Marquette Law Review

Volume 26
Issue 4 *June 1942*

Article 4

The Tompkins Decision and Rule 8(c) of the Federal Rules of Civil Procedure

Robert T. McGraw

NOTE

THE TOMPKINS DECISION AND RULE 8(c) OF THE FEDERAL RULES OF CIVIL PROCEEDURE

An interesting question has arisen because of the apparent conflict between the decision in *Erie Railroad Co.* v. *Tompkins*[1] and the Federal Rules of Civil Procedure.[2] Under the *Tompkins* decision the federal courts are bound to follow state law in matters of substance. On the other hand the Federal Rules, which the federal courts are likewise bound to follow, have attempted to deal with certain matters as procedural. The question then is, what of a situation where under state law certain matters have been declared to be matters of substance and the same matters are dealt with in the Federal Rules as matters of procedure? Which is to prevail, the state law or the Federal Rules of Civil Procedure?

Question of contributory negligence, statutes of limitations and statutes of fraud are illustrative situations in which this conflict is likely to arise.

Under the Federal Rules of Civil Procedure, rule 8(c), these three matters are treated as matters of affirmative defense[3] and as merely procedural, but in some states, as shown later, these matters are recognized as matters of substance, going to the rights of the parties. The present inquiry will be as to how the federal courts, under rule 8(c), have handled situations where under state law contributory negligence, statutes of frauds, and statutes of limitations are treated as matters of substance.

An examination of the question of contributory negligence shows that it is generally regarded to be a matter of affirmative defense, the proof of which rests upon the defendant in the action.[4] It is apparent then that there is no conflict here with Federal Rule 8(c) in the majority of jurisdictions in the United States. However some states hold that contributory negligence is not a matter of affirmative defense, but is a matter from which the plaintiff must affirmatively prove himself

---

[1] 304 U.S. 63, 58 Sup. Ct. 817, 82 L.ed. 1188, 114 A.L.R. 1487 (1938).

[2] Federal Rules of Civil Procedure, 28 U.S.C.A. following sec. 723c.

[3] Rule 8(c)—"Affirmative Defenses. In a pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of the 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, statutes of limitation, waiver and any other matter constituting an avoidance or affirmative defense . . . "

[4] Restatement of Torts, sec. 477 (1934) "The burden of establishing the plaintiff's contributory negligence rests upon the defendant."

free before he is entitled to recover.[5] Illustrative of state cases holding that contributory negligence is a matter of substance are *Sanderson* v. *Chicago, M. & St. P. Ry. Co.*[6] and *Mazello* v. *Chicago City Ry. Co.*[7] In the former it is said, ". . . The burden of proof rests upon the plaintiff not only to show the negligence of the defendant upon which liability is predicated, but also that the injured person was free from any negligence on his part contributing to the injury . . ." In the latter it was stated, ". . . failure to aver and prove freedom from contributory negligence precludes a recovery . . ." Thus it would seem that proof by the plaintiff that he was free from contributory negligence goes to his right of recovery in these states. It is difficult to see how a fact essential to the plaintiff's recovery could be regarded as anything but a matter of substance, it going to the very right of his cause of action. If additional authority is needed to show that the plaintiff's necessity of proving himself free from contributory negligence is a matter of substance we have only to look to the case of *Central Vermont Ry.* v. *White*[8] which held, "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For in Vermont and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. . . . In those states the plaintiff is as much under the necessity of proving one of these facts (that defendant is guilty of negligence and that he was not guilty of contributory negligence) as the other; and as to neither can it be said that the burden is imposed by a mere rule of procedure, since it arises out of a general obligation imposed upon every plaintiff to establish all of the facts necessary to make out his cause of action."

