

FEDERAL PROCEDURE—RULE OF *ERIE R. R. v. TOMPKINS*—DETERMINATION OF APPLICABLE LAW IN ABSENCE OF STATE DECISION—[Federal].—"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.* * * There is no federal general common law."¹ *Erie R. R. v. Tompkins*² by these pronouncements revolutionized federal substantive law³ but left doubt as to the principles of law applicable when the state law is conflicting, nebulous, or non-existent.

The Seventh Circuit Court of Appeals recently decided *Toomey v. Toomey*⁴ by what prior to *Erie R. R. v. Tompkins* had been the general law, construing certain agreements which decedent had signed as evidencing no intention of making his brother and sister beneficiaries of his life insurance which his wife held. The court recognized its duty to apply Illinois law but, finding no case precisely in point and "no Illinois decision which would sustain a decision in favor of appellants,"⁵ it resorted to the old established federal rule. In *New York Life Insurance Co. v. Jackson*,⁶ decided by the same court, wherein a disability insurer was held liable to insured who became totally and permanently disabled during the period of grace following the date fixed for the semi-annual premium payment, it was stated that since the exact question had never been presented to or decided by the Missouri courts, "we have no choice but to consider the question as we have previously considered it, exercising an independent judgment with respect to the issues presented."⁷ The court limited itself by the proposition that the decision reached must not be out of harmony with principles of law of the State of Missouri and affirmed the judgment be-

1. *Erie R. R. v. Tompkins* (1938) 304 U. S. 64.

2. For discussion of this case see Comment (1938) 23 WASHINGTON U. LAW QUARTERLY 568; McCormick & Hewins, The Collapse of "General Law" in the Federal Courts (1938) 23 Ill. L. Rev. 126; Shulman, The Demise of Swift v. Tyson (1938) 47 Yale L. J. 1336; Schmidt, Substantive Law Applied by the Federal Courts—Effect of *Erie R. Co. v. Tompkins* (1938) 16 Texas L. Rev. 512; Schweppe, What Has Happened to Federal Jurisprudence? (1938) 24 A. B. A. J. 421; Jackson, The Rise and Fall of Swift v. Tyson (1938) 24 A. B. A. J. 609; Comment Note (1938) 114 A. L. R. 1500.

3. The rule of *Erie R. R. v. Tompkins* was not intended to affect procedural law. *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co.* (C. C. A. 8, August 8, 1938) 98 F. (2d) 416; *Kelly v. Duke Power Co.* (C. C. A. 4, June 6, 1938) 97 F. (2d) 529; *Erwin v. Texas Co.* (C. C. A. 8, July 13, 1938) 97 F. (2d) 806. Query, as to matters in the zone between substantive and procedural law. *Summers v. Hearst* (D. C. S. D. N. Y. June 7, 1938) 23 F. Supp. 986. That substantive federal equity jurisprudence has now a status analogous to that of federal common law, see McCormick & Hewins, *supra* note 2, at 140-142; *Ruhlin v. N. Y. Life Ins. Co.* (1938) 58 S. Ct. 860; *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co.* (C. C. A. 8, August 8, 1938) 98 F. (2d) 416; *Summers v. Hearst* (D. C. S. D. N. Y. June 7, 1938) 23 F. Supp. 986.

4. (C. C. A. 7, July 28, 1938) 98 F. (2d) 736.

5. *Id.* at 739.

6. (C. C. A. 7, August 10, 1938) 98 F. (2d) 950, cert. denied (U. S. 1938) 6 U. S. Law Week 180.

7. 98 F. (2d) at 952.

cause the Missouri Supreme Court construed ambiguities and inconsistencies liberally in favor of the insured. In both cases, the court exercised an independent judgment, governing itself in the former by the purely negative factor that no decision existed which would sustain a holding for defendant, while advancing the affirmative suggestion in the latter that the general principles of state jurisprudence⁸ should control.⁹ In partial conflict with the *Jackson* case is *Fireman's Fund Indemnity Co. v. Kennedy*¹⁰ where the Court of Appeals for the Ninth Circuit held that, absent a controlling state decision, it would apply its independent judgment and find for the insurance company despite the rule of the applicable state that the insurance clause in question was to be construed most strongly against the company.

