

# THE LAW APPLIED IN THE FEDERAL COURTS

FRANK W. SNEPP\*

## I

When the First Congress met, the national struggle between the Federalists and the anti-Federalists was reflected in the debates over the jurisdiction to be conferred upon the federal courts.<sup>1</sup> One group of anti-Federalists wanted no system of lower federal courts at all, and would have left the enforcement of federal laws to the tribunals of the states. Others favored the establishment of federal district courts, but with jurisdiction limited to admiralty and maritime causes. The Federalists, on the other hand, favored the establishment of a system of federal courts clothed with all the powers granted by the Constitution.

It was finally determined that there was to be a system of district courts, but their jurisdiction was hotly argued. Specifically, were these courts to be clothed with the power to hear and determine controversies "between citizens of different states"?<sup>2</sup> The followers of Hamilton argued, against bitter opposition, that it was desirable to afford for out-of-state litigants tribunals which would be free of the local prejudices likely to be encountered in state courts—an important consideration in the young nation of thirteen provincial and mutually suspicious states. There was also the hope that by staying out of state courts the commercial and trading classes could avoid some of the growing antagonism of the debtor class.<sup>3</sup>

The Federalists carried the day, and jurisdiction in diversity cases was conferred upon the federal district courts.<sup>4</sup>

What law was to be applied by the federal courts? The Congress enacted, in Section 34 of the Judiciary Act of 1789, that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall 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."<sup>5</sup>

Perhaps no other single word in American law has evoked as much controversy among lawyers and legal scholars as has the word "laws" in this act. Did the drafters intend that it include state decisional law as well as state statutory law? Professor Warren, as a result of his study of the original papers of the First Congress, concluded that they did so intend.<sup>6</sup> Other scholars have argued that they did not.<sup>7</sup>

\* Member of the third-year class, Duke University Law School.

<sup>1</sup> See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

<sup>2</sup> U. S. CONST. Art. III, §2.

<sup>3</sup> Warren, *supra*, note 1, at 82, 83.

<sup>4</sup> 1 STAT. 73 (1856), REV. STAT. §530 *et seq.* (1875).

<sup>5</sup> REV. STAT. §721 (1875), 28 U. S. C. §725 (1940).

<sup>6</sup> Warren, *supra* note 1, 81-88.

<sup>7</sup> Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519 (1941).

Whatever may have been in the minds of the committee that wrote it, the word was sent forth into the world ambiguous and undefined.

There are strong indications that the early federal judges believed that "laws" included the decisions of state courts, but the picture is not entirely clear. It was early held that state rules affecting property rights and decisions interpreting statutes would be followed.<sup>8</sup> The Supreme Court in 1834 said that "there can be no common law of the United States."<sup>9</sup> State law was in at least one case expressly followed on a non-property question, but Justice Chase noted that he concurred only because the general common law was the same.<sup>10</sup>

In 1842 the famous case of *Swift v. Tyson*<sup>11</sup> settled the question—though not the argument—for the next ninety-six years. Justice Story, who wrote the opinion, held that the New York law of negotiable instruments need not be followed by a federal court, because that law was not founded upon statute or local usage, but was deduced from the general common law. The word "laws" in Section 34 did not include state decisions. "They are, at most," he wrote, "only evidence of what the laws are, and are not of themselves laws."<sup>12</sup> In the fields of contracts and commercial instruments the federal courts were free to discover the law "in the general principles and doctrines of commercial jurisprudence."<sup>13</sup> Thus was born a doctrine which during its long career was to evoke a host of learned articles, impassioned dissents, and as impassioned judicial apologiae.<sup>14</sup>

The doctrine of general law was extended far beyond contracts and commercial paper.<sup>15</sup> It became settled that the only cases in which a federal court was bound to follow state decisions were those in which a state statute, a settled local rule of property, or a "local custom" was involved.<sup>16</sup>

Even in these three categories there were broad exceptions. In 1863, in *Gelpcke v. Dubuque*,<sup>17</sup> the Supreme Court held that, where rights had accrued under a state decision sustaining the validity of a state statute, federal courts were free to ignore a subsequent state decision overruling the first. This doctrine, in its implications inconsistent with the judicial philosophy which underlay *Swift v. Tyson*,<sup>18</sup> in prac-

<sup>8</sup> *McKeen v. DeLancy's Lessee*, 5 Cranch 22 (U. S. 1809); *Green v. Lessee of Neal*, 6 Pet. 291 (U. S. 1832); *Livingston's Lessee v. Moore*, 7 Pet. 469 (U. S. 1833).

<sup>9</sup> *Wheaton v. Peters*, 8 Pet. 591, 658 (U. S. 1834).

<sup>10</sup> *Brown v. Van Braam*, 3 Dall. 344 (U. S. 1797); but see Teton, *supra* note 7, at 527-530.

<sup>11</sup> 16 Pet. 1 (U. S. 1842).

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> Among the innumerable articles, see in addition to those already cited: Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 ILL. L. REV. 533 (1910); Green, *The Law as Precedent, Prophecy, and Principle; State Decisions in Federal Courts*, 19 ILL. L. REV. 217 (1924); Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225 (1930); Johnson, *State Law and the Federal Courts*, 17 KY. L. J. 355 (1929); Shelton, *Concurrent Jurisdiction—Its Necessity and Its Dangers*, 15 VA. L. REV. 137 (1938); Waterman, *The Nationalism of Swift v. Tyson*, 11 N. C. L. REV. 125 (1933); Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A. B. A. J. 609 (1938).

<sup>15</sup> See the extensive annotation of general law subjects following 28 U. S. C. A. §725 (1940).

<sup>16</sup> *Bucher v. Cheshire R. R.*, 125 U. S. 555 (1887); *City of Chicago v. Robbins*, 2 Black 418 (U. S. 1873).

<sup>17</sup> 1 Wall. 175 (U. S. 1863).

