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Evidence: Admissability of Evidence and the Competency of Witnesses in Federal Courts

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EVIDENCE: EFFECT OF ERIE RAILWAY CO. vs. TOMPKINS ON THE ADMISSABILITY OF EVIDENCE AND THE COMPETENCY OF WITNESSES IN FEDERAL COURTS

In *Erie Railway Co. v. Tompkins*[1] it was decided that section 34 of the Federal Judiciary Act of 1789[2] which provides "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise 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," was applicable to the decisional law of the states as well as to state statutory law. The case held in effect that the Federal Government whether acting through Congress or the federal courts is powerless to create any substantive law binding on the states unless the Constitution authorizes federal legislation in that field. A federal court then, acting in cases where it acquires jurisdiction by virtue of diversity of citizenship rather than by virtue of a federal question must apply the substantive law of the state wherein the cause of action arises.

This decision is limited to substantive law, however. That the Federal Government has the sole power to determine the procedure to be applied in the federal courts has been recognizd since the case of *Wayman v. Southard.*[3] *Erie Railway Co. v. Tompkins,*[4] since it it is limited to substantive law, has not disturbed that principle.[5] It should be noted that federal power over federal procedure includes both cases where jurisdiction is obtained because federal questions are involved and where jurisdiction is based on diversity of citizenship.

The *Tompkins* case was decided partially on Constitutional grounds. The Court held that it would be unconstitutional for the federal courts or Congress to impose rules of substantive law binding on states in instances not specifically authorized by the Constitution. The practise of the federal courts in the past under *Swift v Tyson*[6] was an unconstitutional invasion of rights reserved to the states. Accepting this argument of the Court, then the question of the *Tompkins* case on the admissability of evidence or on federal procedure in general is basically a Constitutional question.

This conclusion may be established by pointing to the fact that Congress is free to change its statutes (including the Judiciary Act)

[1] 304 U.S. 64 (1938).
[2] Now 28 U.S.C.A. section 725.
[3] 10 Wheaton 1 (1825).
[4] Supra note (1).
[5] The language of Justice Reed in his concurring opinion in *Erie Railway* v. *Tompkins,* 304 U.S. 64 at page 92 may be cited as authority for this statement as well as *Bixby* v. *Chris Craft*: 7 F.R.D. 80 (1946); *Franzen* v. *Du Pont De Nemours Co.* 51 Fed. Supp. 578 (1943); and the following articles: 1F.R.D. 417 at page 418 (1940); and 51 Yale Law Journal 763 at page 776 (1942).
[6] 16 Pet. 1 (1842).

as it desires. Congress has in fact (through the agency of the Supreme Court) enacted the Federal Rules of Civil Procedure[7] and the Federal Rules of Criminal Procedure[8] to be the present law governing procedure (including the rules governing the admissability of evidence and competency of witnesses) in federal courts. Even though the language of the statute interpreted in the *Tompkins* case[9] had been held to include procedural matters, the enactment of the Federal Rules of Civil Procedure[10] and the Federal Rules of Criminal Procedure[11] changed this statutory law and imposed definite federal rules of procedure. Since Congress can and has changed its statute, the sole question then arising is has Congress in enacting the new statutes exceeded the Constitutional limit on its authority brought out by the *Tompkins* case — namely that in cases where federal courts acquire jurisdiction by virtue of diversity of citizenship, they must apply state substantive law.

The Federal Rules of Civil Procedure[12] embody the present rules governing civil procedure in federal courts. They were formulated by the Supreme Court prior to its decision in the *Tompkins* case; consequently the effect of this case was not considered while these rules were being formulated. These rules are labeled "Rules of Procedure". However, the line between procedure and substance is closely drawn and often is indiscernable. The power of the Federal Government to determine what law shall be applied in the federal courts in diversity of citizenship cases is limited solely to procedural law. It becomes necessary then in passing on the validity of these rules to appraise each rule and to determine whether it is procedural or if it is of such a nature as to be classified as substantive.

Charles E. Clark, United States Circuit Court Judge, in an article on the effect of the *Tompkins* case on the Federal Rules of Civil Procedure,[13] points out that it is impossible to separate procedure from substance in every instance and for this reason suggests that some aspects of the Federal Rules of Civil Procedure[14] will fail because they embody elements of substantive law. As an example of the hazy line between substance and procedure it may be noted there is a difference of opinion as to whether a rule placing the burden of proof of contributory negligence is substantive or procedural. Judge Clark suggests as an approach toward the problem that each case should be considered on its facts in determining whether a given rule invades

[7] 28 U.S.C.A. following section 723(c) (1938).
[8] 18 U.S.C.A. following section 687 (1946).
[9] 28 U.S.C.A. section 725.
[10] Supra note (7).
[11] Supra note (8).
[12] Supra note (7).
[13] 1F.R.D. 417 (1940).
[14] Supra note (7).

the field of substantive law or is within the realm of procedure. Our inquiry, however, does not include all of the new federal rules but is limited solely to the effect of the *Tompkins* case on the admissability of evidence and competency of witnesses.

