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Erie to York to Ragan--A Triple Play on the Federal Rules

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ERIE TO YORK TO RAGAN—A TRIPLE PLAY ON THE FEDERAL RULES

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Approximately twelve years have passed since the Supreme Court of the United States promulgated the Federal Rules of Civil Procedure almost simultaneously with its decision in *Erie R. R. v. Tompkins*.[1] These two events revolutionized almost every phase of practice in the federal courts. The Rules substituted uniformity for state conformity in federal procedure, while the *Erie* decision required an adherence to state conformity in matters of substantive law.

As a result of this concurrent, diverse treatment of substantive and adjective law, it was assumed that the Court intended, in future diversity of citizenship cases, to recognize the dichotomy of *substance* and *procedure*. This recognition was certainly necessary if the conflicting doctrines of *Erie* and the Rules of Procedure were to be given full application within the boundaries seemingly established for them by the Court in 1938.[2] Since 1945, however, it has become increasingly apparent that the Court does not intend to be bound by any imaginary line of demarcation between substance and procedure. In 1949, this fact was demonstrated beyond any doubt, when the Court rendered three decisions which extended the doctrine of the *Erie* case in such a way that state law was made to govern several matters already specifically covered by the Federal Rules.[3]

The *Erie* invasion of the Rules has brought about a general uncertainty and confusion which undoubtedly matches that which caused the Court to overrule the doctrine of *Swift v. Tyson*[4] in 1938. Practising attorneys are

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1. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

2. 1 MOORE, FEDERAL PRACTICE 24 (Supp. 1945), where it is stated: ". . . it is well to remember at this point that the term procedure must be given a workable construction or the Federal rules will be devitalized and procedural reform thwarted at the outset. . . ." See also, Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417 (1940), 24 J. AM. JUD. SOC. 158 (1941), where the writer argues for *prima facie* validity of the rules; and Note, *Erie R.R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030, 1032 (1949). Compare Note, 38 COL. L. REV. 1472, 1474 (1938): "There appears to be a latent conflict between the policy of Erie Railroad v. Tompkins—that there shall be *conformity* of rules of decision . . . . and the policy of the Federal Rules—that there shall be *uniform* and liberal rules of practice in the federal courts. To the extent that a satisfactory line cannot be drawn between the "substantive" sphere of the *Erie* case and the "procedural" sphere of the Federal Rules, attempted resolution of this conflict of policy must be also unsatisfactory."

3. The three decisions were in Ragan v. Merchants Transfer & Warehouse Company, Inc., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949); Woods v. Interstate Realty Co., 337 U.S. 535, 69 Sup. Ct. 1235, 93 L. Ed. 1524 (1949); and Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949).

4. 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842).

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unable to determine which of the Federal Rules will remain in full effect, and which might be rejected by the courts on the theory that they conflict in a substantial way with some state law. Every important step in a federal diversity case is taken today at a calculated risk. Litigants must constantly decide whether this procedure, or that procedure, should be taken in accordance with the Rules or as prescribed by state law. Some have concluded that the methods established by both systems of law should be pursued—assuming, of course, that such pursuit is possible.[5]

This article is written with the hope that it may contribute to the elimination of this unfortunate situation. Initially, the *Erie* decision and the events which led to the adoption of the Federal Rules will be discussed briefly. Then follows an analysis of the important decisions of the Supreme Court which have tended to *Erietompkinize* many of the Federal Rules. Finally, a solution to the existing problem is proposed. This solution might be adopted by the Supreme Court or Congress in order to clarify federal practice and to insure that justice, not procedural technicality, will prevail in all future diversity of citizenship cases.

A BRIEF FLASHBACK TO 1938

Anyone remotely connected with the practice or study of law is familiar with the opinion in *Erie R. R. v. Tompkins*.[6] That famous decision, rendered in 1938, is one of the most discussed cases in the Supreme Court's history. One eminent circuit judge has repeatedly stated: "I don't suppose a civil appeal can now be argued to us without counsel sooner or later quoting large portions of *Erie Railroad v. Tompkins*." [7] The Federal Rules have likewise received considerable attention from legal scholars, and every practising attorney should be cognizant of their contents and operation. Thus, the only purpose of this review of the events which caused the Court to establish the *Erie* doctrine and promulgate the Rules in 1938 is to construct briefly a foundation for the subsequent discussion of the recent decisions by the Court affecting the Rules themselves.

5. In Nola Electric, Inc. v. Reilly, Civil No. 44-396. U.S. District Court for the Southern District of New York, a very distinguished member of the New York Bar argued after the *Ragan* and *Cohen* decisions that a diversity action in New York should be commenced pursuant to both the provisions of Rules 3 and 4 of the Federal Rules, and the provisions of the New York Civil Practice Act, Sect. 17; that where state law called for commencement of an action by delivering the summons to a state sheriff for service plaintiff was under an obligation to comply with that requirement, and with Rule 4, by having the Court appoint the state sheriff as a person capable of serving the federal summons. The court dismissed this contention. and decided that plaintiff complied with both state and federal law by delivering the federal summons to the United States Marshal for service.

6. 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

7. The statement is attributed to Judge Learned Hand by Judge Charles E. Clark, in *State Law in The Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 269 (1946). Both judges are members of the U.S. Court of Appeals for the Second Circuit.