<sup>18</sup> See Rand, *Swift v. Tyson v. Gelpcke v. Dubuque*, 8 HARV. L. REV. 328 (1895).

tice became intermingled with the theory of "general law."<sup>19</sup> State law might also be disregarded where a state court had construed a statute after judgment in the federal court but pending appeal,<sup>20</sup> or when the state court spoke only after the rights of the parties had accrued but before the action was begun,<sup>21</sup> or if there had been but one state decision on the point.<sup>22</sup>

In diversity cases, the inevitable result of the doctrine of *Swift v. Tyson* and its progeny was widespread "forum shopping," especially by corporations. Merely because of diversity of citizenship a party could, by suing in federal court, or by removal of an action against him, obtain a result different from that ordained by the law of the state in which the cause of action arose.<sup>23</sup> In non-diversity cases also, state-created rights had one set of consequences in state courts, another in federal courts.<sup>24</sup>

There was powerful judicial dissent from the doctrine. Justice Field expressed the fervent hope that it, "like other errors, will, in the end 'die among its worshippers.'"<sup>25</sup> Justice Holmes vigorously attacked its extension and particular applications, denying that "there is one august corpus, to understand which clearly is the only task of any Court concerned."<sup>26</sup>

The merits of the doctrine were hotly debated by legal writers. It was attacked as allowing federal courts to control a field over which Congress had no power to legislate,<sup>27</sup> as failing to promote the promised uniformity,<sup>28</sup> and as historically inaccurate.<sup>29</sup> It was defended as promoting uniformity and as giving lawyers a nation-wide basis of prediction,<sup>30</sup> as the rightful exercise of an equal and independent judicial power,<sup>31</sup> and as the means for the enforcement of rights which had an existence independent of those enforced by state courts.<sup>32</sup>

By 1930 there seemed to be some tendency away from *Swift v. Tyson*. The

<sup>19</sup> See *Township of Pine Grove v. Talcott*, 19 Wall. 666 (U. S. 1873).

<sup>20</sup> *Burgess v. Seligman*, 107 U. S. 20 (1882).

<sup>21</sup> *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349 (1909); *Great Southern Fireproof Hotel Co. v. Jones*, 193 U. S. 532 (1904).

<sup>22</sup> *Barber v. Pittsburgh, F. W., & C. Ry.*, 166 U. S. 83 (1897).

<sup>23</sup> Perhaps the most notorious example is *Black and White Taxicab and Transfer Co. v. Black and Yellow Taxicab and Transfer Co.*, 276 U. S. 518 (1927). A corporation was organized in Tennessee, and purchased the assets of a Kentucky corporation, solely for the purpose of suing another Kentucky corporation in the federal courts and so avoiding a settled rule of Kentucky law.

<sup>24</sup> See Sec. II, *infra*.

<sup>25</sup> *Baltimore & Ohio R.R. v. Baugh*, 149 U. S. 368, 403 (1892).

<sup>26</sup> *Black and White Taxicab v. Brown and Yellow Taxicab*, *supra*, note 23, at 533; *Kuhn v. Fairmont Coal Co.*, *supra*, note 21.

<sup>27</sup> Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225 (1930).

<sup>28</sup> Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499 (1928).

<sup>29</sup> Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

<sup>30</sup> Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A. B. A. J. 433 (1932).

<sup>31</sup> Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 ILL. L. REV. 217 (1924).

<sup>32</sup> Green, *The Law as Precedent, Prophecy, and Principle; State Decisions in Federal Courts*, 19 ILL. L. REV. 217 (1924).

Supreme Court began to show a disposition to restrict its operation, and to give more deference to the views of state courts.<sup>33</sup>

On April 25, 1938, the Court, in a rare departure from accepted appellate practice, struck down *Swift v. Tyson*. Justice Brandeis startled the legal world with the opening sentence of his opinion in *Erie Railroad v. Tompkins*:<sup>34</sup>

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.<sup>35</sup>

Neither party had raised such a question, either before the Supreme Court or below.<sup>36</sup>

Justice Brandeis reviewed the entire history of the doctrine of *Swift v. Tyson*, and, after the funeral oration, lowered the corpse into the grave:

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.<sup>37</sup>

Justice Reed would not go so far as to agree that in applying *Swift v. Tyson* the federal courts had been guilty of almost a century of unconstitutional conduct.<sup>38</sup> The constitutional holding was not necessary to the decision; it was perhaps advanced to overcome the objection that Congress had by long acquiescence adopted Story's interpretation of Section 34.

Thus did the era of "general law" come to an end. One method of meeting the fundamental problem posed by the existence in our federal system of two systems of courts with concurrent jurisdiction had been tried and rejected. The basis of the new approach was laid down, but it still remained for the courts to define its full implications and extent.

## II

Although it was in suits between citizens of different states that the doctrines of both *Swift v. Tyson* and *Erie Railroad v. Tompkins* have received their greatest emphasis, neither of these decisions was by its terms limited solely to diversity cases. Prior to 1938, federal courts held themselves free to make an independent determination of the law applicable to state-created rights whenever the question was one of "general law," regardless of the manner in which jurisdiction was acquired.<sup>39</sup>

<sup>33</sup> *Mutual Life Insurance Co. v. Johnson*, 293 U. S. 328 (1934); Note, *Some Recent Implications of Swift v. Tyson*, 48 HARV. L. REV. 979 (1935).

<sup>34</sup> 304 U. S. 64 (1938).

<sup>35</sup> *Id.* at 69.

<sup>36</sup> *Id.*, arguments of counsel, and dissenting opinion of Mr. Justice Butler, at 78.

<sup>37</sup> *Id.* at 78.

<sup>38</sup> *Id.* at 90. See Shulman, *The Demise of Swift v. Tyson*, 47 YALE L. J. 1336 (1938); Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L. J. 3 (1941); Herriott, *Has Congress the Power to Modify the Effect of Erie Railroad v. Tompkins?*, 26 MARQ. L. REV. 1 (1941); Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 B. U. L. REV. 659 (1938).

<sup>39</sup> *Willing v. Binstock*, 312 U. S. 272 (1937) (suit against receiver of national bank—question of set-off one of general law but state rule followed because same as federal rule and question balanced with doubt); *In re Leterman, Becker, & Co.*, 260 Fed. 543 (C. C. A. 2d 1919) (question of priority of assignments in bankruptcy case one of general law); *Bryant v. Williams*, 16 F. 2d 159 (E. D. N. C. 1926) (jurisdiction under National Banking Act, question of ownership of notes held one of general law).

Since the *Erie* case, state decisional law must be followed by federal courts whenever a state-created right is involved, whatever may be the basis of jurisdiction.<sup>40</sup> This was made apparent by the Supreme Court in 1939, in *Wichita Royalty Co. v. City National Bank*.<sup>41</sup> The district court had jurisdiction by reason of the fact that the case was concerned with winding up the affairs of a national bank.<sup>42</sup> The Court held, on the authority of *Erie Railroad v. Tompkins*, that a state decision on the right to fasten a special trust upon a fund in the hands of a receiver must be followed by the federal court. Before the *Erie* case, this question had been held to be one of "general law."<sup>43</sup>

In the final analysis, of course, the federal courts still determine when state decisional law will be followed, since the characterization of a right as "state-created" or "federally created" is itself a federal question.<sup>44</sup> But once it has been determined that the right is one created by a state, and not by the federal government, a federal court must follow state decisional law, regardless of how it acquired jurisdiction.

### III

Mr. Tompkins was walking beside the Erie Railroad tracks in the state of Pennsylvania when an object protruding from the doorway of a boxcar knocked him into judicial immortality. He brought suit in a federal district court in New York. While Mr. Justice Brandeis apparently assumed that the law of Pennsylvania rather than that of New York was controlling, he did not elucidate the steps in the process by which that conclusion was reached.

