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NOTES

DEVELOPMENTS IN THE DOCTRINE OF *ERIE RAILROAD CO. V. TOMPKINS. I*

Unequivocal as was Mr. Justice Brandeis' opinion in *Erie R. Co. v. Tompkins*¹ in stating the necessity for applying state decisions in federal courts, it left many areas in which the applicability of the rule was doubtful. From what source federal courts should draw their conflict of laws rules; where and how the line between substance and procedure would be drawn; whether and to what extent the doctrine was applicable in equity; to what extent matters not specifically covered by Congressional legislation would be said to arise under the "laws of the United States"; what sorts of pronouncements by state courts would be considered controlling in the federal courts—on all these Mr. Justice Brandeis' opinion shed little light. It is the purpose of this note to consider the developments of the *Erie* decision in each of these areas, tracing the growth of the tendency toward applying the doctrine so as to reach the same result as would have been reached by the courts of the state in which the federal court is sitting.

¹ 304 U.S. 64 (1938).

The developments in the first two of these areas, conflict of laws and substance-procedure, will be discussed in this issue of the *Review*. Discussion of the remaining three matters will appear in the February issue.

CONFLICT OF LAWS

The *Erie* case itself gave no indication of the effect to be given local conflict of laws rules; it simply said that the law of "the" state must control.² The Court applied the commonplace *lex loci delicti* rule without discussion of whether that rule was being used because it was the conflict rule of New York,³ the state in which the district court was sitting, or because it was a rule approved by the federal courts.⁴ One week later, in *Ruhlin v. New York Life Ins. Co.*,⁵ the Court expressly left the problem open. So the lower federal courts, faced with the necessity of applying state substantive law far more often than before, and therefore with an increased number of conflict problems, were left without guidance. Some have, without discussion, applied a generally accepted conflict rule⁶ or have simply stated which substantive law was controlling.⁷ Others have discussed the problem, but the law of the possible states being the same, they found it unnecessary to decide.⁸ Others have applied the conflict rules

² The Rules of Decision Act, Rev. Stat. § 721 (1875), 28 U.S.C.A. § 725 (1928), declares that the laws of the several states shall control, without further specification; the *Erie* case did nothing more to indicate which state was meant in any particular case. The indefinite language of the act might be interpreted as leaving to the federal court the choice of the state whose law was to be applied, thereby short-cutting the problem of whether conflict of laws rules are "substantive law." Congress, the *Tompkins Case*, and the *Conflict of Laws*, 52 Harv. L. Rev. 1002, 1005 (1939).

³ *Fitzpatrick v. Internat'l R. Co.*, 252 N.Y. 127, 169 N.E. 112 (1929).

⁴ *Tompkins*, injured by a train in Pennsylvania, brought suit in a federal district court in New York. In reversing the circuit court of appeals the Supreme Court held, without referring to the New York conflict rule, that the substantive law of Pennsylvania controlled.

⁵ 304 U.S. 202, 208 n. 2 (1938).

⁶ E.g., *Cochran v. M. & M. Transportation Co.*, 112 F. (2d) 241 (C.C.A. 1st 1940) (since accident occurred in Massachusetts, Massachusetts trespasser-on-the-highway doctrine must be applied in accident involving unregistered out-of-state vehicle); *Bissonette v. Nat'l Biscuit Co.*, 100 F. (2d) 1003 (C.C.A. 2d 1939) (New York law controls where lack of due care and consumption of defective bread occurred in New York). That a general rule was followed without reference to state law does not necessarily mean that state law was ignored; the judge deciding the first case cited held in *Sampson v. Channell*, 110 F. (2d) 754 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940), that state conflict rules must control.

⁷ *Lyon v. Mutual Benefit Ass'n*, 305 U.S. 484 (1939); *Mutual Benefit Ass'n v. Bowman*, 304 U.S. 549 (1938), same case on remand, 99 F. (2d) 856 (C.C.A. 8th 1938); *Interstate Transit Lines v. Crane*, 100 F. (2d) 857 (C.C.A. 10th 1939); *Rachlin v. Libby-Owens-Ford*, 96 F. (2d) 597 (C.C.A. 2d 1938).