The basic statute underlying the decision in the *Erie* case is Section 34 of the Judiciary Act of 1789.[8] It provides that "the laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." In *Swift v. Tyson,*[9] decided by the Supreme Court in 1842, Mr. Justice Story held that the word "laws" in Section 34 referred only to statutes enacted by state legislatures, and that federal tribunals were not bound to follow decisions of the various state courts. The doctrine of *Swift v. Tyson* was summed up by Justice Story as follows:

> "Undoubtedly, the decisions of the local tribunals . . . are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." [10]

Mr. Justice Story's theory was followed by the federal courts for almost a century. It was subjected to vigorous attack in 1923, when Charles Warren showed that Story's decision in *Swift v. Tyson* was founded upon a misconception of the Judiciary Act itself.[11] He revealed that it was Congress' intention, at the time it enacted Section 34, that the word "laws" was to include the unwritten common law of the several states, as well as their statutory law.[12] Criticism of Story's doctrine became widespread after the Supreme Court's decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Company.*[13] There, a Kentucky corporation by the mere device of re-incorporating in Tennessee and thereby creating diversity of citizenship between it and its main competitor, enforced a contract in federal court, which would have been absolutely void if sued upon in a Kentucky state court. This sort of discrimination in favor of a noncitizen corporation against a citizen, solely because of diversity jurisdiction, prompted the Supreme Court to overrule *Swift v. Tyson,* and establish the following canon in *Erie R. R. v. Tompkins:*

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the

8. 1 STAT. 92, 28 U.S.C.A. § 1652 (1948).
9. 16 Pet. 1, 10 L. Ed. 865 (U.S. 1842).
10. 16 Pet. at 19.
11. See Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923).
12. See *id.* at 86-87.
13. 276 U.S. 518, 48 Sup. Ct. 404, 72 L. Ed. 681, 57 A.L.R. 426 (1928). See also, Frankfurter, *Distribution of Judicial Power between Federal and State Courts,* 13 CORNELL L. Q. 449, 524-30 (1928); Johnson, *State Law and the Federal Courts,* 17 KY. L. J. 355 (1929); Fordham, *The Federal Courts and Construction of Uniform State Laws,* 7 N.C. L. REV. 423 (1929); Dobie, *Seven Implications of Swift v. Tyson,* 16 VA. L. REV. 225 (1930); Shelton, *Concurrent Jurisdiction—Its Necessity and Its Dangers,* 15 VA. L. REV. 137 (1928).

State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." [14]

Thus, in 1938, the Story plan for a nationally uniform common law was replaced by the *Erie* doctrine of state conformity. The Court justified this drastic change-over by saying that, in addition to all of its other weaknesses, the Story doctrine could never have attained its goal—a uniform American common law. The Court pointed out that state courts had refused to follow federal decisions as Story had hoped they would, and as a result *Swift v. Tyson* simply complicated the common law of this country and caused confusion among jurists, litigants and counsel.[15]

While federal courts, prior to the *Erie* decision, were applying the doctrine of *Swift v. Tyson* in matters of substantive law, they were following state law in matters of procedure, pursuant to the provisions of the Conformity Act.[16] This law, enacted by Congress, provided that federal practice and procedure in all civil cases other than equity and admiralty causes, had to conform "as near as may be" to practice in like causes in state courts wherein the federal courts sat. As early as 1911, the American Bar Association initiated a movement, the purpose of which was to do away with the Conformity Act, and replace it with a uniform system of federal procedure.[17] In 1912 and almost yearly thereafter bills were introduced in Congress, seeking adoption of the idea.

Finally, in 1934, Congress passed the Enabling Act,[18] which authorized the Supreme Court to prescribe general rules for practice and procedure in the federal district courts. In June, 1935, the Court appointed an ad-

14. 304 U.S. 64, 78, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).
15. 304 U.S. at 74.
16. 17 STAT. 197, 28 U.S.C.A. § 724. It provided that federal practice, pleadings, and forms and modes of preceedings in other than equity and admiralty causes had to conform as near as may be to practice in like causes in courts of record in states wherein the federal courts sat.
17. See 37 A.B.A. REP. 434, 435 (1912). The resolution passed by the Bar Association provided: "Whereas [the Conformity Act] has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases, and whereas, it is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court, therefore, be it Resolved, that a complete uniform system of law pleading should prevail in the federal and state courts, and that a system of rules for use in the federal courts and to serve as models for state adoption should be prepared and put into effect by the Supreme Court of the United States." For an excellent summary of the history of the Federal Rules, see Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).
18. 48 STAT. 1064, 28 U.S.C.A. § 2072 (1948). "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States . . . in civil actions. Such rules shall not abridge, enlarge or modify any substantive right. . . ."

visory committee to prepare and submit to the Court a draft of a unified system of rules. With the aid and suggestions of members of the Bar, the Advisory Committee prepared a preliminary draft in 1936, a second draft in April, 1937, and a final report in November, 1937. The final report was accepted by the Supreme Court, and was submitted to Congress. Hearings were held before the judiciary committees of the House of Representatives and the Senate. Congress made no changes in the Rules, and they were promulgated by the Court in 1938, shortly before its decision in the *Erie* case.[19]