---

[5] Wright v. Godin, 108 Vt. 23, 182 Atl. 189 (1936); Crichton v. Barrow Coal Co. Inc., 100 Vt. 460, 139 Atl. 252 (1927); Ward v. City Fuel Oil Co., 2 So. (2d) 586 (Florida, 1941); Silvia v. Caizz, 7 Atl. (2d) 704 (Rhode Island, 1939); Spooner et al. v. Wisecup et al., 227 Iowa 768, 288 N.W. 894 (1939); Denny v. Augustine, 223 Iowa 1202, 275 N.W. 117 (1937); Kehm v. Dilts, 222 Iowa 826, 270 N.W. 388 (1936); Smith v. City of Hamburg, 212 Iowa 1022, 237 N.W. 330 (1931); Sanderson v. Chicago, M. & St. P. R. Co., 167 Iowa 90, 149 N.W. 188 (1914); Grummel v. Decker et ux., 294 Mich. 71, 292 N.W. 562 (1940); Pulford v. Mouw, 279 Mich. 376, 272 N.W. 713 (1937); Grubman v. City of N. Y., 27 N.Y.S. (2d) 757 (1941); McLoughlin v. Bonpark Realty Corp., 23 N.Y.S. (2d) 156 (1940); Walheim v. City of Batavia, 12 N.Y.S. (2d) 228 (1939); De Nisi v. J. Grugman Co. Inc. et al., 10 N.Y.S. (2d) 681 (1939); Fitzpatrick v. International Ry. Co., 252 N.Y. 127, 169 N.E. 112 (1929); Wright v. Palmison, 260 N.Y.S. 812 (1932); Segal v. Chicago City Ry. Co., 256 Ill. App. 369, 171 N.E. 922 (1930); Foreman Bank v. Chicago Rapid Transit Co., 252 Ill. App. 151 (1929); Penrod v. East St. Louis Ry. Co., 197 Ill. App. 151 (1915); Morolewski v. McCurrie, 205 Ill. App. 551 (1917); Benner v. East St. Louis & Suburban Ry. Co., 207 Ill. App. 544 (1917); Mazello v. Chicago City Ry. Co., 207 Ill. App. 15 (1917); Gustavson v. Hester, 211 Ill. App. 439 (1918).

[6] 167 Iowa 90, 149 N.W. 188 (1914).

[7] 207 Ill. App. 15 (1917).

[8] 238 U.S. 507, 35 Sup. Ct. 865, 59 L.ed. 1433 (1915).

An examination of the federal cases since the *Tompkins* case and the promulgation of the Federal Rules shows that in the few instances in which the question has arisen in the federal courts, they have been inclined to adopt a similar stand, when acting in states holding contributory negligence to be a matter of substance.[9] For example in *Schopp* v. *Muller Dairies,*[10] the court, faced with the fact that under New York law the burden of proving contributory negligence is upon the plaintiff, said, ". . . in view of the decisions in *Erie Railroad Co.* v. *Tompkins* and *Central Vermont Ry. Co.* v. *White* the conclusion is inescapable that the burden of proof as to contributory negligence is not merely a matter of procedure, but is a matter of substance." The court therefore applied the law of New York.

However the federal courts have not ben unanimous in their choice of applying the *Tompkins* rule in place of the Federal Rule 8(c). *Sierocinski* v. *E. I. Du Pont De Nemours,*[11] for example, held: "In the federal courts the rule is that freedom from contributory negligence on the part of the plaintiff in a personal injury case need not be negatived or disproved by him." The strongest argument presented by the federal courts holding this question to be governed by Federal Rule 8(c) rather than the *Tompkins* decision is that Congress has the power to authorize the Supreme Court to adopt and promulgate general rules regulating procedure for the federal courts, and when Congress does so act the rule is exclusive. The Supreme Court acting under this authority has adopted such rules and by rule 8(c), declaring contributory negligence to be a matter of affirmative defense, in effect has declared it to be a matter of procedure.[12]

This argument seems to be met and overcome in the case of *Francis* v. *Humphrey,*[13] "If said rule 8(c), a strictly procedural rule, be interpreted and applied so as to abridge or modify the substantive rights of the plaintiff in this case, as established by the law of Illinois, the rule thus interpreted and applied is necessarily unauthorized and void." The court continues, "My conclusion is that the absence of contributory negligence is made an essential part of the plaintiff's cause of action by the substantive law of Illinois and this substantive rule declared by the courts of Illinois must be recognized and followed by the federal courts. Being substantive law neither Congress nor the Supreme Court has power to declare it to be other than the courts