Under *Swift v. Tyson*, of course, such typical conflict-of-laws problems were obviated to the extent that "general law" was applied. Since "general law" would be followed no choice was necessary in many cases. When a determination was necessary, it was the general view that the choice of the proper law was itself a matter for independent determination by the federal courts, although there had been no direct holding on this point by the Supreme Court.<sup>45</sup>

In 1941, settling a conflict among circuits, the Supreme Court held in the *Klaxon*<sup>46</sup> case that under *Erie Railroad v. Tompkins* a district court must follow the choice-of-law rules of the state in which it sits.<sup>47</sup> Justice Reed in his opinion said:

Any other ruling would do violence to the principle of uniformity within a state upon

<sup>40</sup> The occasional statement that the rule of *Erie Railroad v. Tompkins* applies only to cases of diversity is not accurate. The error arises from confusing those cases in which the right is a federal one with those in which the right is a state one. See *Shackelford v. Latchum*, 52 F. Supp. 205 (1943), where the court assigned this reason for not following state rule as to parol evidence in suit to recover federal income taxes.

<sup>41</sup> 306 U. S. 103 (1939).

<sup>42</sup> 36 STAT. 1092 (1911) 28 U. S. C. §41(16) (1940).

<sup>43</sup> *Beard v. Independent Dist. of Pella City*, 88 Fed. 375 (C. C. A. 8th 1898).

<sup>44</sup> *Irving Trust Co. v. Day*, 314 U. S. 556 (1942); *Schuykill Trust Co. v. Pennsylvania*, 296 U. S. 102 (1935).

<sup>45</sup> *Dygart v. Vermont Loan and Trust Co.*, 94 Fed. 913 (C. C. A. 9th 1899), did so hold. See annotation, 40 L. R. A. (N. S.) 426 (1926).

<sup>46</sup> *Klaxon Co. v. Stentor Mfg. Co.*, 313 U. S. 487 (1941).

<sup>47</sup> Compare *Sampson v. Channell*, 110 F. 2d 754 (C. C. A. 1st 1940), with *Klaxon Co. v. Stentor Mfg. Co.*, 115 F. 2d 268 (C. C. A. 3rd 1940); *Wolkin, Conflict of Laws in the Federal Courts; The Erie Era*, 94 U. of Pa. L. Rev. 293 (1946).

which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.<sup>48</sup>

On the same day the Court further emphasized the application of the *Erie* doctrine to conflicts cases in *Griffin v. McCoach*,<sup>49</sup> in which it held that the district court is bound by the public policy of the state in which it sits.

One important question in the field of conflicts which is suggested by the *Erie* case has as yet had no answer from the courts. Does the doctrine of the *Klaxon* case govern conflicts cases where one of the contacts is with a foreign nation? New York,<sup>50</sup> for example, has held that it will not follow *Hilton v. Guyot*<sup>51</sup> on the recognition of foreign judgments. Does the *Erie* doctrine require a federal court sitting in New York to follow the state rule? Or is this, because of its close relation to foreign policy, a "federal field," in which state courts not only cannot bind the federal courts, but are themselves bound to follow federal decisional law?<sup>52</sup>

#### IV

While the substantive law applied by federal courts to state-created rights prior to 1938 was governed by *Swift v. Tyson*, "procedure" in federal courts was prescribed by the Conformity Act,<sup>53</sup> which provided that practice and procedure in the federal district courts should conform, "as near as may be," to that of the courts of the state in which the federal tribunal sat.

On June 19, 1934, Congress gave the Supreme Court power to prescribe general rules of procedure for the district courts in civil actions.<sup>54</sup> A distinguished committee of legal scholars and practitioners was appointed by the Court to draft the new rules, which were adopted by the Court on December 30, 1937.<sup>55</sup>

The Supreme Court was forbidden by Congress to affect any "substantive" rights by adoption of the Rules of Civil Procedure.<sup>56</sup> The inclusion of certain matters in the Rules apparently indicated that in the opinion of the Supreme Court they were "procedural." Four months later the *Erie* case declared that in certain types of cases the federal courts must determine the "substantive" rights of the parties according to state law. This posed the question, What is to happen if a rule of state law is so closely bound up with the question of recovery or non-recovery that

<sup>48</sup> 313 U. S. at 496 (1941).

<sup>49</sup> *Id.* at 498. For criticism of the *Klaxon* and *McCoach* cases, see WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* c. V. (1940).

<sup>50</sup> *Johnston v. Compagnie Generale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926).

<sup>51</sup> 159 U. S. 113 (1895).

<sup>52</sup> See Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. of PA. L. REV. 430, 447 (1941). See *United States v. Belmont*, 301 U. S. 324 (1937), *United States v. Pink*, 315 U. S. 203 (1942), on the power of the national government in foreign relations.

<sup>53</sup> REV. STAT. §914 (1875), 28 U. S. C. §724 (1940).

<sup>54</sup> 48 STAT. 1064 (1937), 28 U. S. C. §723(b) (1940).

<sup>55</sup> 302 U. S. 783 (1937). The Federal Rules of Civil Procedure are set out at 308 U. S. 663 (1940), and at 28 U. S. C. following §723(c) (1940).

<sup>56</sup> 48 STAT. 1064 (1937), 28 U. S. C. §723(b) (1940).

under the *Erie* doctrine it might well be labeled "substantive," and yet the matter is one of those provided for by the Rules?<sup>57</sup>

There are two possible solutions to the problem. First, it may be concluded that provision for a matter in the Rules is a determination by the Supreme Court that the matter is "procedural" and state law is not binding. Second, it may be recognized that since the decision in *Erie Railroad v. Tompkins* the prior determination by the Supreme Court is no longer conclusive in situations governed by the doctrine of that case.

At bottom the question is one of policy. It is necessary to balance the *Erie* doctrine against the policy underlying the Federal Rules. The line between "substance" and "procedure" must be drawn at a point which will carry out the policy chosen, and classifications perhaps valid for other purposes must be rejected<sup>58</sup>—the same process for which Professor Cook has so cogently argued in the field of conflict of laws.<sup>59</sup> In an increasing number of cases the federal courts have taken the second course suggested above, and have found the policy of the *Erie* case to be the weightier, as indicated by the cases considered below.

The rule which first raised the problem was 8(c), which provides for affirmative defenses, including contributory negligence. Prior to 1938, when the *Erie* case was decided and the rules were adopted, the federal rule was that the burden of proof of contributory negligence was "substantive" and a question of "general law" under *Swift v. Tyson*.<sup>60</sup>

In 1939 the Supreme Court indicated the effect of the *Erie* case upon this doctrine when it held in an equity case that the burden of proof of bona fide purchase in an action to quiet title was a matter of "substance," governed by the *Erie* case, and therefore that state law must be followed.<sup>61</sup> Four years later, the question was settled by the decision in *Palmer v. Hoffman*,<sup>62</sup> which held that federal courts in cases where the *Erie* doctrine applies must follow state law as to the burden of proof of contributory negligence. The Court said that Rule 8(c) governed only the manner of pleading, and not the burden of proof.