From the foregoing brief summary of the events which led the Court to establish the *Erie* doctrine and promulgate the Federal Rules, it is clear that the Court so acted because of distinctly independent forces. The two pronouncements were based upon separate desires and reasoning. *Erie* was born because of the failures of *Swift v. Tyson,* and because of the Court's former misinterpretation of Section 34 of the Judiciary Act. The Federal Rules, on the other hand, were adopted to satisfy the almost universal desire in this country for state and federal uniformity of procedure. The Court in 1938 must not have foreseen fully the possibility that *Erie* and the Rules, by reason of their conflicting aims and theories, would clash at many points in those zones of the law which are not clearly substantive and not clearly procedural. It seems that the Court firmly believed that *Erie* and the Rules could live happily together in diversity cases because of the ever-present line of demarcation between matters of substance and matters of procedure. Mr. Justice Reed so implied in his concurring opinion in the *Erie* case, where he stated: "The line between procedural and substantive law is hazy but no one doubts federal power over procedure." [20]

Moreover, the Enabling Act, from which the Court derived its power to adopt the Federal Rules, specifically provides that any rules promulgated by the Court shall neither abridge, enlarge, nor modify the substantive rights of any litigant.[21] It is to be presumed, therefore, that the Court kept this provision of the Act in mind when it accepted the Rules of Procedure, and that the Court considered all matters contained therein as properly within the realm of procedural law. As we shall see in the next sections of this article, the Court has not adhered to the dichotomy of substance and procedure, and as a result, it has allowed the *Erie* doctrine to take ito its fold many matters specifically covered by the Federal Rules.

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19. See historical commentary following Rule 1 of the Federal Rules, 28 U.S.C.A. § 723c (1941).
20. 304 U.S. 64, 92, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
21. See note 18 *supra.*

YORK DISCARDS THE DICHOTOMY OF SUBSTANCE AND PROCEDURE

During the years from 1938 to 1945, jurists and scholars expressed increasingly their anxiety that the Court might destroy procedural uniformity by failing to adhere strictly to the divide which apparently had been established between substantive law and procedure.[22] For instance, Judge Clark of the Court of Appeals for the Second Circuit wrote, in October, 1940:

> "Personally I would put it that the federal rules may be decidedly endangered if certain views of the wide scope of substance and the narrow extent of procedure . . . should prevail; but I would add that such an outcome does not seem to me a necessary result of the Tompkins case." [23]

Finally, in 1945, the Supreme Court handed down an opinion which demonstrated the Court's intention not to abide by any imaginary division between substance and procedure. *Guaranty Trust Co. v. York*[24] was an equity action brought in federal court solely because of diversity of citizenship. The defendant bank interposed as a defense the New York statute of limitations. The Second Circuit Court of Appeals had held that, in a suit brought on the equity side of a federal court, the court was not required to apply a state statute of limitations.[25] The circuit court so concluded because it found limitations to be a matter of procedural or remedial law, and in that case, the federal "equitable remedial rights" doctrine governed, and not the rule of *Erie v. Tompkins*.[26]

When the case reached the Supreme Court, the circuit court was overruled. Relying upon the *Erie* doctrine, the Court directed application of the New York statute of limitations. Mr. Justice Frankfurter, writing for the Court, stated:

> *"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 out-

22. See Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417 (1940), 24 J. AM. JUD. SOC. 158 (1941); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939); Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938); Notes and articles collected in 1 FED. RULES SERV. 860-67.

23. Clark, *supra* note 22, 1 F.R.D. at 418.

24. 326 U.S. 99, 65 Sup. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231 (1945).

25. 143 F.2d 503, 528 (2d Cir. 1944).

26. For an excellent discussion of "the equitable remedial rights doctrine," see Note, 55 YALE L. J. 401 (1946); see also Robinson v. Campbell, 3 Wheat. 212, 222, 4 L. Ed. 372 (U.S. 1818); Kirby v. Lake Shore & M.S.R.R., 120 U.S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569 (1887); Guffy v. Smith, 237 U.S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856 (1915); Russell v. Todd, 309 U.S. 280, 60 Sup. Ct. 527, 84 L. Ed. 754 (1940).

come of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." [27]

The Court was most definite in its conclusion that the line separating *substance* and *procedure* did not furnish a point from which federal courts could decide the type of law to be applied in each diversity case. In this connection, Justice Frankfurter stated:

"Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. . . .

"And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" [28]

Thus, no longer was it a question of where the line between substance and procedure was to be placed. The entire "dichotomy theory" was abandoned by the Court, and a new test was established to control the determination of whether or not the rule of the *Erie* case was to be applied. The federal courts were directed, in each instance, to decide whether the result of a litigation would be affected substantially if some provisions of state law were not followed, in favor of an adherence to federal procedural or remedial law. If a conflict between the two systems is found to exist, then the federal courts seem duty-bound to apply state law, under the doctrine of the *Erie* case, as extended by *Guaranty Trust Co. v. York.*

The *York* case, of necessity, spelled death to the hope for a completely uniform federal procedure. When its doctrine is logically applied, each important step in a diversity action must be examined in the light of two systems of law—first, under the Federal Rules, and then under the law of the state in which the federal court sits. In one state, a particular Rule might not clash with a local law or decision which significantly bears upon the outcome of a litigation. Under such circumstances, the Rule should prevail, although the determination as to its applicability is actually made under state law. In another state, the same Rule might conflict in some substantial way with that state's policy or law. In such instances, state law, and not the Rule, will govern a federal court's decision. This unhappy fact was realized by the

