between the lessor and lessee. Thus distress is in the nature of a hangover, although it may be justified on its own grounds in that it provides an easily workable protection to a particular kind of creditor, and just because it is not available for most creditors is not a complete reason why it should not be available for a particular one.

The rights bestowed upon landlords by distress and lien statutes may appear to work undue hardship on the tenant despite the fact that generally certain property is by statute exempt from distress and execution. The lien of the innkeeper on the personality which the transient brings upon the premises is justifiable on account of the obligation of the innkeeper to take in any traveller who seeks shelter in his establishment and because of the extraordinary responsibility of the innkeeper for the goods of his guest. These reasons, however, do not adequately explain the existence of such liens as those granted other landlords. Whether the lien be one that arises upon a distress for rent or whether it be one that is given by statute, it may be that the lessor is given extraordinary protection because he is considered a peculiar type of creditor, having permitted the tenant to have the use of part or all of his land, a subject which has always been a favorite of the law, and having provided the tenant with one of the primary essentials of life, whether it be a place for a home or a location for his business. A comparison of the landlord's lien with liens based on possession, such as those given the attorney, the warehouseman, and the ship-owner, suggests that the landlord is in a situation analogous to that of one in possession. That is, the landlord is also entitled to protection because the tenant, by placing his chattels on the leased premises, in effect is putting the landlord in possession of the chattels. Furthermore, it appears that the landlord's lien is almost universal, probably on account of this reason. It is found in the Civil Codes of Germany, Switzerland, and France, as well as in the United States and England.

Practice—Federal Rules of Civil Procedure—Pleading of Contributory Negligence—[Federal].—The plaintiff brought an action in the federal district court of Illinois, for injuries received in an automobile accident. The complaint did not have an allegation negativing contributory negligence. The defendant moved to dismiss the complaint on the ground that the decision in Erie R. Co. v. Tompkins made Rule 8(c) of

At common law very little of the tenant's property was exempt from distress for rent. Now, however, in those jurisdictions having statutes, either specific exemptions are set out or the general exemption statutes apply. See Jones, op. cit. supra note 45, at § 563 (3d ed. 1914) and Tiffany, op. cit. supra note 8, at § 328k. For the Illinois exemption statute, see Ill. Rev. Stat. 1937, c. 52, § 13.

Brown, op. cit. supra, note 45, at § 114; Holdsworth, op. cit. supra note 10, at 512.

Unless good reasons are proffered for the existence of the landlord's lien, this protection would seem to be an unfair discrimination among creditors in favor of the landlord. Corn. L. Q. 357 (1917).

One authority defends this added protection given the landlord on the grounds that otherwise the poor would be unable to secure credit and to rent property. Jones, op. cit. supra note 45, at § 540.

German Civil Code, §§ 559-63.


304 U.S. 64 (1938) holding "there is no federal common law" and expressly overruling Swift v. Tyson, 16 Pet. (U.S.) 1 (1842).
the Federal Rules of Civil Procedure inapplicable because the Illinois rule requiring the plaintiff to plead freedom from contributory negligence is one of substantive law. Held, motion sustained. Francis v. Humphrey. In Washington and Georgetown R.R. Co. v. Gladmon, the leading case for the federal rule requiring the defendant to plead and prove contributory negligence, the only law capable of being applied was federal law because the action was brought in the District of Columbia for a tort occurring there. This decision did not decide whether the pleading and proving of contributory negligence is procedural or substantive law. But the Supreme Court and lower federal courts have subsequently applied this rule even though the state rule of pleading contributory negligence where the federal court was sitting was otherwise. If the rule was procedural, the Conformity Act would seem to require the federal courts to follow the state decisions, but since the cases follow the Gladmon ruling without discussing this problem it can be contended that the burden of pleading and proving contributory negligence is by implication substantive law. The Erie doctrine, however, because of the constitutional injunction on the federal courts to apply state substantive law and because Rule 8(c) of the rules of Federal Procedure state that contributory negligence is an affirmative defence, has made it necessary to determine whether the rule of pleading and the generally resulting burden of proving contributory negligence is a rule of substantive or of procedural law.