The same type of problem is raised by Rule 23(b), which provides that, in order to maintain a shareholder's derivative suit, the plaintiff must have been a shareholder at the time of the transaction complained of, or have acquired his shares since that time by operation of law.

<sup>57</sup> See Clark, *The Tompkins Case and the Federal Rules*, 1 F. R. D. 417 (1941); Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad v. Tompkins*, 24 J. AM. JUD. SOC'Y 57 (1940).

<sup>58</sup> In a conflict-of-laws case, two separate characterizations may be necessary: first, to determine whether the *Erie* doctrine requires that the law of the state be applied, and second, to determine the characterization which the state of the forum would make for conflict-of-laws purposes. See Sampson v. Channell, 110 F. 2d 754 (C. C. A. 1st 1940).

<sup>59</sup> COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154 *et. seq.*; Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939).

<sup>60</sup> Central Vt. Ry. v. White, 238 U. S. 507 (1915).

<sup>61</sup> Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939).

<sup>62</sup> 318 U. S. 109 (1943).

Among the states there is a wide split of authority on this requirement.<sup>63</sup> The federal rule is a continuation of Equity Rule 27, the history of which leaves in doubt whether it was regarded as "substantive" or "procedural."<sup>64</sup> The Supreme Court had held in 1908, however, that the lack of such a showing deprived the plaintiff of standing in a court of equity.<sup>65</sup>

The question has been raised in a number of lower federal courts. Most of them have noted apparent conflict with the *Erie* doctrine, but have deferred to the authority of the Rules,<sup>66</sup> have avoided deciding because the state rule was the same,<sup>67</sup> or have merely commented upon the fact, without considering it.<sup>68</sup> At least one court has held the matter to be "substantive," and governed by state law,<sup>69</sup> and another has as flatly rejected this view.<sup>70</sup>

The Advisory Committee on the Federal Rules recently considered the advisability of amending Rule 23(b), but concluded that the question should be left to be determined by the Supreme Court when and if a case comes before it.<sup>71</sup>

It would seem that the requirement of Rule 23(b) does affect "substantive" rights for the purposes of the *Erie* doctrine, and state law should govern. Otherwise a plaintiff who cannot qualify under the federal rule, but who could maintain the suit under the state rule, could be defeated by removal, merely because of diversity of citizenship.

Rule 43 makes admissible all evidence which is admissible under any federal statute, or which was admissible under the old equity practice, or which is admissible in the courts of the state in which the federal court sits. That rule which favors admissibility is to be preferred.

Prior to 1938, matters of evidence depended upon the Competency of Witnesses Act,<sup>72</sup> the Rules of Decision Act,<sup>73</sup> and the Conformity Act.<sup>74</sup> There was some conflict as to which governed particular matters, and there was disagreement as to whether or not state decisional law of evidence was binding upon federal courts.<sup>75</sup>

<sup>63</sup> Annotation, 148 A. L. R. 1091 (1944).

<sup>64</sup> See 2 MOORE AND FRIEDMANN, MOORE'S FEDERAL PRACTICE 2246-2253 (1938), for a statement of the development of this rule.

<sup>65</sup> *Venner v. Great Northern Ry.*, 209 U. S. 24 (1908). Dean, then Commissioner, Pound concluded that the requirement was "substantive." *Home Fire Ins. Co. v. Barber*, 67 Nebr. 644, 93 N. W. 1024 (1903).

<sup>66</sup> *Summers v. Hearst*, 23 F. Supp. 986 (S. D. N. Y. 1938).

<sup>67</sup> *McQuillen v. National Cash Register Co.*, 112 F. 2d 877 (C. C. A. 4th 1940); *Mullins v. DeSoto Securities Co.*, 45 F. Supp. 871 (W. D. La. 1942).

<sup>68</sup> *In re Western Tool and Mfg. Co.*, 142 F. 2d 404 (C. C. A. 6th 1944); *Piccard v. Sperry Corp.*, 36 F. Supp. 1006 (S. D. N. Y. 1941).

<sup>69</sup> *Gallup v. Caldwell*, 120 F. 2d 90 (C. C. A. 3rd 1941).

<sup>70</sup> *Perrott v. United States Banking Corp.*, 53 F. Supp. 953 (Dela. 1944).

<sup>71</sup> *Report of Proposed Amendments to Rules of Civil Procedure by Advisory Committee*, 5 F. R. D. 449, 451 (1946).

<sup>72</sup> REV. STAT. §858 (1875), 28 U. S. C. §631 (1940).

<sup>73</sup> REV. STAT. §721 (1875), 28 U. S. C. §725 (1940).

<sup>74</sup> REV. STAT. §914 (1875), 28 U. S. C. §724 (1940).

<sup>75</sup> See *Thompson v. Railroad Companies*, 6 Wall. 134 (U. S. 1867) (must follow state decisions); *Conn. Mutual Life v. Shaefer*, 94 U. S. 457 (1876) (competency of witness is governed by federal law); but see *Chicago and N. W. R. R. v. Kendall*, 167 Fed. 62 (C. C. A. 8th 1909) (state decisions on common-law rules of evidence not binding on federal courts).



Under the *Erie* case the courts have concluded that some evidentiary matters are so intimately tied up with the result of the action that state law must be followed regardless of any choice offered by Rule 43. This has been held in regard to the parol evidence rule,<sup>76</sup> *res ipsa loquitur*,<sup>77</sup> the presumption of death after an absence of seven years,<sup>78</sup> privileged communications,<sup>79</sup> sufficiency of evidence,<sup>80</sup> and the burden of proof on the issue of suicide or accident.<sup>81</sup> There have been cases holding that the state rule as to judicial notice of foreign law will govern,<sup>82</sup> but it would seem that the better view is to the contrary,<sup>83</sup> since judicial notice of foreign law merely relieves one of the parties from the burden of proving it, and does not necessarily change the result.

Outside the area covered by the Federal Rules, questions of "substance" and "procedure" are encountered in applying the doctrines of *forum non conveniens* and "internal affairs."<sup>84</sup> These doctrines have become so intertwined and present so many features in common that they may be considered together for purposes of discussion of their application under the *Erie* case.

The Supreme Court has three times avoided ruling whether or not the *Erie* case requires a federal court exercising diversity jurisdiction to follow the state law in these cases.<sup>85</sup> But the Court did decide, in 1947, that federal venue statutes do not preclude federal courts from applying the doctrine of *forum non conveniens*, thus removing one possible objection to the application of state law.<sup>86</sup> If statutory venue provisions can be made to yield at all to judicial concepts of convenience, there is no apparent reason, in the light of the *Erie* policy, why they should not yield when the concepts are those of state judges.