⁸ *New York Life Ins. Co. v. Waterman*, 104 F. (2d) 990 (C.C.A. 9th 1939), cert. den. 308 U.S. 592 (1939); *Myers v. Ocean Accident & Guaranty Corp.*, 99 F. (2d) 485 (C.C.A. 4th 1938); *Egan Chevrolet Co. v. Bruner*, 102 F. (2d) 373 (C.C.A. 8th 1939).

of the states in which they were sitting,⁹ once with discussion,¹⁰ usually without it.

At last, in *Klaxon Co. v. Stentor Electric Mfg. Co.*,¹¹ the Supreme Court has resolved the question: a federal court must apply the conflict rules of the state in which it sits. It was error for the district court, sitting in Delaware, to apply the New York rule as to interest on a judgment without considering whether or not the state courts of Delaware would have applied the New York rule.¹² There was no attempt by the Court to limit the holding to the facts nor to distinguish among different types of conflict of laws situations. The case makes it clear that the law of the state in which the court sits must first be looked to, and that a reference to another state must be controlled by that law.¹³

At least two possible qualifications remain. In the first place, a federal court probably need not apply a state rule which simply has to do with the jurisdiction of the state courts. In *Stephenson v. Grand Trunk R. Co.*¹⁴ the federal court in Illinois heard an action for wrongful death occurring in Michigan, even though an Illinois statute provided that, where service of process could be obtained elsewhere, no suit should be brought in Illinois for a wrongful death which had occurred outside the state.¹⁵ The court viewed the matter as relating to the jurisdiction of the federal courts—a matter exclusively controlled by Con-

⁹ *Ringling Bros.-Barnum & Bailey v. Olvera*, 119 F. (2d) 584 (C.C.A. 9th 1941); *First Nat'l Bank v. Mayor of Baltimore*, 108 F. (2d) 600 (C.C.A. 4th 1940); *Schram v. Smith*, 97 F. (2d) 662 (C.C.A. 9th 1938).

¹⁰ *Sampson v. Channell*, 110 F. (2d) 754 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940).

¹¹ 313 U.S. 487 (1941).

¹² The Court was also supported by the fact that it is provided by statute, Rev. Stat. § 966 (1875), 28 U.S.C.A. § 811 (1928), that federal courts shall follow the same rule as to interest on judgments as do the courts of the state in which they sit.

In a sense there is a *renvoi* problem involved. It might be argued that if the Delaware law calls the right to interest on judgment procedural, the law of the forum controls, and, the forum being the federal court, the federal rule as to interest on judgments applies, which refers in turn to the state rule. It might also seem there is a *renvoi* in allowing the rule of the state court to refer to the law of another state; but there the reference would usually terminate. To "refuse" such a *renvoi* would mean that the federal court would apply local law to all cases.

¹³ Thus the federal court reaches the same result as would the courts of the state in which it is sitting. The desirability of this result was clearly discussed in *Sampson v. Channell*, 110 F. (2d) 754 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940). In that case the court recognized that however the Massachusetts federal court decided the question of burden of proof of contributory negligence in a case arising out of an accident in Maine, there would necessarily be a conflict, either with the conclusion a Maine court would reach, or with that a Massachusetts court would reach, in a suit based on the same accident.

¹⁴ 110 F. (2d) 401 (C.C.A. 7th 1940), cert. granted 310 U.S. 623 (1940), cert. dismissed 311 U.S. 720 (1940).

¹⁵ Ill. Rev. Stat. (1941) c. 70, § 2. Cf. *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142 (1907), holding a similar Ohio statute constitutional.

gress and the Constitution.¹⁶ Again, in *Stepp v. Employers' Liability Assurance Corp.*,¹⁷ the federal court in Texas heard an action based on the New Mexico Workmen's Compensation Act, although the Texas state courts had previously refused to hear a compensation action based on a similar foreign statute, because it was not adapted to the processes of the Texas courts.¹⁸

These cases were both decided before the *Klaxon* case, and *Griffin v. McCoach*,¹⁹ decided by the Court the same day as the *Klaxon* case, casts some doubt on them. In the *Griffin* case, it was held that a Texas "public policy," forbidding recovery under a foreign insurance policy by one who has no insurable interest under Texas law, must be given effect by the federal courts in Texas. The "jurisdiction" cases can also be stated in terms of "public policy"; as a matter of fact, in one of the cases mentioned above, the federal court dealt with the Texas rule as a matter of "public policy," stating that Texas public policy was not binding on the federal courts.²⁰ The *Griffin* case, however, can hardly be considered as binding the federal courts to every state rule which can conceivably be stated as one of "public policy." There is a considerable difference between a rule having to do with the safety of the lives of Texas citizens, and one designed to free the courts from unfamiliar law and to prevent the crowding of the docket. Moreover, the former type of rule presumably involves an adjudication of the merits of a claim;²¹ the latter is simply a refusal to hear the