In effect these courts are continuing to employ the doctrine that "where state decisions are in conflict or do not clearly establish what the local law is, the federal court may exercise an independent judgment and determine the law of the case,"¹¹ a doctrine which was worked out under the corollary to the rule of *Swift v. Tyson*¹² applicable to federal "local law" jurisprudence¹³ in spite of the Rule of Decisions Act¹⁴. If *Erie R. R. v. Tompkins* is construed broadly as meaning that in any matters not governed by the Federal Constitution or by Act of Congress only state law shall be applied, it is difficult to see on what basis "independent judgment" may be exercised or to understand what law the courts are applying when they resort to independent judgment if there is no federal general common law.¹⁵

8. In this connection it is to be noted that application of the general principles of a state's courts may include its conflicts of law rules. *Rachlin v. Libby-Owens-Ford Glass Co.* (C. C. A. 2, May 2, 1938) 96 F. (2d) 597; *Schram v. Poole* (C. C. A. 9, June 16, 1938) 97 F. (2d) 566; *Schram v. Smith* (C. C. A. 9, June 27, 1938) 97 F. (2d) 662; *Ostroff v. New York Life Ins. Co.* (D. C. S. D. Cal. June 17, 1938) 23 F. Supp. 724; *Reconstruction Finance Corporation v. Md. Casualty Co.* (D. C. D. Md. July 6, 1938) 23 F. Supp. 1008. Expansion of the field of constitutional law in the future to unify these rules is likely, see *McCormick & Hewins, supra*, note 2, at 139.

9. See also *Hack v. American Surety Co. of New York* (C. C. A. 7, April 26, 1938) 96 F. (2d) 939.

10. (C. C. A. 9, June 30, 1938) 97 F. (2d) 832.

11. *Edward Hines Yellow Pine Trustees v. Martin* (1925) 268 U. S. 458, 463.

12. (1842) 16 Pet. 1.

13. *Edward Hines Yellow Pine Trustees v. Martin* (1925) 268 U. S. 458 and cases cited; *Brainard v. Commissioner of Internal Revenue* (C. C. A. 7, 1937) 91 F. (2d) 880; *Pryor v. National Lead Co.* (C. C. A. 8, 1937) 87 F. (2d) 461; *Christian v. Waialua Agr. Co.* (C. C. A. 9, 1937) 93 F. (2d) 603. " * * * If the questions presented are questions of local law, we are required, ordinarily, to sustain it by the great deference due the local tribunals, unless there is a sense of clear error committed." *Christian v. Waialua Agr. Co., supra*, at 609.

14. The Judiciary Act of 1789, 1 Stat. 92, (1928) 28 U. S. C. A. sec. 725: "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

15. That there remains "specialized" federal law for jurisdictions other

Some courts seem to give *Erie R. R. v. Tompkins* this enlarged application, holding that they may only decide as the state supreme court would were the case before it, as evidenced both by its past decisions and considered *dicta*.¹⁶ In *Jones v. Casualty Co.*,¹⁷ where there was no case directly in point and a definite conflict of authority elsewhere on the issue, the court followed a state case which merely cited with approval the leading case on one side. In *Wichita Royalty Co. v. City Bank of Wichita Falls*,¹⁸ the court followed a Texas case which purported to "adopt" the general law in other jurisdictions, saying that the Texas Supreme Court would therefore probably arrive at the same conclusion.¹⁹ Another court has said that it would "administer the same justice which the state court would administer between the same parties."²⁰

Can federal courts administer the "same justice" that state courts would when the federal courts are bound not only by state statutes and supreme court decisions, but by *dicta*, opinions, general rules, and even lower court rulings?²¹ It would seem that the federal courts must operate within a narrower range of discretion than an analogous state court in that they may neither overrule prior decisions nor examine freely on grounds of public policy or legal soundness, the rules of other jurisdictions, as contrasted with courts which not infrequently find grounds for their opinions in other states.

These cases indicate the difficulties occasioned by the broad statement of the rule in *Erie R. R. v. Tompkins* and show that the limits of that rule need to be defined and clarified. Altogether aside from questions of the desirability of inflexible adoption of state decisions or of substantial elimination of the judicial discretion of federal judges, unqualified adherence to the implications of that rule may be pragmatically impossible. The strug-

than diversity of citizenship is evident from Mr. Justice Brandeis' opinion in *Hinderlider v. La Plata River and Cherry Creek Ditch Co.* (1938) 304 U. S. 92, which was handed down the same day as *Erie R. R. v. Tompkins* and in which "federal common law" was applied in determining controversies over rights in interstate streams. For "specialized" federal law in other fields see *McCormick & Hewins*, *supra* note 2, at 126, 142, 143, n. 76, n. 82; *Shulman*, *supra* note 2, at 1350; *Downey v. City of Yonkers* (D. C. S. D. N. Y., June 13, 1938) 23 F. Supp. 1018.