Because the Supreme Court could adopt only rules of procedure, it would seem that the promulgation of the Federal Rules by the Supreme Court indicates that Rule 8(c) is procedural. Also, after the approval of the Federal Rules, the Supreme Court, in the same term, decided the Erie case; hence it can be contended the Supreme Court did not intend to nullify the rule. Although the court in the instant case relied on Central


3 Calumet Iron and Steel Co. v. Martin, 115 Ill. 358, 368, 3 N.E. 456, 460 (1885).


8 Swift v. Tyson, 16 Pet. (U.S.) 1 (1842); 3 Moore, Federal Practice 1068 (1938); 2 Foster, Federal Practice 880 (1901). See Parramore v. Denver & R.G.W. R. Co., 5 Fed. (2d) 912, 914 (C.C.A. 8th 1925) for a dictum stating that the question of contributory negligence is a question of general law.

9 The Federal Rules are silent on the burden of proof. However, the pleadings usually determine the burden of proof. Thayer, Preliminary Treatise on Evidence at the Common Law 353 (1898). But see, 5 Wigmore, Evidence § 2486 (2d ed. 1923).


11 1 Moore, Federal Practice 571 (1938). The Federal Rules were promulgated on December 20, 1937 and became effective on September 16, 1938. Rule 86 of the Federal Rules of Civil Procedure. The Erie decision was rendered April 25, 1938.
VT. Ry. v. White," which was an action arising under the Federal Employers' Liability Act, the holding in the Central VT. Ry. case involved the burden of proving (not the pleading of) contributory negligence as related to a statute creating a substantive right. A rule of law though normally procedural can be deemed substantive when a statute inherently ties up the procedural aspect with the substantive right. In the absence of a statute, the burden of proving contributory negligence merely settles the procedural question of presenting facts to the court so that the Central VT. Ry. case is not strictly in point.

Where an accident occurs in state 1 and suit is brought in state 2, the general view is that with reference to the pleading and proving of contributory negligence state 2 will apply its own rules. State 2 uses its own rules of procedure because the shifting of the burden of pleading and proving contributory negligence does not abolish any of the substantive rights of the parties, but allocates their duties as to presenting facts. To apply the procedural laws of different jurisdictions would greatly impede the court in the administration of justice. The federal courts therefore when confronted with the problem of deciding whether the pleading and proving of contributory negligence is procedural or not, should approach the question from this point of view. Besides, since the state courts' decisions generally indicate that they consider their own rules as to pleading and proving contributory negligence procedural, as is the case in Illinois, deference for state substantive law under the Erie case could hardly require the application of the state rules on these issues in the federal courts.

12 238 U.S. 507 (1914); cf. Schopp v. Muller Dairies, 1 F. Supp. 50 (N.Y. 1938), where the court relied on the Central VT. Ry case in holding the burden of proof substantive; noted in 87 U. of Pa. L. Rev. 344 (1939). See also 38 Col. L. Rev. 1472 (1938).

13 The argument is used when the statute of limitations is invoked so that a state can limit the time on which an action can be commenced. Goodrich, Conflicts of Laws 202 (2d ed. 1938); 3 Beale, Conflicts of Law 1609 (1935). Cf. Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 341 (1931); St. Louis, I.M. & S. Ry. Co. v. Hambrick, 97 S.W. 1072 (Tex. 1906).


16 In Ginsberg v. Ginsberg, 361 Ill. 499, 507, 198 N.E. 432, 436 (1935), the court said on the issue of determining the burden of proof in wills' cases: "Appellant contends that . . . the constitution would be violated if . . . the burden of proof is held to be put upon the contestants. His argument is that the Civil Practice Act can embrace the subject of procedure alone, and that a change of the burden of proof amounts to a change in the substantive law of wills. . . . The cases relied upon by appellant do not hold that this rule is a part of the substantive law of wills. It is clear that instead it was always a rule of procedure." See also Sackheim v Piqueron, 215 N.Y. 62, 109 N.E. 109 (1915); Stumberg, Conflict of Laws 135 (1937).

17 Stumberg, Conflict of Laws 128 (1937); 3 Beale, Conflict of Laws 1599 (1935).

18 See Ginsberg v. Ginsberg, 361 Ill. 499, 507, 198 N.E. 432, 436 (1935); note 16 supra.