27. 326 U.S. 99, 109, 65 Sup. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231 (1945).
28. *Id.* at 108-9.

late Mr. Justice Rutledge, who wrote a lengthy dissent in the *York* case, in which he stated:

> "More is at stake in the implications of the decision, if not in the words of the opinion, than simply bringing federal and local law into accord upon matters clearly and exclusively within the constitutional power of the state to determine." [29]

Justice Rutledge felt that the Court had seriously erred in failing to abide by the dichotomy of substance and procedure. He stated that the "large division between adjective law and substantive law still remains, to divide the power of Congress [over procedure] from that of the states and consequently to determine the power of the federal courts to apply federal law or state law in diversity matters." [30] Rutledge stood firm in this position, and dissented consistently against the Court's extensions of the *Erie* doctrine.

THE ERIE INVASION OF THE FEDERAL RULES

After the decision in *Guaranty Trust Co. v. York,* it was only a matter of time until several of the Federal Rules would necessarily be delimited or overruled by the Supreme Court. This fact was reluctantly admitted by most of the writers who pondered over the fate of the Rules during the period from 1945 to 1949.[31] On June 20, 1949, the expected occurred. Simultaneously, the Court handed down three decisions which actually brought uniformity in federal procedure to an end.[32]

The first decision, *Ragan v. Merchants Transfer & Warehouse Company, Inc.,*[33] concerned Rule 3 of the Federal Rules, which provides: "A civil action is commenced by filing a complaint with the court." The *Ragan* case involved a highway accident which occurred on October 1, 1943. On September 1, 1945, suit was instituted in the federal district for Kansas, and jurisdiction was predicated solely upon diversity of citizenship. The action was commenced in accordance with Rule 3, but service was not made until December 28, 1945. Kansas has a two-year statute of limitations applicable to such tort claims.[34] Defendant pleaded the statute and moved for summary

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29. *Id.* at 115.
30. *Id.* at 116.
31. See Clark, *State Law in the Federal Courts: the Brooding Omnipresence of Erie v. Tompkins,* 55 YALE L.J. 267, 288 (1946); Note, *Erie R.R. v. Tompkins and the Federal Rules,* 62 HARV. L. REV. 1030 (1949).
32. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949); Woods v. Interstate Realty Co., 337 U.S. 535, 69 Sup. Ct. 1235, 93 L. Ed. 1524 (1949); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949). See Keeffe, Gilhooley, Bailey and Day, *Weary Erie,* 34 CORNELL L.Q. 494 (1949). The authors went so far as to state: "These decisions spell the death of diversity litigation in the federal courts and compel those courts to follow state procedure in diversity cases. The only hope for the future lies in the dissent of Justice Rutledge." *Id.* at 531.
33. 337 U.S. 530, 69 Sup. Ct. 1233, 93 L. Ed. 1520 (1949).
34. KAN. GEN. STAT. § 60-306 (1935).

judgment. Plaintiff claimed that filing of the complaint pursuant to Rule 3 commenced the action and tolled the statute. Defendant argued that, by reason of a Kansas statute, the statute of limitations was not tolled until service of the summons.[35] The district court denied defendant's motion, and after a trial, verdict was entered in favor of plaintiff. The Court of Appeals for the Tenth Circuit reversed,[36] ruling that the requirement of service of summons within the statutory period was an integral part of the state's statute of limitations, which, under the *Erie* and *York* decisions, should be applied in federal diversity cases. The Supreme Court upheld the decision of the court of appeals. The Court held that "if recovery could not be had in the state court, it should be denied in federal court." With regard to Rule 3, the Court stated:

> "Here, there can be no doubt that the suit was properly commenced in the federal court. But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. . . . It accrues and comes to an end when local law so declares. . . . Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed." [37]

It is noteworthy that the Court also held in the *Ragan* case that Rule 3 still prevails in cases involving only a federal question. In such a case, irrespective of state requirements, the action is still commenced and the applicable statute of limitations tolled by the mere filing of the complaint.[38] In sum and substance, therefore, the Court delimited Rule 3 in diversity of citizenship cases, but preserved it for all other types of civil actions. As a result, all "strictly federal" civil cases will now be governed by Rule 3, while diversity cases must of necessity be commenced in accordance with prevailing state law. Under such circumstances, uniformity of procedure is a thing of the past insofar as commencement of actions in federal court is concerned.

The *Ragan* decision must have proved particularly ungratifying to Mr. Ragan himself. As mentioned above, he obtained a substantial judgment on the merits of his action in the lower federal court, but was prevented from recovering solely by reason of the confusion and uncertainty arising from

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35. *Id.* § 60-308, which provides: "An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him. . . ."

36. 170 F.2d 987 (10th Cir. 1948).

37. 337 U.S. at 533.

38. The Court made reference to Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947). That case was a suit to enforce rights under a federal statute. The Court made it clear, therefore, that its holding in the Ragan action was limited to diversity cases, and that Rule 3 remained in effect as far as other federal civil actions were concerned.

procedural technicalities and by the initial engulfment of a Federal Rule by *Erie* and *York*.