16. *McCormick & Hewins*, *supra*, note 2, at 136. Apparently in accord with this view is the Amendment to paragraph 5(b) of Rule 38 of the Rules of the Supreme Court, promulgated by order of May 31, 1938. 303 U. S. xv.

17. (D. C. E. D. Va. July 16, 1938) 23 F. Supp. 932.

18. (C. C. A. 5, June 10, 1938) 97 F. (2d) 249.

19. Neither the *Jones* nor the *Wichita Falls* case represents a clear holding to the rule of such decisions only as the state court would make, since in the *Jones* case there was a complete conflict even among the federal cases between which the court had to decide, and in the *Wichita Falls* case the court may have been merely rationalizing its "general law" position by mentioning the fact that the state supreme court had "adopted" it.

20. *Sommer v. Nakdimen* (C. C. A. 8, July 5, 1938) 97 F. (2d) 715, 719; see also *Huffman v. Buckingham Transp. Co.* (C. C. A. 10, Sept. 15, 1938) 98 F. (2d) 916.

21. *Hack v. American Surety Co. v. N. Y.* (C. C. A. 7, April 16, 1938) 96 F. (2d) 939.

gle of the federal courts to reconcile the rule with requisite independence towards doubtful or undecided questions is manifest. To quote Professor Corbin, "If it [*Erie R. R. v. Tompkins*] is an admonition to federal judges that there is no 'federal general common law' that is to be found solely in the opinions of other federal judges, much is thereby gained. But if it is a direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread forty-eight states, something has indeed been lost."²²

C. A.

REAL PROPERTY—ESTATES BY THE ENTIRETY—HOMESTEAD RIGHTS IN TWO PERSONS IN THE SAME FAMILY—[Missouri].—In a recent Missouri case¹ land was held in an estate by the entirety. After the death of the husband a judgment in favor of plaintiff on a joint note executed by the man and wife subsequent to acquisition of the land was sought to be levied thereon. *Held*, that the wife under Missouri statutes² acquired a right of homestead and exemptions upon the filing of the deed to herself and husband, and that the husband having failed to claim such exemptions, she might do so after his death.

This case emphasizes a peculiar interpretation of the Homestead Statutes³ and the Married Woman's Act⁴ when construed together. Under the Homestead Act alone,⁵ before the Married Woman's Statute,⁶ the wife could never claim an exemption unless the husband died, absconded, or absented himself from his usual place of abode.⁷ She could never claim it when the husband was alive and present regardless of whether the title to the property was in the husband, wife, or jointly in both.⁸ But when the husband died leaving a widow or minor children, the homestead right descended to them and this was not made conditional upon the husband's having failed to claim.⁹ Under the Married Woman's Act¹⁰ the wife may

22. Note, *The Common Law of the United States* (1938) 47 *Yale L. J.* 1351, 1353.

1. *Ahmann v. Kemper* (Mo. 1938) 119 S. W. (2d) 256.

2. R. S. Mo. (1929) secs. 608, 615, 2998.

3. R. S. Mo. (1929) sec. 608.

4. R. S. Mo. (1929) sec. 2998.

5. R. S. Mo. (1929) sec. 608 provides in part that "The homestead of every housekeeper or head of a family, consisting of a dwelling house and appurtenances, and the land used in connection therewith * * * [shall] be exempt from attachment and execution."

6. R. S. Mo. (1929) sec. 2998.

7. *Gladney v. Berkley* (1898) 75 Mo. App. 98; *White v. Smith* (1904) 104 Mo. App. 199, 78 S. W. 51.

8. *Martin v. Barnett* (1911) 158 Mo. App. 375, 138 S. W. 538.

9. *Armor v. Lewis* (1913) 252 Mo. 568, 161 S. W. 251.

10. R. S. Mo. (1929) sec. 2998, after stating that a married woman shall be deemed a *femme sole*, provides that "a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption for the protection of his own property." See also *Luster v. Cook* (Mo. App. 1927) 297 S. W. 459.