Judge Learned Hand, in *Weiss v. Routh*,<sup>87</sup> held that state law should govern the application of *forum non conveniens*, and clearly stated the reasons for that conclusion. He pointed out that a purpose of the *Erie* doctrine was to avoid a different result because of diversity, and that this "extends as much to determining whether the court shall act at all, as to how it shall decide, if it does."<sup>88</sup>

<sup>76</sup> *Russell v. Barnes Foundation*, 143 F. 2d 871 (C. C. A. 3rd 1944); *Zell v. American Seating Co.*, 138 F. 2d 641 (C. C. A. 2d 1943); *Long v. Morris*, 128 F. 2d 653 (C. C. A. 3rd 1942).

<sup>77</sup> *Coca-Cola Bottling Co. v. Munn*, 99 F. 2d 190 (C. C. A. 4th 1938).

<sup>78</sup> *Occidental Life Ins. Co. v. Thomas*, 107 F. 2d 876 (C. C. A. 9th 1939).

<sup>79</sup> *Munzer v. Swedish American Line*, 35 F. Supp. 493 (S. D. N. Y. 1940).

<sup>80</sup> *Waldron v. Aetna Casualty and Surety Co.*, 141 F. 2d 330 (C. C. A. 3rd 1943); *Cooper v. Brown*, 126 F. 2d 874 (C. C. A. 3rd 1942); *Sheinmann and Sons v. Scranton Life Ins. Co.*, 125 F. 2d 341 (C. C. A. 3rd 1939); *Allison v. Great Atlantic and Pacific Tea Co.*, 99 F. 2d 769 (C. C. A. 4th 1940).

<sup>81</sup> *Ryan v. Denver Union Terminal Ry. Co.*, 126 F. 2d 782 (C. C. A. 10th 1942); *Rast v. Mutual Life Ins. Co.*, 112 F. 2d 769 (C. C. A. 4th 1940).

<sup>82</sup> *Sheinmann and Sons v. Scranton Life Ins. Co.*, *supra* note 80; *Affiliated Enterprises v. Courter Amusement Co.*, 32 F. Supp. 11 (E. D. N. Y. 1940).

<sup>83</sup> *Alcaro v. Jean Jordan*, 138 F. 2d 90 (C. C. A. 3rd 1941).

<sup>84</sup> See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

<sup>85</sup> *Williams v. Green Bay and W. R. R.*, 326 U. S. 549 (1946); *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947); *Koster v. Lumberman's Mutual Casualty Co.*, 330 U. S. 518 (1947); Note, *The Development of the "Internal Affairs" Rule in the Federal Courts*, 46 COL. L. REV. 413 (1946).

<sup>86</sup> *Gulf Oil Corp. v. Gilbert*, *supra*, note 85.

<sup>87</sup> 149 F. 2d 193 (C. C. A. 2d 1945).

<sup>88</sup> *Id.* at 195.

The results in the lower courts are inconclusive,<sup>89</sup> but at least show an awareness of the problem. Judge Hand's position would seem to be in accord with the policy of the *Erie* case.

## V

Until 1947, it was not generally supposed that the doctrine of *Erie Railroad v. Tompkins* had any effect upon the extent of the jurisdiction of federal courts. Since 1938 lower federal courts had continued to apply the doctrine of the *Lupton* case,<sup>90</sup> that a state statute limiting the jurisdiction of state courts did not operate to limit the jurisdiction of federal courts in diversity cases.<sup>91</sup>

In 1947 the Supreme Court, in *Angel v. Bullington*,<sup>92</sup> declared that the *Lupton* case is "obsolete," and held that when a state denies to its courts jurisdiction to hear certain causes of action, a federal district court sitting in that state cannot entertain them. Justice Frankfurter wrote:

The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.<sup>93</sup>

While there was another ground of decision—that the judgment in a prior suit between the same parties in the state courts, in which the highest state court held that the state courts lacked jurisdiction to hear the cause of action, was *res judicata*—Justice Frankfurter for the majority placed great stress upon denial of jurisdiction through the operation of the *Erie* doctrine.

It had already been pointed out by the Court that the *Erie* case did more than overrule *Swift v. Tyson*—that it also overruled "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."<sup>94</sup> *Angel v. Bullington* would seem to follow logically from this major premise. If the federal court in diversity cases is able to entertain a cause of action which cannot be heard by the courts of the state in which it sits, then suit in a federal court would produce a different result, merely because of the "accident of diversity."

<sup>89</sup> *Gilbert v. Gulf Oil Corp.*, 153 F. 2d 883 (C. C. A. 2d 1946) (local law does not control); *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291 (S. D. N. Y. 1945) (local law does control); *Lewald v. York Corp.*, 68 F. Supp. 386 (S. D. N. Y. 1945) (would not decide since result the same); *Hall v. American Cone and Pretzel Co.*, 71 F. Supp. 266 (E. D. Pa. 1947) (refused to follow state law).

<sup>90</sup> *David Lupton's Sons v. Automobile Club of America*, 225 U. S. 489 (1912).

<sup>91</sup> *Stephenson v. Grand Trunk Western R. Co.*, 110 F. 2d 401 (C. C. A. 7th 1940); *Martineau v. Eastern Airlines*, 64 F. Supp. 235 (N. D. Ill. 1946).

<sup>92</sup> 330 U. S. 183 (1946), 60 HARV. L. REV. 822 (1947). See Harper, *The Supreme Court and the Conflict of Laws*, 47 COL. L. REV. 883, 890 (1947).

<sup>93</sup> *Id.* at 191.

<sup>94</sup> *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945).

## VI

The federal equity jurisdiction is said to be identical in extent with that of the English Court of Chancery at the time of the Revolution.<sup>95</sup> It has been repeatedly held that state laws cannot increase or diminish this jurisdiction by creating or abolishing remedies.<sup>96</sup> A state may, however, create new "substantive" rights which may be enforced in federal courts of equity.<sup>97</sup> If the state at the same time prescribes a remedy to enforce the right, and the remedy is substantially consistent with ordinary modes of procedure, then federal courts may give such remedy.<sup>98</sup> All of the foregoing is subject to the statutory requirement that suits in equity shall not be sustained where a plain, adequate, and complete remedy may be had at law.<sup>99</sup> The remedy at law must be one available in the federal court, and not merely in the state courts.<sup>100</sup> Federal equity jurisdiction is further circumscribed by the constitutional requirement of trial by jury in actions traditionally legal.<sup>101</sup>

Although the Rules of Decision Act by its terms applied only to "trials at common law," the Supreme Court had declared that the enactment was merely declaratory of existing law, and did not by implication exclude equity cases;<sup>102</sup> and, by reasoning analogous to that in *Swift v. Tyson*, federal courts were freed from dependence on the pronouncements of state courts as rules of decision in equity cases as well. Prior to 1938 federal courts were as free to disregard state decisional law in equity as in cases at law.<sup>103</sup>

In the *Ruhlin* case,<sup>104</sup> decided within a week after *Erie v. Tompkins*, the Supreme Court applied the new doctrine to a question arising in an equity case. It did not hold, however, that equitable questions were governed by the *Erie* doctrine, but only that when in an equity case a question arose which would have been one of "general" law prior to the *Erie* case, state law must now be followed. The same cautious approach was used in the next equity case decided, *Cities Service Oil v. Dunlap*,<sup>105</sup> in which the Court held that the burden of proof of bona fide purchase in an action to quiet title was "substantive," and not merely a matter of equity practice, and state law must be followed.

