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Procedure or Substance-Burden of Proof-Erie v. Tomkins and the New Federal Rules

PROCEDURE OR SUBSTANCE—BURDEN OF PROOF—ERIE V. TOMKINS AND THE NEW FEDERAL RULES.—Plaintiff, purchaser from defendants' vendee, sued to remove cloud on title to land. Because of diversity of citizenship the federal district court had jurisdiction. The defendants filed a cross-bill alleging a mistake in the insertion of a call in the deed which conveyed more land than intended and alleging that the metes and bounds was the correct description. The plaintiff denied the mistake and alleged that it was a bona fide purchaser for value without notice. The federal court applied the federal rule placing the burden of proving bona fide purchase on the party asserting this. The plaintiff asserted that the Texas rule which placed the burden on the party asserting an equitable title against the legal record owner should be applied. The district court held that this was only a matter of procedure and followed the federal rule, and was sustained by the circuit court of appeals. Held, reversed. The burden of proof is a substantive matter and under *Erie v. Tomkins*[1] the federal courts must follow the state rule. *Cities Service Oil Co. v. Dunlap* (1939), 60 S. Ct. 201.

Whether a rule is substantive or procedural may depend upon the purpose for which the distinction is made.[2] There have been many decisions on this matter[3] but the present case arises in a new field as a result of *Erie v. Tomkins*. Classically burden of proof is a part of remedial law and the law of evidence and is procedural.[4] Occasionally the rules as to burden of proof have been given almost a substantive meaning but it has seldom been necessary in carrying out the purpose for which the classification was made to actually decide that burden of proof was anything but procedural.[5] Conflicts of law cases are

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[1] Erie v. Tomkins (1938), 304 U. S. 64, 58 S. Ct. 819. The federal courts must follow state court decisions as to substantive law in diversity of citizenship cases as well as state statutes.

[2] Cook, *"Substance and Procedure" in the Conflicts of Laws* (1933), 42 Yale L. Jl. 333, 337. "If once we recognize that the 'line' (between substance and procedure) can be drawn only in the light of the purpose in view, it cannot be assumed that as our purpose changes the line can be drawn precisely at the same point."

[3] Sackheim v. Pigueron (1915), 215 N. Y. 62, 109 N. E. 109; Southern Ind. Ry. Co. v. Peyton (1901), 157 Ind. 690, 61 N. E. 722.

[4] "Procedure is the machinery for carrying on the suit, including pleading, process, evidence, and practice whether in the trial court or the appellate court, or in the processes by which cases are carried to appellate courts for review, or in laying the foundation for such review." Jones v. Erie R. R. Co. (1923), 106 Ohio St. 408, 140 N. E. 360. "Substance is that part of the law which creates, defines and regulates rights, as apposed to *adjactive* or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion." Anderson v. Wirkmon (1923), 67 Mont 176, 215 P. 224.

[5] Midland v. Martin (1935), 100 Ind. App., 194 N. E. 862; *cf.* Helton v. Alabama R. R. Co. (1893), 97 Ala. 278, 12 So. 276; Jones v. Chi. R. R. Co.

analogous to the principal case as in both there is a court of one jurisdiction applying the substantive law of another jurisdiction but its own procedure. In the conflicts cases "burden of proof" is considered procedural; but where the procedure of the forum would for practical purposes destroy substantive rights the foreign rule of procedure sometimes is applied.[6] In the principal case it would seem that the Supreme Court did not follow the usual distinction between substance and procedure.

In considering the distinction between substance and procedure the new federal rules must also be considered. These rules, promulgated by the Supreme Court, must be procedural, for otherwise they are unconstitutional.[7] While the new federal rules do not specifically state upon which party the burden of proving bona fide purchase rests, rule 8 (c) sets out many affirmative defenses[8] and also declares, "and any other matter constituting an avoidance or affirmative defense."[9] The last part of 8 (c) merely re-enacts the code and the common law rules, and it is only a fair interpretation of this clause that it incorporates all formerly well established affirmative defense. There has been a clear and well established rule in the federal courts since 1836 that the burden of proof of bona fide purchase is on the party asserting the matter.[10] Furthermore the new rules are exclusive and should apply to all cases before the federal courts.[11] It would seem that under the new federal

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(1900), 80 Minn. 488, 183 N. W. 446; Menard v. Goltra (1931), 328 Mo. 368, 40 S. W. (2d) 1053; Richmond R. R. Co. v. Mitchel (1893), 92 Ga. 77, 18 S. E. 290; Penn. v. McCann (1896), 59 Ohio St. 10, 42 N. E. 768.

[6] Olson v. Omaha (1936), 131 Neb. 94, 267 N. W. 246. See also Precourt v. Driscol (1931), 85 N. H. 280, 157 Atl. 525, in which there is language calling burden of proof substantive unnecessarily in view of the exception of this field.

[7] Erie v. Tomkins (1938), 304 U. S. 64, 58 S. Ct. 819. "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. * * * Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence." Pp. 78, 79. See also the concurring opinion of Justice Reed: "If the opinion commits this court to the position that Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between substance and procedure is hazy but no one doubts the federal power over procedure." P. 92.