¹⁶ See *Overfield v. Pennroad Corp.*, 113 F. (2d) 6 (C.C.A. 3d 1940) (state policy of not interfering in internal management of foreign corporation merely a matter of jurisdiction of state courts). Contra: *Gallagher v. Florida East Coast R. Co.*, 196 Fed. 1000 (D.C. N.Y. 1912) (applying local state decision refusing to hear case under foreign death statute). The principle that the laws of a state may not limit the jurisdiction of federal courts was applied to state laws limiting actions to state courts. *Suydam v. Broadnax*, 14 Pet. (U.S.) 67 (1840); *Railway Co. v. Whitton*, 13 Wall. (U.S.) 270 (1871). It has been extended to state laws forbidding foreign corporations which are not complying with certain conditions from suing in the state. *David Lupton's Sons Co. v. Auto Club of America*, 225 U.S. 489 (1912); *Metropolitan Life Ins. Co. v. Kane*, 117 F. (2d) 398 (C.C.A. 7th 1941). Cf. Rule 17(b), Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941).

¹⁷ 30 F. Supp. 558 (Tex. 1939); see *Franzen v. Du Pont De Nemours Co.*, 36 F. Supp. 375, 377-78 (N.J. 1941).

¹⁸ *Johnson v. Employers Liability Assurance Corp.*, 99 S.W. (2d) 979 (Tex. Civ. App. 1936); see *Mexican Nat'l R. Co. v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896). But there is an intimation in *Stepp v. Employers' Liability Assurance Corp.*, 30 F. Supp. 558 (Tex. 1939), that the federal court would have followed the state policy if it had been embodied in a state statute.

¹⁹ 313 U.S. 498 (1941).

²⁰ *Stepp v. Employers' Liability Assurance Corp.*, 30 F. Supp. 558 (Tex. 1939).

²¹ *Roller v. Murray*, 71 W. Va. 161, 76 S.E. 172 (1912) (previous Virginia action concerning West Virginia lands, in which contract was refused enforcement as champertous, bars action in West Virginia, which had no applicable policy against champerty); cf. *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (though Missouri court ignored Mississippi-law governing the contract, Mississippi court must give Missouri judgment full faith and credit).

Of course, not every denial of enforcement of a right of action is an adjudication on the merits. For instance, a suit dismissed on the ground that the action is barred by the local

case, leaving the matter open for suit elsewhere.²² In matters on which the state court attempts no adjudication, a federal court operating under the new Federal Rules should feel free to disregard considerations peculiar to the state's system of court organization and procedure.

In the second place, a federal court will not apply a state conflict of laws rule which is unconstitutional.²³ As far as present Supreme Court decisions go, however, it seems that the importance of this exception is negligible. In only a very few types of cases has the Court subjected state conflict rules to constitutional limitations.²⁴ Nor will the possibility that this reluctance of the Court has been due primarily to an unwillingness to undertake the task of administration be likely to change the matter. The mere fact that the constitutional questions will now be raised in federal rather than in state courts will not take the ultimate burden off the Supreme Court.²⁵

Moreover, recent decisions of the Court, such as the *Griffin* case²⁶ itself, indi-

statute of limitations may be brought in another state with a longer period of limitations, the statute of limitations being regarded as merely affecting the remedy. *Warner v. Buffalo Drydock Co.*, 67 F. (2d) 540 (C.C.A. 2d 1933), cert. den. sub nom. *Buffalo Drydock Co. v. Salkeld*, 291 U.S. 678 (1934). Refusal to enforce a cause of action, because of a public policy against gambling, champerty, or the enforcement of insurance contracts where there is no insurable interest, seems much like "barring the remedy" under the statute of limitations; and the point not having been clearly decided, it is possible that it would be so treated. 9 Univ. Chi. L. Rev. 141 (1941), noting *Griffin v. McCoach*, 313 U.S. 498 (1941). But if in these latter cases the refusal to enforce does not amount to *res judicata*, then may it not be argued that for the federal courts to take account of the state public policy would be to permit the states to limit the jurisdiction of the federal courts? See note 16 supra (cases in which state refusal to enforce is based on a policy having nothing to do with court organization or practice).

