

The modern limitations on the extension of the rule seem to be returning the majority of American jurisdictions to a use of the privilege in its original meaning—the excluding of testimonial utterances made under compulsion. But a more precise interpretation of “testimonial” is being obtained. Whereas any speaking or writing was originally considered *ipso facto* testimonial, the courts now seem to distinguish between questioning for the purposes of identification or observation and questioning for the purpose of obtaining information.¹³ In the instant case there was compulsory questioning, but the court did not consider its nature. It merely ruled that compulsory “demonstrations” violated the privilege against self-incrimination. Thus, the court seems to have followed the older American view of the rule against self-incrimination by basing its decision on the factor of compulsion alone.¹⁴

D. A.

FEDERAL COURTS—APPEAL IN DIVERSITY OF CITIZENSHIP CASES—RETROSPECTIVE APPLICATION OF CHANGE IN STATE LAW UNDER *Erie R. R. v. Tompkins*—[United States].—An employee sued his employer in the federal district court in Ohio, alleging negligence resulting in occupational disease. Under the then existing state law, plaintiff had no cause of action and the trial court dismissed the petition. Pending hearing on appeal from the order of dismissal, the state supreme court overruled its previous decisions so as to allow actions of the sort plaintiff sought to bring. The circuit court of appeals held that the state law obtaining at the time of the trial was the law of the case. On certiorari, the Supreme Court of the United States held: The state law as changed by the highest state court must be given effect on appeal, so that the order of dismissal, though correct when made, must be reversed and plaintiff's action reinstated. *Vandenbark v. Owens-Illinois Glass Co.*¹

When there is a change in the law between trial and appeal, there are two possible courses. Either the law and facts existing at the time of trial must be considered as a unit, so that a change in the law will not change the law of the case, or the intervening change in the law must be given retrospective effect and so control the outcome. The general rule in the

13. *United States v. Mullaney* (C. C. 1887) 32 Fed. 370; *Bradford v. People* (1896) 22 Colo. 157, 43 Pac. 1013; *State v. McKowen* (1910) 126 La. 1075, 53 So. 353. See 8 Wigmore, *op. cit. supra*, note 3, at 375, sec. 2265: “Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.”

14. Several jurisdictions approve of compulsory examinations to determine intoxication. *State v. Gatton* (1938) 60 Ohio App. 192, 20 N. E. (2d) 265. See: *State v. Duguid* (1937) 50 Ariz. 276, 72 P. (2d) 435; *Noe v. Monmouth County Court* (C. P. 1928) 6 N. J. Misc. 1016; *Schmidt v. District Atty.* (1938) 8 N. Y. S. (2d) 787, 255 App. Div. 353. Cf. *People v. Henry* (1937) 23 Cal. App. (2d) 155, 72 P. (2d) 915. For a thorough study of the problem, see Ladd and Gibson, *The Medico-Legal Aspects of Blood Tests to Determine Intoxication* (1939) 24 Iowa L. Rev. 191.

1. (1941) 61 S. Ct. 347.

state courts is that an overruling decision is to be given retrospective application so as to control cases then pending on appeal.² But this rule applies only if the overruling decision involves a matter of substantive law. If it relates to a matter of procedure it is given prospective effect only.³ Also, a well established exception is made when contract or property rights were acquired in reliance on an existing state of the decisions or construction of a statute or constitutional provision.⁴

The rules applied by the federal courts cannot be stated so simply. Before *Erie R. R. v. Tompkins*,⁵ in cases originating in the federal courts and involving only federal questions, a change in the federal law was given retrospective application.⁶ And when certiorari to a state supreme court was granted to review a federal question, an intervening change of decision by the Supreme Court of the United States was given retrospective application.⁷ But this rule was not limited to changes in the federal law. Any change in the applicable state law which affected the outcome of the case was given effect by the Supreme Court.⁸ In cases arising in the federal courts because of diversity of citizenship, there were two rules. When the suit involved a matter of "general" law, a change in federal law was given retrospective effect.⁹ But when the suit involved a matter which was formerly regarded as "local" law, the Supreme Court at different times has followed opposite rules. For many years the rule was that the federal court did not have to give retrospective effect to an intervening state decision.¹⁰ Then

2. *O'Malley v. Sims* (1938) 51 Ariz. 155, 75 P. (2d) 50, 115 A. L. R. 634; *Pearson v. Orcutt* (1920) 107 Kan. 305, 191 Pac. 286; *Great Atlantic & Pacific Tea Co. v. Scanlon* (1936) 266 Ky. 785, 100 S. W. (2d) 223, *Donohue v. Russell* (1933) 264 Mich. 217, 249 N. W. 830; *Klocke v. Klocke* (1919) 276 Mo. 572, 208 S. W. 825; *Ross v. Board of Chosen Freeholders* (1917) 90 N. J. Law 522, 102 Atl. 397; *People ex rel. Rice v. Graves* (1934) 242 App. Div. 128, 273 N. Y. S. 582. See also Note (1938) 25 Va. L. Rev. 210.