Having once avoided the problem of the application of the *Erie* doctrine to an exclusively equitable question,<sup>106</sup> the Court in 1945 met the issue squarely in *Guaranty Trust Company v. York*.<sup>107</sup> It held that the state statute of limitations should be

<sup>95</sup> *Atlas Ins. Co. v. W. I. Southern Inc.*, 306 U. S. 563 (1939).

<sup>96</sup> *Henrietta Mills v. Rutherford County*, 281 U. S. 121 (1930); *Pusey and Jones Co. v. Hanssen*, 261 U. S. 491 (1923).

<sup>97</sup> *Missouri, K. & T. Trust Co. v. Krumscig*, 172 U. S. 351 (1899).

<sup>98</sup> *Clark v. Smith*, 13 Pet. 195 (U. S. 1839).

<sup>99</sup> REV. STAT. §723 (1875), 28 U. S. C. §384 (1940).

<sup>100</sup> *Atlas Ins. Co. v. W. I. Southern*, *supra*, note 95.

<sup>101</sup> *Scott v. Neely*, 140 U. S. 106 (1891).

<sup>102</sup> *Mason v. United States*, 260 U. S. 545 (1923).

<sup>103</sup> *Neves v. Scott*, 13 How. 268 (U. S. 1851).

<sup>104</sup> *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202 (1938).

<sup>105</sup> 308 U. S. 208 (1939).

<sup>106</sup> *Russell v. Todd*, 309 U. S. 280 (1940).

<sup>107</sup> 326 U. S. 99 (1945).

applied in a class suit for breach of trust. Justice Frankfurter, who wrote the opinion, first reiterated traditional ideas of equity jurisdiction, and said that state law cannot define the remedies which a federal equity court may afford in diversity jurisdiction. But, he continued, it was immaterial whether statutes of limitation be classified as "substantive" or "procedural":

*Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between state and federal courts. In essence the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.<sup>108</sup>

Is the import of this language consistent with traditional ideas of federal equity jurisdiction? Justice Frankfurter decried an exception to the *Erie* doctrine in equity cases,<sup>109</sup> and closed his opinion by saying, "Dicta [which] may be cited characterizing equity as an independent body of law . . . merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin."<sup>110</sup> If the policy underlying the *Erie* doctrine is as compelling as this language implies, must not equitable remedies which are available in state courts be available in federal courts sitting in diversity jurisdiction if the lack of such remedies would lead to a different result in the federal courts?

The scope of the *York* decision is not clear, especially since the decision in *Angel v. Bullington*, which established that, in some measure at least, the jurisdiction of federal courts in diversity jurisdiction is dependent upon state law. It would seem at least arguable that the traditional statements of federal equity jurisdiction in diversity cases are no longer entirely valid.<sup>111</sup>

## VII

Before *Erie Railroad v. Tompkins*, federal courts were free to disregard state decisions under certain circumstances although the case was not one which fell into the category of "general law." When a state decision had been rendered subsequent to the judgment of a lower federal court, but pending appeal, federal judges were not bound to follow the latest decision,<sup>112</sup> although they sometimes did so.<sup>113</sup> When a state decision invalidated contract rights previously held to be valid, federal courts were free to ignore the subsequent decision.<sup>114</sup> The decisions of intermediate state

<sup>108</sup> *Id.* at 109.

<sup>109</sup> *Id.* at 111.

<sup>110</sup> *Id.* at 112.

<sup>111</sup> It has been pointed out that some lower federal courts avoid application of the *Erie* doctrine in equity cases. Note, *The Equitable Remedial Rights Doctrine*, 55 *YALE L. J.* 401 (1946). See *Purcell v. Summers*, 145 F. 2d 979 (C. C. A. 4th 1944); *Black and Yates, Inc. v. Mahogany Ass'n.*, 129 F. 2d 227 (C. C. A. 3rd 1941).

<sup>112</sup> *Burgess v. Seligman*, 107 U. S. 20 (1882).

<sup>113</sup> *Moore v. National Bank*, 104 U. S. 625 (1881).

<sup>114</sup> *Gelpeke v. Dubuque*, 1 Wall. 175 (U. S. 1863). This case has never been overruled, but it is doubtful that it will ever again be followed, as it is wholly inconsistent with the *Erie* doctrine.

courts were not binding on federal tribunals,<sup>115</sup> although they were sometimes followed.<sup>116</sup>

There were basic conflicts between these doctrines and the *Erie* case.<sup>117</sup> Within a period of about thirty days at the end of 1940 and the beginning of 1941, the Supreme Court in a series of cases overthrew the old doctrines.<sup>118</sup> It held that federal courts are bound to follow decisions of intermediate state courts in the absence of decisions of the highest state court, and of more convincing evidence of the law of the state.<sup>119</sup> The Court also laid down, in *West v. American Telephone & Telegraph Company*,<sup>120</sup> guides for the ascertainment of state law. Justice Stone declared that:

A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or another is preferable.<sup>121</sup>

And he continued:

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.<sup>122</sup>

In *Vandenbark v. Owens-Illinois Glass Company*,<sup>123</sup> the Court held that where a decision of the highest state court was delivered after judgment in the district court, but before decision in the Circuit Court of Appeals, the Circuit Court of Appeals was bound to follow the state decision.

In *Meredith v. Winter Haven*,<sup>124</sup> the Supreme Court made it plain that federal courts may not avoid decision of disputed questions of state law upon which there is no authority merely because of the difficulty of ascertaining the law.<sup>125</sup>

<sup>115</sup> *Summers v. Travelers Ins. Co.*, 109 F. 2d 845 (C. C. A. 8th 1940); *Knight v. Atlantic Coast Line R. R.*, 73 F. 2d 76 (C. C. A. 5th 1934).

<sup>116</sup> *Erie R. R. v. Hilt*, 247 U. S. 97 (1918).

<sup>117</sup> See Note, *Erie R. R. v. Tompkins and Supervening Changes in State Law*, 50 YALE L. J. 315 (1940).