The second case decided by the Court on June 20, 1949, concerned Rule 17(b) of the Federal Rules. This rule provides, in part: "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." The case, *Woods v. Interstate Realty Company*,[39] was commenced in federal district court in Mississippi on the ground of diversity of citizenship. Plaintiff, a Tennessee corporation, sued a resident of Mississippi to recover a brokerage commission alleged to be due upon the sale of real estate located in Mississippi. Defendant moved for summary judgment, claiming that under a Mississippi statute[40] the action was barred because plaintiff corporation had failed to qualify to do business in Mississippi. The district court sustained the motion. The Court of Appeals for the Fifth Circuit reversed.[41] It reviewed Mississippi decisions under the statute, and concluded that they barred actions by foreign corporations in the state courts *only*.[42] In reliance upon the rule established by the Supreme Court in *David Lupton's Sons Co. v. Automobile Club*,[43] the court of appeals held that a state statute, thus interpreted by state courts, did not close the doors of a federal court sitting in that state.

Shortly thereafter, however, the Supreme Court handed down its decision in *Angel v. Bullington*.[44] In that case, Mr. Justice Frankfurter, writing for the Court, stated:

> "Cases like *Lupton's Sons Co. v. Automobile Club* . . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad v. Tompkins*. . . . That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts." [45]

The defendant, in the *Woods* case, immediately moved for reargument

39. 337 U.S. 535, 69 Sup. Ct. 1235, 93 L. Ed. 1524 (1949).

40. MISS. CODE § 5319 (1942), requires a foreign corporation doing business in the State to file a written power of attorney designating an agent on whom service of process may be had. It also provides, "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

41. 168 F.2d 701 (5th Cir. 1948).

42. The cases relied upon were Long Beach Canning Co. v. Clark, 141 Miss. 177, 106 So. 646 (1926); and Citizen's Bank of Hattiesburg v. Grigsby, 170 Miss. 655, 155 So. 684 (1934).

43. 225 U.S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177 (1912). In the Lupton case, the question and facts presented were substantially the same. Mr. Justice Hughes, writing for the Court, stated, "The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract." 225 U.S. at 500. In connection with the Lupton case, see Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORNELL L.Q. 499, 524-25 (1928). As early as 1928, Justice Frankfurter expressed his disapproval of the Lupton case.

44. 330 U.S. 183, 67 Sup. Ct. 657, 91 L. Ed. 832 (1947).

45. 330 U.S. at 192.

in the circuit court, claiming that the *Lupton* case had been overruled. The circuit court stood firm in its former position, holding that the *Angel* case was decided by the *res judicata* doctrine, and the remainder of the decision was simply *obiter dicta.*[46]

On appeal to the Supreme Court, the court of appeals naturally was reversed. Mr. Justice Douglas, writing for the Court, held that the *Lupton* case had been overruled by *Angel v. Bullington.* He therefore dismissed the action in the *Woods* case, on the theory that "where . . . one is barred from recovery in the state court, he should likewise be barred in the federal court." [47]

The Court did not specifically mention Rule 17(b) in its decision in the *Woods* case. Yet the provisions of that Rule pertaining to the capacity of corporations to sue and be sued were nevertheless effectively delimited by the *Woods* decision. First of all the provisions of that Rule on corporate capacity were inserted by the Advisory Committee [48] in reliance upon the Court's decision in *David Lupton's Sons Co. v. Automobile Club.*[49] The Supreme Court expressly overruled that decision in *Angel v. Bullington* and again in the *Woods* case. Moreover, the net effect of the decision in the *Woods* case is that in diversity actions a foreign corporation's capacity to sue must now be determined by the law of the state in which it seeks to sue, and not in accordance with the laws of the state of its incorporation. As stated above, Rule 17(b) provides that a corporation's capacity to sue is to be determined under the laws of the place of its incorporation. Thus, another Federal Rule succumbed to the *Erie* doctrine insofar as diversity cases are concerned, and uniformity of procedure in the federal courts received another blow.

The third decision handed down by the Court on June 20, 1949, was *Cohen v. Beneficial Industrial Loan Corporation.*[50] This case applied provisions of New Jersey law in such a way as to add new requirements to those of Rule 23 of the Federal Rules. The action was brought by minority shareholders of a corporation to recover from defendants, managers and directors of the corporation, the sum of $100,000 for waste and diversion of corporate assets. Federal jurisdiction was predicated upon diversity of citizenship. The action was brought in 1943. Various proceedings had taken place when, in 1945, New Jersey enacted a statute,[51] the effect of which was to make a plaintiff in a stockholder's action liable for all expenses and attorneys' fees of the defense in the event he failed to make good his com-

46. 170 F.2d 694 (5th Cir. 1948).
47. 337 U.S. at 538.
48. FED. R. CIV. P. 17(b). See Notes of Advisory Committee, p. 503.
49. 225 U.S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177 (1912).
50. 337 U.S. 541, 69 Sup. Ct. 1221, 93 L. Ed. 1528 (1949).
51. N.J. Laws 1945, c. 131.