²² See *Slater v. Mexican Nat'l R. Co.*, 194 U.S. 120, 129 (1904).

²³ See *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Sampson v. Channell*, 110 F. (2d) 754, 759, 761 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940). In *Griffin v. McCoach*, 116 F. (2d) 261 (C.C.A. 5th 1940), the circuit court of appeals held that to apply the Texas public policy to a contract made in New York would be unconstitutional. The Supreme Court reversed, 313 U.S. 498 (1941), not on the ground that the lower court should not have considered the constitutionality of the rule, but rather on the ground that the particular rule was constitutional.

²⁴ *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (insurance contract); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914) (insurance contract); *Bradford v. Clapper*, 286 U.S. 145 (1932) (workmen's compensation); *Broderick v. Rosner*, 294 U.S. 629 (1935) (receivership of foreign corporation); *Royal Arcanum v. Green*, 237 U.S. 531 (1915) (interpretation of charter of mutual benefit society); cf. *Yarborough v. Yarborough*, 290 U.S. 202 (1933) (effect to be given foreign divorce decree fixing permanent alimony).

²⁵ For a while, at least, the decision in the *Klaxon* case will put an increased burden on the Court. Before the *Klaxon* decision, petitions for certiorari coming up from state courts could simply be denied. Now, conflicts among circuits and with state courts (not feeling bound by lower federal court decisions) will make it much more difficult to deny certiorari. It is conceivable that, faced with the necessity of considering the cases in any event, the Court would be willing to extend constitutional limitations. But see notes 26, 27 infra.

²⁶ *Griffin v. McCoach*, 313 U.S. 498 (1941).

cate that the reluctance of the Court to apply constitutional limitations in this field has been due not so much to the administrative difficulty as to a strong desire to allow the states to make their own determinations in these matters.²⁷ One may urge that uniformity in conflict of laws rules is desirable; that it has become even more desirable since the *Erie* case removed one of the hopes of uniformity in substantive matters;²⁸ that, now that the *Klaxon* decision has broken down the uniformity even among the federal courts on conflict rules,²⁹ uniformity should be attained through the imposition of constitutional limitations. But it seems that the argument, for the near future at least, must remain an argument.

SUBSTANCE AND PROCEDURE

The *Erie* rule requires only that the state law shall apply as to matters of substantive law; as to procedural matters the rule of the federal court controls.³⁰ While it is true that even "procedural" matters sometimes affect the outcome of the case, the application by federal courts of their own procedural rules does not often mean that the result reached by the federal court is different from the result which would have been reached by the local state courts. These "procedural" rules are largely concerned with "practice," and mean no more than that counsel must conduct the litigation in a given way; assuming that counsel does so, the result of the litigation is the same as it would have been under some other rule of practice.³¹ It is only in cases in which counsel have

²⁷ See *Alaska Packers Ass'n v. Industrial Accident Com'n*, 294 U.S. 532 (1935) (state with governmental interest in workman may apply its own compensation act, though another compensation act was adopted by contract of employment). Perhaps the restriction in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), that a state having nothing to do with the transaction may not apply its own law, is the only remaining one; see *Griffin v. McCoach*, 313 U.S. 498, 507 (1941).

²⁸ For the advantages of uniformity gained by the *Swift v. Tyson* doctrine, consult Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A.J. 433, 438 (1932).

²⁹ There was also the possibility that uniform conflict of laws rules applied by the federal courts might by their persuasive force influence the state courts to follow them. But in *Erie R. Co. v. Tompkins* it seems to be accepted that this centralizing force is of insufficient value to outweigh the disadvantage of discrepancies between federal and state courts.

³⁰ Where the federal rule itself refers to state law, however, it is immaterial for this purpose whether the rule is substantive or procedural; e.g., Rev. Stat. § 966 (1875), 28 U.S.C.A. § 811 (1928) (right to interest on judgment controlled by state law). It has also been suggested that the Conformity Act, Rev. Stat. § 914 (1875), 28 U.S.C.A. § 724 (1928), is still in force except as to rules specifically laid down in the Federal Rules. Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 Ill. L. Rev. 271 (1939); *Stephenson v. Grand Trunk Western R. Co.*, 110 F. (2d) 401, 407 (C.C.A. 7th 1940), cert. granted 310 U.S. 623 (1940), cert. dismissed 311 U.S. 720 (1940) (semble) (must follow state rule of practice that one valid count among several will support verdict in negligence case). But consult Advisory Committee, Note 1 on Rule 2, Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941), and 1 Moore and Friedman, *Moore's Federal Practice* § 1.02, p. 36 (1938), to the effect that the Conformity Act is completely superseded.