<sup>118</sup> *Fidelity Union Trust Co. v. Field*, 311 U. S. 169 (1940); *Six Companies of California v. Joint Highway Dist.*, 311 U. S. 180 (1940); *West v. American Telephone and Telegraph Co.*, 311 U. S. 223 (1940).

<sup>119</sup> *Fidelity Union Trust Co. v. Field*, *supra*, note 118.

<sup>120</sup> Cited *supra*, note 118.

<sup>121</sup> *Id.* at 236, 237.

<sup>122</sup> *Id.* at 237. See also *Stoner v. New York Life Ins. Co.*, 311 U. S. 464 (1940).

<sup>123</sup> 306 U. S. 103 (1939).

<sup>124</sup> 320 U. S. 228 (1943); see Note, *Recent Supreme Court Limitations on Federal Jurisdiction*, 53 YALE L. J. 788 (1944).

<sup>125</sup> Cases in which it is held that a federal court should not decide questions of state law because an important state policy is involved, or because a state statute has not been construed by state courts, represent a special doctrine, and must be distinguished from the *Winter Haven* case. See *American Federation of Labor v. Watson*, 327 U. S. 582 (1947); *Burford v. Sun Oil Co.*, 319 U. S. 315 (1943); *Chicago v. Fieldcrest Dairies*, 316 U. S. 168 (1942); *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496 (1941); Note, *Recent Supreme Court Limitations on Federal Jurisdiction*, 53 YALE L. J. 788 (1944).

Although the rules laid down by the Supreme Court for the determination of state law have been sharply attacked as unduly circumscribing the judicial discretion of federal judges,<sup>126</sup> lower federal courts have shown a great deal of flexibility in their search for state law. Since the Supreme Court has indicated that it will, if possible, defer to the judgment of lower federal judges on disputed matters of state law,<sup>127</sup> district and circuit judges have a high degree of freedom in this matter.<sup>128</sup>

There are three possible situations confronting the federal judge when he undertakes to ascertain state law. First, the highest state court may have spoken on the point. Second, in the absence of decision by the highest state court, there may be decisions by intermediate state courts. Third, there may be an entire absence of state authority upon the point.

In the first situation the duty of the federal court is clear. It must follow the state decision.<sup>129</sup> But even here the federal court may disregard the decision if it concludes from an examination of later state decisions that the highest state court would no longer follow its earlier opinion.<sup>130</sup>

When there are only intermediate state court decisions, federal courts must then turn to them.<sup>131</sup> Although some courts have followed intermediate state decisions even though they rather obviously disagreed with them,<sup>132</sup> federal courts are not required to follow blindly.<sup>133</sup> They are free to examine other pertinent data, as did the Fourth Circuit Court of Appeals in a recent case, and find that the state law is not as the intermediate state court says.<sup>134</sup> Some federal judges have noted that they followed these decisions only in the absence of other convincing evidence,<sup>135</sup> or because the highest state court had refused to review the decision.<sup>136</sup>

It is in the third type of case, where there is an absence of state authority, that the

<sup>126</sup> Corbin, *The Laws of the Several States*, 50 YALE L. J. 762 (1941); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267 (1946); Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case*, 31 KY. L. J. 99 (1943).

<sup>127</sup> *Steele v. General Mills*, 329 U. S. 433 (1947); *Huddleston v. Dwyer*, 322 U. S. 232 (1944); *MacGregor v. State Mutual Life Assur. Co.* 315 U. S. 280 (1942).

<sup>128</sup> See LaSalle, *The Problem Facing Federal Courts Where State Precedents Are Lacking*, 24 TEX. L. REV. 361 (1946).

<sup>129</sup> *West v. American Telephone and Telegraph Co.*, 311 U. S. 223 (1940). See *American Nat. Ins. Co. v. Belch*, 100 F. 2d 48 (C. C. A. 4th 1938), where on rehearing court withdrew former opinion when shown a state decision newly discovered by counsel.

<sup>130</sup> *West v. American Telephone and Telegraph*, *supra*, note 129, *Moore v. Illinois Central R. R.*, 312 U. S. 630 (1941) (implication); *contra: Grand Trunk Western R. R. v. Nelson Co.*, 118 F. 2d 252 (C. C. A. 6th 1941), which would seem to be erroneous.

<sup>131</sup> *West v. American Telephone and Telegraph*, *supra*, note 129.

<sup>132</sup> *Gustin v. Sun Life Assur. Co.*, 152 F. 2d 447 (C. C. A. 6th 1945).

<sup>133</sup> *Wickes Boiler Co. v. Godfrey-Keeler Co.*, 121 F. 2d 415 (C. C. A. 2d 1941) (Circuit Court of Appeals on first hearing followed New York Appellate Division case with which it disagreed. Upon appeal the New York Court of Appeals carefully avoided approving the view which the Circuit Court of Appeals had followed, but affirmed on other grounds. Circuit Court of Appeals granted rehearing and changed its former opinion).

<sup>134</sup> *Order of Commercial Travelers of America v. King*; 161 F. 2d 108 (C. C. A. 4th 1947).

<sup>135</sup> *Gustin v. Sun Life Assur. Co.*, 154 F. 2d 447 (C. C. A. 6th 1946). *Miller v. National City Bank*, 69 F. Supp. 187 (S. D. N. Y. 1946).

<sup>136</sup> *Gustin v. Sun Life Assur. Co.*, 152 F. 2d 447 (C. C. A. 6th 1945).

federal courts have freest rein. Judges have stated that under such circumstances they will rely upon "a general statement of the law,"<sup>137</sup> upon authorities from other jurisdictions,<sup>138</sup> or will proceed by analogy to other state decisions.<sup>139</sup> One Circuit Court of Appeals, in the absence of state authority, has in the finest common law tradition created a new cause of action.<sup>140</sup>

The policy underlying *Erie Railroad v. Tompkins* does not require that in the absence of state authority federal courts achieve mathematical identity with what a state court may in the future declare to be the law of the state. To achieve such a result would require the services of clairvoyants rather than judges. Any incongruity in the individual case arising from the fact that a federal court decides the rights of the parties upon the assumption that the state law is one way, and the state courts later, and in another case, decide that the principle is to the contrary, is inherent in a federal system providing for dual courts with concurrent jurisdiction. When the state court does speak, the federal court must follow. Until that time, the most that a federal judge can do is, as Judge Parker puts it:

... to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it.<sup>141</sup>

### VIII

On the same day that *Erie Railroad v. Tompkins* was decided, Justice Brandeis also delivered the opinion of the Court in *Hinderlider v. LaPlata River and Cherry Creek Ditch Company*,<sup>142</sup> in which he said that the apportionment of the water of an interstate stream "is a question of 'federal common law,' upon which neither the statutes nor the decisions of either State can be conclusive."<sup>143</sup>

This case served to emphasize the fact that, as before *Erie*,<sup>144</sup> there are "federal fields," governed by "federal common law." There are cases to which, because an interest of the United States is involved,<sup>145</sup> because of the sweep of a federal

<sup>137</sup> *Hornstein v. Kramer Bros. Freight Lines*, 133 F. 2d 143 (C. C. A. 3rd 1943).