[9] Sampson v. Channel, 110 F. (2d) 754 (C.C.A. 1st, 1941); Francis v. Humphrey, 25 F. Supp. 1 (E.D. Ill., 1938); Schopp v. Muller Dairies, 25 F. Supp. 50 (E.D. N.Y. 1938); Fort Dodge Hotel Co. v. Bartelt, 119 F. (2d) 253 (C.C.A. 8th, 1941).

[10] *Supra,* note 9.

[11] 25 F. Supp. 706 (E.D. Penn., 1938).

[12] Kellman v. Stotz, 1 F.R.D. 726 (N.D. Iowa, 1941).

[13] Francis v. Humphrey, 25 F. Supp. 1 (E.D. Ill., 1938).

of Illinois have established it nor to undermine or destroy it by procedural requirements."

Thus the sounder rule would seem to be that when federal courts are acting in states holding the plaintiff responsible for proving himself free from contributory negligence they should regard the matter as one of substance and under the *Tompkins* decision apply the state law, in place of rule 8(c).[14]

Under Federal Rule 8(c) statutes of limitations are also listed as matters of affirmative defense, and are treated as matters of procedure. They are so regarded by some states.[15] However a bald statement that statutes of limitations are to be regarded as merely procedural would be incorrect, for although this statement is true with respect to general statutes of limitations, an important exception is recognized. This is that when a state statute not only creates a right but puts a time limit upon the duration of that right, the statute is not regarded as something merely remedial but is regarded as pertaining to the right or substance of the cause of action.[16] The most common example of such statute is death statutes which not only create a right unknown at common law, but also create a means of extinguishing such a right.[17]

When a federal court is faced with this type of statute of limitation, what is it to adopt as its norm, the Federal Rule or the state rule? If the former it will have to treat the statute as merely procedural; if the latter, as substantive. While this question has not been squarely before the federal courts since the *Tompkins* case and the enactment of the Federal Rules, it is interesting to note that the Federal Courts also recognize this distinction between general statutes of limitations and statutes which both create and limit the right.[18] In *Kaplan* v. *Manhattan Life Ins. Co.*, in speaking of general statutes of limitations, the court said, "according to the established rule, a limitation on the time of a suit is procedural and is governed by the law of the forum."[19] On the other hand in *Haefer* v. *Herndon,* the court is discussing stat-

[14] See also as to this problem, Restatement of Conflict of Laws, § 601 (1934); Tobin v. Pennsylvania R. Co., 100 F. (2d) 435 (C.C.A., D.C. 1938); McDonald et al. v. Central Vermont Ry. Inc., 31 Supp. 298 (D. Conn., 1940); Sibback v. Wilson & Co. Inc., 108 F. (2d) 415 (C.C.A. 7th, 1939).

[15] Alropa Corporation v. Kirchwehn, 138 Ohio St. 30, 33 N.E. (2d) 655 (1941); Hood v. Commonwealth Trust & Savings Bank, 376 Ill. 413, 34 N.E. (2d) 414 (1941).

[16] Carter v. Burns, 332 Mo. 1128, 61 S.W. (2d) 933 (1933); Kirsch v. Lubin, 131 Misc. 700, 228 N.Y.S. 94 (1927); Pringle v. Gibson, 135 Me. 297, 195 Atl. 695 (1937); Turner v. Missouri-Kansas-Texas R. Co., 346 Mo. 28, 142 S.W. (2d) 455 (1940); Norman v. Baldwin, 152 Va. 800, 148 S.E. 831 (1929).

[17] Tinsley et. al. v. Mills, 36 F. Supp. 621 (E.D. Louisiana, 1940).