³¹ This does not mean that there may not be advantages in getting a case before a federal court. There are still factors such as different judges, different juries, and more convenient

misunderstood the rule of practice, or have failed to anticipate developments at the trial, that its application leads to a result different from that which would have been reached by the local state court.

There are of course borderline cases in which it is not so clear that a mere adjustment by counsel is involved; here a troublesome problem of characterization arises.³² Various and sometimes contradictory factors have played their part in causing the line to be drawn at one place or another in applying the *Erie* case: weight of the *Erie* trend toward getting the same result that a local state court would get; analogies to the substance-procedure characterizations made in other fields; insistence on maintaining the integrity of the Federal Rules of Civil Procedure; desire of federal courts to follow their own ways;³³ and consideration of the way in which the particular rule is characterized by the local state courts. Without attempting to solve all the cases, it is suggested that the most helpful criterion is this: if, assuming that counsel properly apply the federal rule, the result of the litigation is likely to be the same as that which would be reached by the application of the state rule, then the matter should be considered procedural, and the federal rule applied. If, on the other hand, even though counsel properly apply the federal rule, the federal court will probably reach a result different from that which would be reached by application of the state rule, the matter should be considered substantive. Emphasizing this consideration is most consistent with the trend of the *Erie* developments toward uniformity of result whether the suit is brought in the federal or state court. Characterizations made in other fields, being made for different purposes, provide nothing more than analogies;³⁴ and there seems to be no particular sanctity in the integrity of the Federal Rules as such.

procedure. One author, writing while *Swift v. Tyson* was still law, apparently considered these matters more important than the *Swift v. Tyson* doctrine itself. Parker, *The Federal Jurisdiction and Recent Attacks upon It*, 18 A.B.A.J. 433, 437-38 (1932). These differences remain, no matter where the substance-procedure line is drawn.

³² Consult Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 Ill. L. Rev. 271 (1939).

³³ Compare the like tendency in the conflict of laws, note 34 *infra*.

³⁴ Moore has used the analogy of the characterization made in the conflict of laws. 1 Moore and Friedman, *Moore's Federal Practice* § 3.06, p. 243 (1938) (what constitutes commencement of action to stop running of state statute of limitations, note 60 *infra*); 3 *ibid.*, at § 43.02, p. 3071 (burden of proof, note 52 *infra*).

The same forces which motivate state courts in conflict of laws cases to apply their own rules, and therefore to label the matter procedural, are also present with federal courts under the *Erie* rule, but there are important differences which should cause more matters to be included in the field of substance under the rule. Since a federal court administers justice in the same territory as a state court, there is little or no difference in the expense and difficulty of maintaining a lawsuit at a distance and in the possibility of obtaining service of process; and if suit has been brought in a state court the defendant may be able to remove to the federal court. Thus there is freer choice between federal and state courts, and divergence in results should be scrutinized more closely. Also, a federal court always refers a "substantive" matter

It has been said rather loosely that the *Erie* case and the Federal Rules taken together "have, legally speaking, turned the world upside down";³⁵ by which it is meant that the former practice of following federal rules of substantive law³⁶ while employing state procedure "as near as may be,"³⁷ has been completely reversed. While this is in a measure true, state statutes and rules of property and federal questions aside, it does not follow that on every question of "general law" on which the federal courts formerly applied their own rule they now, under the *Erie* case, automatically apply the state law. The former effect of a holding that a matter was not "procedural" was that the federal court applied a rule more familiar and congenial to it. Now the effect of a similar characterization is that they apply a less familiar rule. Likewise, the former effect of considering a matter procedural was that the state rule was applied. In some instances it may be in accordance with the policy of the *Erie* decision still to apply the state rule, but to do so requires that it now be labeled substantive.

A superficially attractive policy to follow in characterizing a rule is to apply the same label as is used by the local state courts; this might be said to be demanded by the *Erie* case itself.³⁸ However, the unity demanded by the *Erie* rule is that of results, not terminology.³⁹

in the first instance to the law of the same state; in conflict of laws, the result of calling a matter "substantive" is that it may be referred to the law of any one of forty-seven other states. The inconvenience being much less in the former case, it should be much easier to label a matter "substantive." Finally, in the relation between state and federal courts one should not find the same problem of independent sovereigns jealous of their own ways which is found in the conflict of laws. The federal courts are now considered to be "co-ordinate" with state courts in fields not covered by Congress or the Constitution, adjusting themselves to achieve a minimum of friction. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941).