plaint. Moreover, corporate defendants in such cases were given the right to require a bond or other indemnity before the suit could be prosecuted. The statute, by its terms, was made applicable to those actions already pending when it became effective. The corporate defendant in the *Cohen* case promptly moved to require security from the plaintiffs, and claimed that a bond of $125,000 was appropriate. The district court denied the motion, holding that the New Jersey statute was not applicable to cases in federal court.[52] The court of appeals was of contrary opinion and reversed.[53] The Supreme Court thereupon granted certiorari, and in due course sustained the ruling of the court of appeals. In holding that the federal court was bound to apply the New Jersey statute, Mrs. Justice Jackson stated:

> "[T]his statute is not merely a regulation or procedure. With it or without it the main action takes the same course. However, it creates a new liability where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. . . . We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device." [54]

Concerning plaintiff's claim that the New Jersey statute was strictly procedural, that he had complied with all of the applicable requirements of the Federal Rules, and that Rule 23 exclusively governs procedure in shareholders' actions in federal court, Mr. Justice Jackson stated:

> "It is urged . . . that Federal Rule of Civil Procedure No. 23 deals with plaintiff's right to maintain such an action in federal court and that therefore the subject is recognized as procedural and the federal rule alone prevails. . . . These provisions [of Rule 23] neither create nor exempt from liabilities, but require complete disclosure to the court and notice to the parties in interest. None conflict with the statute in question and all may be observed by a federal court, even if not applicable in state court." [55]

The practical effect of the Court's decision is that parties in future diversity cases will naturally seek to avail themselves of the many ancillary procedural rights and benefits provided by various state laws. The Supreme Court has not stated how far it plans to extend the *Erie* doctrine in this direction. So, as matters stand, lower federal courts and practising attorneys must determine for themselves whether or not state laws providing security for costs, special attachments, injunctions *pendente lite,* body arrests and the like should be applicable in federal diversity cases. Shareholders' actions are particularly hazardous at this time as a result of the *Cohen* decision. Defendants in such cases will probably seek to inject every feasible state requirement into federal practice, while plaintiffs will probably argue as

52. Cohen v. Beneficial Industrial Loan Corp., 7 F.R.D. 352 (D.N.J. 1947).
53. Cohen v. Beneficial Industrial Loan Corp., 170 F.2d 44 (3d Cir. 1948).
54. 337 U.S. at 555-56.
55. *Id.* at 556.

Justices Douglas and Frankfurter did, in their dissenting opinion in the *Cohen* case, that Rule 23 governs procedure in such actions exclusively, and that the *Cohen* ruling should not be extended by the federal courts.

Since the Supreme Court rendered its decisions in the *Ragan, Woods* and *Cohen* cases, the lower federal courts and the Advisory Committee on the Federal Rules itself have dealt further blows to the doctrine of uniformity of procedure. In *Nola Electric Inc. v. Reilly,*[56] the district court for the southern district of New York decided, on September 30, 1949, that the action there was commenced, not by filing of the complaint under Rule 3, but by delivery of the summons to the United States Marshal with the intent that service upon the defendant be made. The court applied the rule of the *Ragan* case, by holding that where state law provides that an action is commenced by delivery of the summons to a state sheriff for service,[57] the state provisions are to be followed by litigants in federal court. The court reasoned that a state sheriff was wholly without authority to serve a federal summons. Consequently, the court held that, under such circumstances, federal litigants need only conform as near as possible to state law, with the result that delivery of the summons to the United States Marshal was sufficient. This decision is undoubtedly correct as it is founded upon sound logic and a long line of like interpretations of the applicable New York law.[58]

The district court in the *Nola* case also passed upon the applicability of Rule 15(c) in cases based solely upon diversity of citizenship. This Rule provides that whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. In the *Nola* case, plaintiff filed an amended complaint after the applicable statute of limitations had expired. Defendant moved to dismiss the amended pleading on the ground that it was outlawed by reason of the statute. The district court originally entertained this motion prior to the Supreme Court's decision in the *Ragan* case. Relying upon Rule 15(c), it denied the motion, and held that the amended complaint related back to the date of the initial pleading. After the *Ragan* de-

56. This case is unreported. It bears Civil No. 44-396 in the U.S. District Court for the Southern District of New York. The decision was rendered by Judge Sylvester J. Ryan on September 30, 1949.

57. N.Y. CIV. PRAC. ACT § 17, which provides: "An attempt to commence an action . . . is equivalent to the commencement thereof . . . within the meaning of each provision of this act which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff . . . of the county in which the defendant . . . resides."

58. See Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947); United States v. Northern Finance Corp., 16 F.2d 998 (2d Cir. 1927); Acheson Graphite Co. v. Mellon, 21 F.2d 562 (W.D.N.Y. 1927); United States v. Elliott, 27 F. Supp. 253 (E.D.N.Y. 1939); United States v. Fischer, 16 F. Supp. 743 (E.D.N.Y. 1936); Knox v. Beckford, 167 Misc. 200, 3 N.Y.S.2d 718 (Albany City Ct. 1938), *aff'd mem.*, 258 App. Div. 823, *aff'd mem.*, 285 N.Y. 762, 34 N.E.2d 911 (1941).

cision, however, defendant moved for reargument. The district court reversed its prior decision, stating:

> "It does not require a scryer to foresee that the logical extension of the doctrine of the *Ragan* decision requires that this question be decided in accordance with statutory and case law of New York."

