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

An interesting question has arisen because of the apparent conflict between the decision in Erie Railroad Co. v. Tompkins and the Federal Rules of Civil Procedure. 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 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. 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.

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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. Illustrative of state cases holding that contributory negligence is a matter of substance are Sanderson v. Chicago, M. & St. P. Ry. Co. and Masello v. Chicago City Ry. Co. 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 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.

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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 been 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

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\(^10\) *Supra*, note 9.


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

of Illinois have established it nor to undermine or destroy it by pro-
cedural requirements."

Thus the sounder rule would seem to be that when federal courts
are acting in states holding the plaintiff responsible for proving him-
self 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 gen-
eral 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 some-
ing 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 com-
mon law, but also create a means of extinguishing such a right.17

When a federal court is faced with this type of statute of limita-
tion, 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. Man-
On the other hand in Haefer v. Herndon, the court is discussing stat-
hattan 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

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
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. 207, 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. 180, 18 S.E. 831 (1929).
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).
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

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\(^{21}\) 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.*, 128 Conn. 507, 1 Atl. (2d) 146 (1938).

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. 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.


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