[18] Godfrey T. Cabot Inc. v. J. M. Huber Corporation, 35 F. Supp. 373 (N.D. Texas, 1940); Ford, Bacon and Davis Inc. v. Volentine, 64 F. (2d) 800 (C.C.A. 5th, 1933).

[19] Kaplan v. Manhattan Life Ins. Co., 109 F. (2d) 463 (C.C.A., D.C., 1939).

On the other hand in *Haefer* v. *Herndon,* the court in discussing statutes which both create the cause of action and limit the time in which such action might be brought said, "It is the local law that determines the substantive rights of the parties and when a limitation is placed upon the assertion of that right, it has been correctly held to be a matter of substantive as distinguished from procedural law."[20]

Such decisions may be a basis for the federal courts' holding, despite rule 8(c), that the limitations created by statute are matters of substance. To hold them matter of procedure under the rule would place the federal courts in the inconsistent position of declaring the statutes matters of substance on one hand and treating them as matters of procedure on the other.[21]

Statutes of frauds have been held to be matters of procedure and matters of substance. There seems to be a fairly simple rule to guide us here, if the statute has been patterned after the English statute of frauds and reads to the effect that no action shall be brought on the instrument unless the parties comply with the statute. In such case the statute relates only to the remedy and is procedural. On the other hand if the statute provides that the contract will be void unless the requirements are complied with the statute is regarded as a matter of substance.[22] Quite a few states have statutes of this latter type[23] and therefore it would seem permissible to class them as holding their statutes to be matters of substance.

Under Federal Rule 8(c) statutes of frauds are categorically treated as matters of procedure. We have then a situation similar to the one which exists in regard to statutes of limitations, namely that there seems to be a general rule recognizing instances in which statutes of frauds are regarded as matters of substance and yet no distinction is made in rule 8(c), which declares all statutes of frauds to be simply matters of procedure.

Until the conflict which has arisen in the respects discussed has been squarely passed upon by the Supreme Court of the United States, it seems that the federal courts must stand tottering on the fence. From a purely logical viewpoint it seems almost necessary that the federal courts hold these matters to be "of substance" notwithstanding the Federal Rules. A failure to do so means recognizing the fact that states do hold such matters to be of substance, and yet dogmatically

---

[20] Haefer v. Herndon, 22 F. Supp. 523 (S.D. Ill., 1938).

[21] See also as to this problem, Corpus Juris Secundum, Conflict of Laws, § 22, p. 953; Restatement, Conflict of Laws, § 604-605.

[22] Reedy v. Ebsen, 60 S.D. 1, 242 N.W. 592 (1932); Wolfe v. Wallingford Bank and Trust Co., 124 Conn. 507, 1 Atl. (2d) 146 (1938).

[23] Mich. Comp. Laws (1929) § 13417; Comp. Stat. of Neb. (1929) § 36-105; Cahill's Consolidated Laws of N.Y. (1930) § 51-259; Comp. Stat. of Wyoming (1920) § 4719; WIS. STAT. (1941) 240.08.

adhering to the Federal Rules and treating them as procedural matters, despite the decision in *Erie Railroad Co.* v. *Tompkins.*

The Hon. Charles E. Clarke, one of the framers of the rules, has said that the whole question depends upon the point of view with which the matter is approached.[24] He continues, "From the nature of the Federal Rules and the manner of their adotion as a result of long study and careful consideration, a strong presumption should be indulged in that matters included in them as procedural are to be so held by the court." Otherwise, he intimates, the Federal Rules will be endangered. With the latter conclusion there can be no disagreement, but to adopt the position that a presumption of regarding the matters treated in the Federal Rules as procedural should be made, is to our mind to adopt the view that notwithstanding the *Tompkins* case there still is opportunity for the federal courts to modify the substantive rights of litigants.

It seems obvious that the Federal Rules should be clarified in order to avoid conflict with the *Tompkins* decision, and to attain that uniformity which is the purpose of the Federal Rules.

ROBERT T. MCGRAW.

[24] Clark, "The Tompkins case and the Federal Rules," 1 F.R.D. 417 (1940).