegation of non-payment, which though it must be alleged need not be proved and thus is a matter of procedure and not of substance. Freedom from contributory negligence must be affirmatively proved by the plaintiff in Illinois, and if there is no evidence to show that the plaintiff was in the exercise of due care and no reasonable inference of such care can be drawn from the circumstances disclosed by the testimony, the court is under a duty to direct a verdict for the defendant. Thus the burden of showing freedom from contributory negligence can not be said to be imposed by a rule of procedure, "since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action." [22] The Illinois rule would thus seem to be one of substance, as it is defined in *Central Vermont Railway v. White.*

A similar rule as to the burden of allegation and proof of contributory negligence in certain situations is found in a number of jurisdictions. Cases in Connecticut contain statements to the effect that the plaintiff has the burden of proving that his own negligence did not contribute to his injuries.[23] However, in *Robertson v. Viens,*[24] an automobile accident in which the plaintiff sued for injuries caused by the defendant's negligence and the defendant counterclaimed on the same ground, the court held that the plaintiff's allegation that the collision was caused by the defendant's negligence necessarily involved an allegation that the plaintiff's negligence did not contribute to it, so there was no necessity for a separate averment of his freedom from contributory negligence.

The rule in Iowa seems clearly to put the burden of proving lack of contributory negligence on the plaintiff. In *Nelson v. Chicago, R. I. & P. R. R.*[25] the plaintiff sued for injuries sustained while working on

[21] Kepperly v. Ramsden, 83 Ill. 354 at 357 (1876).

[22] Central Vermont Ry. v. White, 238 U. S. 507 at 512, 35 S. Ct. 865 (1915).

[23] Clarke v. Connecticut Co., 83 Conn. 219, 76 A. 523 (1910); Cottle v. New York, N. H. & H. R. R., 82 Conn. 142, 72 A. 727 (1909); Seabridge v. Poli, 98 Conn. 297, 119 A. 214 (1922); Fay v. Hartford & Springfield St. Ry., 81 Conn. 330, 71 A. 364 (1908). However, in these cases the evidence showed that the plaintiff was contributorily negligent.

[24] 110 Conn. 685, 149 A. 140 (1930).

[25] 38 Iowa 564 (1874). See also Patterson v. Burlington & M. R. R., 38 Iowa 279 (1874).

a flat car. The train was negligently started and he was thrown off. The jury were instructed that if the injury was caused by defendant's negligence plaintiff was entitled to damages unless they found from the evidence that plaintiff's own carelessness contributed to produce the injury. Reversing a verdict for the plaintiff, the court declared that under this instruction the jury could have found for the plaintiff if there was no evidence as to his conduct whereas the rule is that they should not find for him unless he has proved that there was no negligence on his part.

In Maine the general rule as stated in the cases is that the burden of proof is on the plaintiff to show that his want of due care did not contribute to his negligence.[26] However, a statute[27] provides that in actions to recover for injuries negligently caused to a person deceased at the time of the action, the deceased is presumed to have been in the exercise of due care and if the defendant would rely on contributory negligence he must plead and prove it.[28]

The Michigan decisions state the rule that the burden of proving freedom from contributory negligence is on the plaintiff.[29] The court in Vermont states a similar rule.[30] In the case of *Cummings v. Cambridge*,[31] the plaintiff sued to recover damages for the death of his intestate caused by the negligence of the defendant in maintaining a bridge. The deceased had been last seen driving cows near the bridge. Shortly afterward the bridge was discovered broken down and the body of the deceased under some of its broken timbers. The cows, which were in a nearby field, were wet. The court refused to direct a verdict for the defendant declaring that though the burden of proof that the deceased was without contributory negligence was on the plaintiff, since there was some evidence reasonably tending to show that he was without negligence the issue should be determined by the jury.

It would thus appear that in a number of jurisdictions allegation and proof of freedom from contributory negligence are essential ele-

[26] Wyman v. Berry, 106 Me. 43, 75 A. 123 (1912); Mosher v. Smithfield, 84 Me. 334, 24 A. 876 (1892). Here the circumstances were equally consistent with negligence or care on the part of the plaintiff. The court set aside a verdict because plaintiff had not proved due care.

[27] Me. Pub. Laws (1913), c. 27, Rev. Stat. (1930), c. 96, § 50.

[28] Curran v. Lewiston A. & W. Street Ry., 112 Me. 96, 90 A. 973 (1914).

[29] Detroit & M. R. R. v. Van Steinburg, 17 Mich. 99 (1868); Tracey v. Township of South Haven, 132 Mich. 492, 93 N. W. 1065 (1903). In these cases, however, there was evidence of the plaintiff's contributory negligence, so that it is doubtful whether they should be taken as supporting the rule.

[30] Selinas v. Vermont State Agricultural Society, 60 Vt. 249 (1888); Boyden v. Fitchburg R. R., 72 Vt. 89 (1899); Bates v. Rutland R. R., 105 Vt. 394, 165 A. 923 (1933); Shumm's Admx. v. Rutland R. R., 81 Vt. 186, 69 A. 945 (1907).

[31] 93 Vt. 349, 107 A. 114 (1919).

ments of the plaintiff's cause of action, and in those states a federal court would, under the doctrine of *Erie Railroad v. Tompkins*, be bound to follow the state rule.

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