Thus, the court refused to apply Rule 15(c) to determine whether or not relation back of the amendment was proper. However, the defendant's motion was again denied by the court on the ground that the New York decisions have adopted the same reasoning as contained in Rule 15(c) with regard to amended pleadings.[59]

Rule 23(b) of the Federal Rules has been involved in a tug-of-war with *Erie* for many years. It provides, among other things, that in shareholders' actions, the complainant "shall aver that plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law." Several states, however, have laws which permit parties to maintain such actions although they acquired their corporate shares subsequent to the date of the transaction complained of. The decisions of the lower federal courts on this question are divided. Some hold that the question is procedural and therefore should be governed solely by Rule 23(b) in diversity actions.[60] Others hold that the matter is one of substance, and that state provisions, not Rule 23(b), are controlling.[61] Recently, the Advisory Committee on the Rules took cognizance of the situation, and issued a supplementary note to Rule 23, which states, in part, as follows:

> "As a result of the decision in Erie R. Co. v. Tompkins, . . . a question has arisen as to whether [Rule 23(b)] deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under Erie R. Co. v. Tompkins [Rule 23(b)] may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23. . . ." [62]

Naturally enough, the position taken by the Advisory Committee has caused uncertainty and confusion. As a result of the Committee's failure to

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59. See Michelson v. Penney, 135 F.2d 409, 417 (2d Cir. 1943); Harriss v. Tams, 258 N.Y. 229, 242, 179 N.E. 476 (1932); Clark v. Title Guarantee & Trust Co., 259 App. Div. 136, 18 N.Y.S.2d 175 (1st Dep't 1940).

60. *See* Gallup v. Caldwell, 120 F.2d 90, 95 (3d Cir. 1941); Perrott v. United States Banking Corp., 53 F. Supp. 953 (D. Del. 1944); Piccard v. Sperry Corp., 36 F. Supp. 1006, 1009-10 (S.D.N.Y. 1941), *aff'd*, 120 F.2d 329 (2d Cir. 1941).

61. Summers v. Hearst, 23 F. Supp. 986 (S.D.N.Y. 1938); Bankers Nat. Corp. v. Barr, 9 Fed. Rules Serv. 23(b) 11, Case 1.

62. See Supplementary Note of Advisory Committee, Regarding Rule 23(b), 28 U.S.C.A. 723c, following Rule 23 of the Federal Rules of Civil Procedure (Supp. 1950). See also *Weary Erie*, 34 CORNELL L.Q. 494, 506-08 (1949); Note, 62 HARV. L. REV. 1030, 1038-39 (1949).

act or to take a stand in the matter after recognizing the existence of the problem, litigants, at great expense in time and money, must continue to proceed in such cases without knowing which position the Supreme Court will adopt with regard to Rule 23(b).

The *Erie* doctrine was also extended recently to operate in place of Rule 14 of the Federal Rules which provides for third party practice in the federal courts. In *Hills v. Price,*[63] the District Court for the Eastern District of South Carolina refused to allow a defendant to bring in a joint tortfeasor as a third-party defendant under the provisions of this Rule. The Court stated:

> "Under the doctrine of Erie R. Co. v. Tompkins, . . . we must look to the law of South Carolina to determine the rights of the parties; that is, the substantive rights, and not merely the rules of procedure in the matter of making third party defendants. . . . I have therefore reached the conclusion that the motion to bring in the third party defendant should be refused." [64]

Space does not permit an analysis of the other provisions of the Federal Rules which might conflict substantially with the laws of one or more of the 48 states. It is submitted, however, that there are many other Rules, such as Rules 1,[65] 13(a) [66] and 41(a) [67] which are susceptible to rejection or delimitation as a result of the current extensions of the *Erie* doctrine to matters which heretofore have been considered strictly procedural.

A Proposed Return to Conformity

The solution to the federal procedure problem will not be a simple one. The entire question eannot be eliminated and cleared up by simply amend-

63. 79 F. Supp. 494 (E.D.S.C. 1948).
64. *Id.* at 495, 497.
65. Rule 1 provides: "These rules govern the procedure in the district courts of the United States in all suits of a civil nature. . . ." 28 U.S.C.A. 723c, Rule 1. Lengthy explanation is unnecessary to show that this Rule has lost its original meaning. Already state law, not the Rules, governs the procedure of commencement, relation back of amendments, third party practice, etc., in many diversity cases.
66. Rule 13(a) compels defendants to state a certain type of claim as a counterclaim in their answers. In Lesnik v. Public Industrial Corp., 144 F.2d 968, 975 (2d Cir. 1944), the court of appeals understood this provision to bar a defendant who fails to plead such a counterclaim from suing on it later in a separate suit in federal or state court. This Rule, so interpreted, certainly has substantial effect upon the outcome of litigations, for the result of such application is to make the federal court judgment in a prior suit *res judicata* as to the subsequent claim. In states which do not have such a rule, federal courts would seem bound by the *Erie* doctrine to apply state law and reject Rule 13(a).
67. Rule 41(a) provides that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court in the United States or of any state an action based on or including the same claim." 28 U.S.C.A. § 723c, Rule 41(a)(1). Under the *Erie* doctrine, as extended by *York* and *Ragan,* this rule is extremely vulnerable to rejection in diversity cases, where a state law or decision conflicts therewith. In this connection, see Missouri Pac. Transp. Co. v. Talley, 199 Ark. 835, 136 S.W.2d 688 (1940), petition for certiorari dismissed on motion of petitioner, 311 U.S. 722 (1940).