Moore, in arguing that burden of proof under the *Erie* case is procedural, has employed the even more dubious analogy to characterizations used in deciding whether a statute changing the burden of proof may be retroactively applied. 3 Moore and Friedman, *Moore's Federal Practice* § 43.02, p. 3071 n. 37 (1938). From the mere fact that one has no such vested right in burden of proof as to prevent the retroactive application of a statute it hardly follows that the federal courts, attempting to reach the same result as the local state court, should also consider the matter "procedural." Compare *Funkhouser v. Preston Co.*, 290 U.S. 163 (1933) (state court may apply retroactively a statute allowing interest as damages) with *Mason v. United States*, 260 U.S. 545 (1923) (federal court of equity must apply state rule as to measure of damages); note 69 *infra*.

³⁵ *Francis v. Humphrey*, 25 F. Supp. 1, 3 (Ill. 1938).

³⁶ *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842).

³⁷ The Conformity Act, Rev. Stat. § 914 (1875), 28 U.S.C.A. § 724 (1928).

³⁸ This course was followed in *MacDonald v. Central Vermont R., Inc.*, 31 F. Supp. 298 (Conn. 1940) (burden of proof of contributory negligence), and, it seems, in *Francis v. Humphrey*, 25 F. Supp. 1 (Ill. 1938). But in *Sampson v. Channell*, 110 F. (2d) 754 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940), burden of proof was held to be substantive so that state law applied, though by the state conflict of laws rule it was characterized as procedural. Cf. also *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), p. 115 *supra*.

³⁹ No state court is faced with the problem of applying the *Erie* rule; thus a state characterization must be for other purposes, and may be used only as an analogy. See note 34 *supra*.

By far the most serious obstacle in the way of analyzing substance-procedure problems under the *Erie* case so as to obtain the same result in the federal court as in the local state courts is that created by the Federal Rules of Civil Procedure.⁴⁰ A number of the Rules have, under the analysis here pursued, a substantive aspect. Federal courts are bound to feel, however, that, in view of their promulgation by the Supreme Court, the Rules should be applied. It has been argued that the Supreme Court, in incorporating a matter in the Rules, has conclusively determined it to be procedural,⁴¹ for necessarily the construction of the Rules involved an interpretation of the proviso in the enabling act that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."⁴² But the interpretation of the enabling act, made while *Swift v. Tyson* was still law, is not necessarily binding under the new order of the *Erie* rule. The *Erie* case had not even been argued at the time the Rules were adopted,⁴³ and there is little indication that the Supreme Court had in mind the abrupt change to be made.⁴⁴ Nor has it seemed likely that the Court would consider its statements in the Rules, made without the benefit of detailed case-by-case consideration, as its final word on the subject. Consequently lower federal courts have felt that the question of whether some of the Rules must not yield to state law was open for consideration.⁴⁵

The argument that the Supreme Court has adopted the Rules as they stand is not the only factor tending to prevent departure from any one of them. There is also a strong feeling that the unity and symmetry of the Rules must be preserved entire.⁴⁶ It has been suggested that the Rules should yield only to a

⁴⁰ 28 U.S.C.A. foll. § 723c (1941).

⁴¹ *Kellman v. Stoltz*, 1 Fed. Rules Dec. 726 (Iowa 1941); *Summers v. Hearst*, 23 F. Supp. 986 (N.Y. 1938) (semble).

⁴² 48 Stat. 1064 (1934), 28 U.S.C.A. § 723b (1941). It can also be argued that even though certain matters in the Rules are substantive, they simply incorporate the previously existing federal law, and therefore do not, contrary to the enabling act, change substantive rights. This argument, however, assumes that the Rules have the force of statute, and that Congress may enact substantive rules to be applied in the federal courts; but the *Erie* case declares that this would be unconstitutional. Moreover, by the time the Rules went into effect, the substantive rights in federal courts were those existing under the *Erie* case. Note 43 *infra*.