3. *Barker v. St. Louis County* (1937) 340 Mo. 936, 104 S. W. (2d) 371; *Koebel v. Tieman Coal & Material Co.* (1935) 337 Mo. 561, 85 S. W. (2d) 519; *Newberry v. St. Louis* (Mo. App. 1937) 109 S. W. (2d) 876.

4. *Cooper v. Hawkins* (1937) 234 Ala. 636, 176 So. 329; *O'Malley v. Sims* (1938) 51 Ariz. 155, 75 P. (2d) 50, 115 A. L. R. 634; *World Fire & Marine Ins. Co. v. Tapp* (1939) 279 Ky. 423, 130 S. W. (2d) 848; *Donohue v. Russell* (1933) 264 Mich. 217, 249 N. W. 830; *State ex rel. May Department Stores Co. v. Haid* (1931) 327 Mo. 567, 38 S. W. (2d) 44; *Klocke v. Klocke* (1918) 276 Mo. 572, 208 S. W. 825; *Eberle v. Koplar* (Mo. App. 1935) 85 S. W. (2d) 919; *People ex rel. Rice v. Graves* (1934) 242 App. Div. 128, 273 N. Y. S. 582.

5. (1938) 304 U. S. 64.

6. *United States v. Schooner Peggy* (U. S. 1801) 1 Cranch 103; *Dinsmore v. Southern Express Co.* (1901) 183 U. S. 115; *Board of Public Utility Comm'rs v. Compania General de Tabacos de Filipinas* (1919) 249 U. S. 425.

7. *Dorchy v. Kansas* (1924) 264 U. S. 286.

8. *Gulf, Colo. & S. F. Ry. v. Dennis* (1912) 224 U. S. 503; *Missouri ex rel. Wabash Ry. v. Public Service Comm.* (1927) 273 U. S. 126.

9. *Watts, Watts & Co. v. Unione Austriaca* (1918) 248 U. S. 9.

10. *Pease v. Peck* (U. S. 1855) 18 How. 595; *Morgan v. Curtenious* (U. S. 1857) 20 How. 1; *Roberts v. Bolles* (1879) 101 U. S. 119; *Burgess v. Seligman* (1882) 107 U. S. 20.

the Court changed its position and provided that the federal courts must give retrospective effect to overruling decisions of the state courts.¹¹ The Court then reverted to its former ruling and provided that the federal courts did not have to give retrospective application to intervening decisions of the state court so as to "make that erroneous which was not so when the judgment of that court [federal trial court] was given."¹² And recently the Court again changed its position, this time holding not only that the state law should govern, but also that action should be brought in the state court to determine the state law.¹³ Added to this confusion was the doctrine of *Gelpcke v. Dubuque*,¹⁴ which held that when contracts had been entered into, or property rights acquired, in reliance on the previously existing law, the intervening state decision was not to be given retrospective application so as to prejudice these rights.

The rule of the *Erie* case pertains only to those diversity of citizenship cases which, under the doctrine of *Swift v. Tyson*,¹⁵ were formerly regarded as subject to decision by federal common law rules. It is in this class that the principal case falls. But the basis for the holding was not clearly stated. It is apparent that the federal court did not apply, as substantive law, a state rule of retrospective application, since no discussion of the state rule is to be found in the opinion. It is a reasonable interpretation of the case to say that the federal court was applying a federal rule as to retrospective application.¹⁶ If this was the true basis of the decision, the question may be asked why the federal courts should adopt their own rule in a diversity of citizenship case. What would happen if the state rule were otherwise? This raises the problem whether the rule itself is one of substance or procedure. If one of procedure, the federal courts would be justified, under *Erie R. R. v. Tompkins*, in adopting their own rule;¹⁷ but if one of substance, the federal courts would have to apply the state rule, though it differed from their own.¹⁸

The Court, near the end of its opinion,¹⁹ stated what may be a different

11. *Bauserman v. Blunt* (1893) 147 U. S. 647; *Sioux County v. National Surety Co.* (1928) 276 U. S. 238.