[8] The burden of proof, i. e., the duty to establish the truth of a claim by preponderance of the evidence, rests throughout on the party asserting the affirmative of the issue. Sellers v. Kincaid (1922), 303 Ill. 216, 135 N. E. 429.

[9] Rule 8 (c), "Affirmative Defense. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. * * *"

[10] Boone v. Chiles (1836), 10 Pet. 177; Great Northern R. R. Co. v. Howes (1914), 236 U. S. 702.

[11] Gavit, *New Federal Rules and Indiana Practice* (1938), 13 Ind. L. Jl. 203, 299, ftns. 6, 376.

rules the burden of proof of bona fide purchase would be procedural; thus the plaintiff would have the burden in the principal case.[12]

While the principal case is apparently based on the distinction between substance and procedure, it actually is an example of the conflict between the policy of *Erie v. Tomkins* and the policy of the new federal rules.[13] The policy of the former is the attainment of the same result in diversity of citizenship cases regardless of whether tried in the federal or state courts.[14] The policy of the latter is the use of a uniform system of procedure in all federal courts. The decision in *Erie v. Tomkins* was that federal courts in diversity of citizenship cases must follow the substantive law of the state as shown by both the state court decisions and the state statutes.[15] It has often been pointed out by exponents of realism that most procedural rules have a material effect on the outcome of a case and in close cases the choice of the rule of procedure may actually determine the decision.[16] Therefore if the Supreme Court desires to carry out completely the policy of *Erie v. Tomkins* either the classical distinction must be changed or the case extended to require the following of state procedural law as well as state substantive law.

There are two apparent solutions to the conflict between the policy of *Erie v. Tomkins* and the policy of the new federal rules. Either the new federal rules may be applied in all cases whether diversity of citizenship cases or those presenting federal questions, or the new federal rules should be restricted to cases in the federal courts on other grounds than diversity of citizenship. While the decision of *Erie v. Tomkins* does not require federal courts to follow state procedure the Supreme Court in the principal case requires this in effect, and thus indicates that the new federal rules will be limited in their application. The validity of this result is merely a matter of opinion, but the manner of obtaining the result seems at best an unfortunate choice. The standard which the court used was that a rule which gives a superior position to a claimant is

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[12] In two recent district court decisions the burden of proving contributory negligence was held to be substantive contrary to the specific provisions in rule 8 (c). If the supreme court sustains these decisions the federal rules will be of little consequence in diversity of citizenship cases. See Frances v. Humphreys (1939), 25 Fed. (2d) 1; Schapps v. Muller Dairies (1939), 25 Fed. (2d) 50.

[13] The new federal rules came out just one week after the decision in *Erie v. Tomkins,* and since both deal with the distinction between substance and procedure they will have to affect each other.

[14] Frankfurt, *Distribution of Judicial Power between U. S. and State Cts.* (1928), 13 Corn L. Q. 490. "If Mr. Justice Brandeis' opinion in the Tomkins case can be said to have a theme, that theme, constantly recurring, is this necessity of preventing a dual court system from spawning dual systems of justice." P. 528.

[15] Erie v. Tomkins (1938), 304 U. S. 64, 58 S. Ct. 819. "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 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." P. 78. See footnote 7 *supra.*

[16] 1 CHAMBERLYNNE, EVIDENCE (1911), Sec. 171. "The distinction between substance and procedure is artificial and illusory. In essence there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself." Justice McReynolds has apparently adopted a realistic view in his opinion in the principal case of the distinction between substance and procedure contrary to the views usually attributed to him.

substantive;[17] it is submitted that this can be said of almost any heretofore regarded procedural rule. The effect of this standard if carried to its logical conclusion would be to destroy the distinction between substance and procedure.

Therefore without quarreling with the extension of the policy of *Erie v. Tomkins* into the procedural field, it is submitted that the Supreme Court could easily have attained the same end without confusing the valuable distinction between substance and procedure. The court could have said: (1) state procedure must be followed in diversity of citizenship cases or, (2) in the absence of a specific rule in the new federal rules, state procedure must be followed or, (3) state rules may be followed in diversity cases when the use of the federal rule would materially alter the outcome of the case. The standard prescribed in the principal case, however, can not avoid causing repercussions in other fields where this distinction is important and it might destroy the usefulness of the distinction altogether.

W. E. B.

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[17] Cities Service Oil Co. v. Dunlap (1939), 60 S. Ct. 201. "In the absence of evidence showing it was not a burden of proof its (P) position was superior to claimants (D) asserting an equitable interest. This was a valuable assurance in favor of its title." P. 203. The only authority cited as analogous to the principal case was Central Vt. R. R. Co. v. White (1915), 238 U. S. 507, 35 S. Ct. 865. This case arose under the commerce clause. As to interstate commerce the power of the federal government is clear and the state could alter neither the substance nor procedure. See Hill v. Smith (1915), 240 U. S. 592; New Orleans and Northwestern R. R. v. Harris (1919), 247 U. S. 367.