<sup>138</sup> *Kansas City Life Ins. Co. v. Wells*, 133 F. 2d 224 (C. C. A. 8th 1943).

<sup>139</sup> *Versluis v. Town of Haskell*, 154 F. 2d 935 (C. C. A. 10th 1946).

<sup>140</sup> *Dailey v. Parker*, 152 F. 2d 174 (C. C. A. 7th 1945), holding that children had a cause of action for alienation of affections against woman for whom their father had abandoned them. See Fitzgerald, *The Celebrated Case of Dailey v. Parker*, 15 U. of KAN. CITY L. REV. 120 (1947). A lower Illinois court has recently followed the Seventh Circuit, *Johnson v. Luhman*, 71 N. E. 2d 810 (1947).

<sup>141</sup> *New England Mutual Life Insurance Co. v. Mitchell*, 118 F. 2d 414, 420 (C. C. A. 4th 1941). Compare the approach of Frank, J., in *Cooper v. American Airlines, Inc.*, 149 F. 2d 355, at 359 (C. C. A. 2d 1945): "What would be the decision of reasonably intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York 'jurisprudence'? An alternative test is what we conjecture would be the decision of the particular judges who now constitute that court."

<sup>142</sup> 304 U. S. 92 (1938).

<sup>143</sup> *Id.* at 110.

<sup>144</sup> *Board of Trade v. Johnson*, 264 U. S. 1 (1924); *Economy Light and Power Co. v. U. S.*, 256 U. S. 113 (1921); *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372 (1918).

<sup>145</sup> *United States v. Standard Oil of California*, 332 U. S. 301 (1947) (right of United States to recover medical expenses incurred in caring for soldier injured through negligence of defendant, although Court held that there was no such cause of action); *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943) (right of United States to recover payment made on forged government check); *Board of*

statute,<sup>146</sup> or because Congress has "occupied the field,"<sup>147</sup> state law has no application. They are not "exceptions" to *Erie Railroad v. Tompkins*, but are outside the rationale of the case. They concern rights created by the Federal Government, and not rights created by the states.<sup>148</sup> The Rules of Decision Act by its terms did not apply to cases "where the Constitution, treaties, or statutes of the United States otherwise require or provide. . . ." On the contrary, in these fields state courts are bound to follow the decisions of federal courts.<sup>149</sup>

It is impossible to predict the eventual extent of the "federal fields" doctrine. There are strong reasons of policy for uniformity of decision in certain areas of activity over which the Federal Government has extended its regulatory powers. There seems to be some tendency for federal courts to extend the concept of exclusively federal questions. A degree of the uniformity desired by the defenders of *Swift v. Tyson* may some day be achieved in reverse, by state courts' following federal decisional law in greatly expanded "federal fields."

## IX

During the ten years which have passed since they were required to make two basic readjustments in their operating procedures, lower federal courts have been almost surprisingly conscientious in the application of *Erie Railroad v. Tompkins* and its offspring. It has no doubt been difficult for many federal judges, traditionally among the ablest of our jurists, at times to subordinate their own ideas to the pronouncements of state courts.

County Commissioners v. United States, 308 U. S. 343 (1939) (right of United States to recover interest on taxes illegally collected by local government from Indian); Girard Trust So. v. United States, 149 F. 2d 872 (C. C. A. 3rd 1945) (rights of United States as lessee of property). See, Eisenhart, *Federal Decisional Law Independent of State Common Law Since Erie v. Tompkins*, 9 GEO. WASH. L. REV. 465 (1941.)

<sup>146</sup> Vanston Bondholders Protective Comm. v. Green, 329 U. S. 156 (1946) (whether bondholder may be paid interest on interest after default is a federal question when presented in bankruptcy case); Heiser v. Woodruff, 327 U. S. 726 (1946) (probability of claim in bankruptcy is governed by federal law); United States v. Waddill, Holland and Flinn, 323 U. S. 353 (1945) (whether another lien was so far perfected before bankruptcy as to be superior to federal tax lien is federal question); Holmberg v. Ambrecht, 327 U. S. 392 (1946) (liability of shareholders of joint stock land bank is not governed by state law); D'Oench, Duhme, and Co. v. FDIC, 315 U. S. 447 (1942) (liability on note given bank is federal question under Federal Reserve Act, when bank was insured by FDIC); American Surety Co. v. Bethlehem National Bank, 314 U. S. 314 (1941) (effect of illegal pledge of assets of national bank is federal question); Dietrick v. Greaney, 309 U. S. 190 (1940) (defense to a note given national bank in contravention of policy of National Banking Act is question of federal law).

<sup>147</sup> Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942) (in field of patents, federal policy covers the field, and state rules do not govern estoppel of licensee of patent to challenge its validity); O'Brien v. Western Union, 113 F. 2d 539 (C. C. A. 1st 1940) (action against telegraph company for libel is governed by federal law because telegraph companies subject to extensive federal regulation); *accord*, Vaigneur v. Western Union, 34 F. Supp. 92 (E. D. Tenn. 1940) (action for negligence); Francis v. Southern Pacific R. R., 162 F. 2d 813 (C. C. A. 10th 1947) (effect of stipulations in pass issued to railroad employee pursuant to Hepburn Act is matter of federal law).

<sup>148</sup> The term "federally created right" is not an entirely satisfactory one. In at least one situation federal decisional law may be applied although Congress has no power to legislate in the field. See *Kansas v. Colorado*, 206 U. S. 46 (1907).

<sup>149</sup> Second Employers Liability Case, 223 U. S. 1 (1912).



In spite of an occasional departure from strict application,<sup>150</sup> the *Erie* doctrine has largely accomplished its purpose. In diversity jurisdiction, federal district courts now administer, as nearly as it is practically possible to do so, the same law as do the courts of the state in which they sit. Forum-shopping for substantive law has been eliminated.<sup>151</sup> In non-diversity cases, state-created rights no longer have one set of consequences in the courts of the sovereign which created them and another in the courts of the Federal Government. While some of its ramifications are still unsettled, *Erie Railroad v. Tompkins* is a firmly established doctrine of our federal system of government.

<sup>150</sup> See *Purcell v. Summers*, 145 F. 2d 979 (C. C. A. 4th 1944), where the court characterized a previous denial of an injunction by a state supreme court as only a finding of fact, and declared that the state law was to the contrary.

<sup>151</sup> Professor Cook points out that under the Federal Interpleader Act some degree of forum-shopping is possible. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, at 129, 130.