It is to be noted that the Constitutional question raised by the *Tompkins* case and discussed above is present only in cases where the federal courts are bound by the Constitution to apply the substantive law of the states in settling the issues before them. It can be readily seen that in cases where the Federal Government is authorized by the Constitution to apply its own substantive law it may apply its procedural law without the problem of the *Tompkins* case arising. For convenience I have spoken of and will continue to speak of the type of cases where state substantive law must be applied by the federal courts as diversity of citizenship cases.

It is difficult to visualize how the rules governing admissability of evidence and competency of witnesses can have substantive elements so as to violate the Constitutional prohibition enunciated in the *Tompkins* case. However, an examination of the Federal Rules of Civil Procedure[15] and the Federal Rules of Criminal Procedure[16] is advisable to see what problems may be raised.

Section 43(a) of the Federal Rules of Civil Procedure[17] deals with the admissability of evidence and competency of witnesses. This section provides three standards for the admissability of evidence and competency of witnesses, namely: (1) the statutes of the United States (2) the rules of evidence "heretofore applied" in United States courts hearing suits in equity (3) the rules of evidence applicable in courts of general jurisdiction of the state wherein the United States court is held. The standard which admits the evidence is the one that governs. If the Constitutional problem raised in the *Tompkins* case is at all applicable to the question of the admissability of evidence or competency of witnesses, the problem is somewhat relieved by the insertion of the third standard in section 43(a). The Constitutional question is still present, however, when the state rules of evidence excludes a matter but that same matter is admissable under either of the first two standards. The problem is also present if the federal court sits in a state different from the one wherein the cause of action arose. In any event the problem ultimately revolves around the question of whether the rule of evidence involved is one purely procedural in nature or whether it is substantive in nature.

In Franzen v Du Pont De Nemours,[18] the court admitted evidence that was not admissable under the rules of evidence of the state

[15] Supra note (7).
[16] Supra note (8).
[17] Supra note (7).
[18] 51 Fed. Supp. 578, affirmed in 146 Fed. 2d 837 (1944).

where the United States court sat but which was admissable under federal rules. The court in admitting this evidence cited several cases wherein this procedure had been adopted and pointed out that this evidence was not substantive to the extent that the ruling in the *Tompkins* case required him to follow the state rule of evidence. The court in reaching this decision apparently used the method of reasoning and approach toward the problem outlined above. This is shown by the court's statement that the doctrine of the *Tompkins* case was not applicable because the rule of evidence involved there was not substantive to such an extent as to come under that doctrine. The test seems to be then: is the rule of admissability (or of exclusion) of evidence or of the competency of witnesses of a substantive or procedural nature. If the former, the Constitutional infirmity of the *Tompkins* case applies, and the federal court must follow state law on the matter.

It might be asked what would be the result of a situation where none of the standards of 43(a) had ruled on a certain type of evidence. That question involves a problem in the interpretation of 43(a) and not of the effect of the *Tompkins* case. Once a determination had been made the question would still be — has there been an invasion of the substantive law in a subject entirely under state control.

The Federal Rules of Criminal Procedure[19] were adopted about six years after the decision in the *Tompkins* case. These rules are not affected by the *Tompkins* case. They are rules of procedure governing United States courts in conducting trials of cases arising under the statutory law of the United States enacted by Congress persuant to proper Constitutional authorization. These cases are in the same category for our purposes as civil cases involving federal questions and there can be no question of the Constitutional power of Congress to authorize rules of procedure to guide the federal courts in dispatching these cases.

Section 26 of the Federal Rules of Criminal Procedure[20] deals with the competency of witnesses and admissability of evidence and provides that in the absence of federal statutes to the contrary "the principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience," shall apply. The notes of the Advisory Committee on this section of the rules state that the purpose of the section was to carry forward with the principles of Funk v United States[21] and Wolfle v United States.[22] These cases indicate that in the absence of statutes, federal courts in criminal

[19] Supra note (8).
[20] Supra note (8).
[21] 290 U.S. 371 (1933).
[22] 291 U.S. 7 (1934).

cases are not bound by state laws of evidence but are guided by common law principles interpreted in the light of reason and experience. The rule was intended to give the federal courts a flexibiilty in adopting the rules of evidence to meet changing conditions.

This rule differs from the rule governing the admissability of evidence in civil cases in that this contemplates a uniform body of law throughout the states while the rule in civil cases allows a partial conformity to state law.

In summary, the effect of the *Tompkins* case on the admissability of evidence and competency of witnesses is felt only in federal civil cases where jurisdiction is based on diversity of citizenship, and there only in so far as the rules of evidence might be regarded as rules of substantive law.[23]

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[23] I have not discussed the effect of the Conformity Act (formerly 28 U.S.C.A. section 724) because this section has been superseded the new rules and has been omitted from the Code.