12. *Concordia Ins. Co. v. School District* (1931) 282 U. S. 545.

13. *Thompson v. Magnolia Petroleum Co.* (1940) 309 U. S. 478. This case involved title to realty which previous to the *Erie* case was considered a matter of "local" law. Since the state law was already binding upon the federal courts in such a situation, the *Erie* case had no application.

14. (U. S. 1863) 1 Wall. 175. This case was followed in *Douglass v. Pike* (1879) 101 U. S. 677; *Taylor v. Ypsilanti* (1881) 105 U. S. 60; *Anderson v. Santa Anna* (1886) 116 U. S. 356; *Loeb v. Columbia Township Trustees* (1900) 179 U. S. 472. See also Snyder, *Retrospective Operation of Overruling Decisions* (1940) 35 Ill. L. Rev. 121.

15. (U. S. 1842) 16 Pet. 1.

16. Some weight is lent to this interpretation by the Court's apparent reliance upon the rule announced in *United States v. Schooner Peggy* (U. S. 1801) 1 Cranch 103, although that case involved a purely federal question.

17. *Sampson v. Channell* (C. C. A. 1, 1940) 110 F. (2d) 754, 128 A. L. R. 394.

18. *Ibid.* See Note, *Burden of Proof in Federal Conflict of Laws Situations*—*Sampson v. Channell* (1941) 26 WASHINGTON U. LAW QUARTERLY 244.

19. *Vandenbark v. Owens-Illinois Glass Co.* (1941) 61 S. Ct. 347, 350.

basis for its decision: that under the Rules of Decision Act²⁰ the federal courts must, at a given moment, apply the then controlling decision of the highest state court. If this is true, what has happened to the doctrine of the *Gelpcke* case,²¹ the so-called "contract exception," which is the rule in many states as well as in the federal courts?²²

Although the Court attempted in the instant case to resolve the confusion in the federal cases, the opinion actually added to it by stating two distinct grounds for the holding, since the choice of one or the other rationale may impel opposite holdings in particular cases. A sounder view would seem to be that a state's rule as to retrospective application of overruling decisions is a part of its substantive law within the rule of the *Erie* case and, as such, must be followed by the federal courts in diversity cases. This view would be in harmony with the effort of the Court in the *Erie* case to eliminate substantial disparities between the state courts and federal courts sitting in matters governed by state law. M. D. C.

FEDERAL PROCEDURE—AVOIDING FEDERAL JURISDICTION—ASSIGNMENT TO PREVENT DIVERSITY OF CITIZENSHIP—[Federal].—A policy of insurance was issued by defendant company, an English corporation. For the sole purpose of keeping an action on the policy in the Missouri courts, the heirs of the beneficiary assigned their rights to plaintiff, a citizen of England and a resident of Missouri. By the terms of the assignment, the assignee was to file suit or otherwise compromise the claim under the policy, receive any money that might be paid on the claim, pay expenses incurred in the collection of the money, and hold the residue of any money thus received in trust for the heirs. Suit was therefore filed in the state court, which granted defendant's petition for removal to the federal court on the ground that there was diversity of citizenship between the heirs and the corporation and that the assignment was a sham to prevent removal. Plaintiff moved to remand. *Held*: Motion granted. The practice of avoiding the jurisdiction of federal courts by an assignment to prevent diversity of citizenship is recognized and approved. *Daddy v. The Ocean Accident and Guarantee Corp.*¹

By the Judiciary Act of 1875,² the federal courts are compelled to dismiss or remand a case if it appears that a colorable assignment or joinder has been made for the purpose of giving them jurisdiction. The Supreme Court has, however, established the general rule that a colorable assignment for the purpose of keeping an action *out* of the federal courts may

20. 28 U. S. C. A. (1928) sec. 725: "Laws of States as rules of decision. 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 decisions in trials at common law, in the courts of the United States, in cases where they apply."

21. See cases cited *supra* note 14.

22. See cases cited *supra* note 4.

1. (D. C. E. D. Mo. 1941) unreported.

2. Act of March 3, (1875) 18 Stat. 470, c. 137, 28 U. S. C. A. (1928) sec. 80.