ing Rule 3 because of the *Ragan* decision, or Rule 17(b) as a result of the *Woods* case, or Rule 23(b) by reason of the *Cohen* decision. These rules are not the only ones which conflict with *Erie*. As shown above, the lower courts have already commenced the *Erie* attack on other provisions of the Rules, and as a result, Rules 14 and 15(c) have been delimited or overruled in diversity cases. The problem does not exist because of the provisions of any particular Federal Rule, but rather by reason of the conflicting theories and doctrines supporting the Rules as a whole and *Erie R. R. v. Tompkins*. As long as *Erie* governs substantive matters in federal cases involving state-created rights and liabilities, there will be a clash between it and the Rules in all matters which in any way substantially affect the outcome of such litigations.

Just as amendments of particular rules would seemingly offer no solution, the adoption of an arbitrary test to govern all situations would likewise seem unworkable. For example, the following test was recently offered as a solution to the problem:

> "The federal courts under *Erie* are required to apply, in the resolution of suits involving the enforcement of state-created rights, all those rules of state law, which, if they were different in the federal courts, would more likely than not lead to or encourage forum-shopping." [68]

Any such test or rule would seemingly create greater uncertainty and confusion than that which presently exists. Jurists and litigants would be compelled in each case to compare state and federal law, and without any definite guide or precedent, come to a conclusion as to which law should control. Each step from the commencement of an action to the submission of the case to a jury would necessarily be taken at a risk, and parties would be justified in appealing to the higher courts from any decision on the ground that the court erred in applying some provision of federal law where it should have applied state law and vice versa. In fact, tests such as the one mentioned above would amount to nothing more than an attempted compromise between *Erie* and the Rules, with the result that the same old problems will exist after their adoption.

The only practical way to solve the existing problem is to break cleanly with the past. For almost a century, incompatible doctrines have supported substantive law and procedural law in the federal judicial system. Prior to 1938, *Swift v. Tyson*, with its theory for a uniform common law, controlled substantive matters, while the Conformity Act, calling for the application of state law, governed matters of procedure. In 1938, the situation was simply reversed, so that conformity to state law has prevailed in substantive mat-

68. Horowitz, *Erie R.R. v. Tompkins—A Test To Determine Those Rules of State Law To Which Its Doctrine Applies*, 23 So. CALIF. L. REV. 204, 215 (1950).

ters under *Erie* while federal uniformity has been made to govern procedure. The difficulties which have arisen have stemmed from the basic fact that it is inherently impossible for these conflicting doctrines to receive compatible application from federal courts, especially when the Supreme Court itself, the promulgator of the Federal Rules and the architect of the *Erie* doctrine, refuses to establish any division between the two. Consequently, without further ado, three suggestions will be made which it is believed should be adopted in order to solve the problem and bring about a more harmonious and desirable practice in the federal courts:

(1) The Supreme Court should promulgate a rule under the Enabling Act, or Congress should pass a law, if necessary, which would make procedure in all diversity of citizenship cases conform as nearly as possible to the procedure prescribed by the laws and decisions of the various states in which federal courts sit. The Federal Rules would be repealed, *but only insofar as they affect actions based upon diversity of citizenship.* This step would eliminate the conflict which presently exists between federal procedure and the *Erie* doctrine, as well as the confusion and uncertainty which exists among jurists and lawyers today as to which Rule might be overruled or delimited by further extensions of *Erie R. R. v. Tompkins.* It seems only logical that if a doctrine of state conformity is to govern substantive matters in diversity cases, a similar doctrine of state conformity must govern procedure. This fact was recognized by Dean Gavit of Indiana, who concluded in a recent article:

> "The Federal Rules of Civil Procedure should be amended to state what is intended, or better yet they should state that in all diversity cases the Rules are not applicable, and that the district courts should in those cases follow the state law of procedure. Nothing less than that will give proper recognition to a genuine State Right to state procedure; nor will it be intelligible." [69]

(2) The Federal Rules should be retained by the Supreme Court to prescribe procedure in all "strictly federal" civil actions. These actions would include all except those founded upon diversity of citizenship, and those governed by other rules, such as the admiralty rules. As a result, the Federal Rules would be given a new lease on life, and under these conditions, they should bring about a genuine uniformity in the well established federal field of law. In this way, they would serve as a working model for the various states which, in the future, choose to modernize their judicial procedure and practice.

(3) The hope of so many for national uniformity in procedure need not be discarded should the Supreme Court or Congress adopt the first suggestion set forth above. Rather, it will become more desirable than ever before

69. Gavit, *States' Rights and Federal Procedure,* 25 IND. L.J. 1, 26 (1949).

for the American Bar Association, and the various state bar associations, to lead a fight for the passage of legislation in each State which would establish modern rules of procedure in state courts, fashioned after the Federal Rules. If such rules were made to govern procedure in each of the 48 states, the result would be a nationally uniform procedure, applicable in both the state and federal courts. This dream is not impossible of realization when one stops to consider that almost all of the states have now adopted uniform laws, such as the Negotiable Instruments Law and the Sales Act.