⁴³ The Federal Rules were adopted by the Supreme Court on Dec. 20, 1937, were submitted to Congress Jan. 3, 1938, and went into effect Sept. 16, 1938. The *Erie* case was decided April 25, 1938.

⁴⁴ The refusal of Mr. Justice Brandeis, who wrote the opinion in the *Erie* case, to sign the Federal Rules might, however, be taken to indicate otherwise. Moreover, Mr. Justice Black, dissenting in *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 172 (1938), two months before the decision in the *Erie* case, advocated following the state rule as to the effect of a presumption.

⁴⁵ Cases cited notes 52, 59 *infra*; consult Clark, *Procedural Aspects of the New State Independence*, 8 Geo. Wash. L. Rev. 1230, 1232 (1940). But see *Sampson v. Channell*, 110 F. (2d) 754, 757 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940).

⁴⁶ Clark, *op. cit. supra* note 45; Clark, *The Tompkins Case and the Federal Rules*, 1 Fed. Rules Dec. 417 (1940).

clearly expressed and important state policy;⁴⁷ this, however, regards the matter more as a struggle between courts, without taking sufficient account of the effect of the Rule on the rights of litigants. The necessity for certainty in procedural rules is, of course, another argument in favor of maintaining the Rules intact, but since it is everywhere admitted that on "substantive" matters contained in the Rules the state law must control, the element of uncertainty will be present until the characterization problem has been resolved.

One of the chief fields of contention has been the requirement of Rule 8(c) of the Federal Rules that a defendant plead affirmatively contributory negligence. Some courts have held that the rule is one of pleading only, having no effect on the burden of proof.⁴⁸ Under this interpretation the rule is procedural, since for this purpose it is important only that counsel know which party is expected to raise the issue; thus burden of proof can be determined according to the state rule without any effect on the Federal Rules.⁴⁹ However, this separation of burden of pleading and burden of proof not only removes the reason for the Rule as to burden of pleading, but may lay a trap for counsel.⁵⁰ Other courts have held that the Rule includes both burden of pleading and burden of proof,⁵¹ but not all of these have held that the Rule must yield to the local state law.⁵²

The state rule is now followed as to burden of proof in general.⁵³ For in-

⁴⁷ Clark, *The Tompkins Case and the Federal Rules*, 1 Fed. Rules Dec. 417, 422 (1940).

⁴⁸ *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C.C.A. 8th 1941); *Sampson v. Chanell*, 110 F. (2d) 754 (C.C.A. 1st 1940), cert. den. 310 U.S. 650 (1940). These courts relied upon the facts that the Rule is in a section having to do with pleading and motions, and that it in terms requires only the pleading of contributory negligence.

⁴⁹ This interpretation has been advocated on the ground that it would render unnecessary a determination of the validity of Rule 8 (c). Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 Ill. L. Rev. 271, 288 (1939).

⁵⁰ Clark, *The Tompkins Case and the Federal Rules*, 1 Fed. Rules Dec. 417, 419 n. 7 (1940).

⁵¹ *Kellman v. Stoltz*, 1 Fed. Rules Dec. 726 (Iowa 1941); *McDonald v. Central Vermont R., Inc.*, 31 F. Supp. 298 (Conn. 1940); *Francis v. Humphrey*, 25 F. Supp. 1 (Ill. 1938); 1 Moore and Friedman, *Moore's Federal Practice* § 8.10, p. 570 (1938); Clark, *op. cit. supra* note 50. These authorities argue that according to the terms of the Rule contributory negligence is an affirmative defense, and that there is a close connection between burden of pleading and burden of proof.

⁵² Federal Rule must yield to local law: *Francis v. Humphrey*, 25 F. Supp. 1 (Ill. 1938). Contra: *McDonald v. Central Vermont R., Inc.*, 31 F. Supp. 298 (Conn. 1940) (local state court called its rule procedural). In *Kellman v. Stoltz*, 1 Fed. Rules Dec. 726 (Iowa 1941), it was held that in Rule 8(c) the Supreme Court had conclusively determined that the burden of proof of contributory negligence is procedural; but in *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C.C.A. 8th 1941), decided one month before *Kellman v. Stoltz*, but not considered in it, the circuit court of appeals in a case on appeal from the same Iowa federal court held that the burden of proof of contributory negligence is a substantive matter on which state law must control.

⁵³ *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939); *Rast v. Mutual Life Ins. Co. of New York*, 112 F. (2d) 769 (C.C.A. 4th 1940); *Aetna Life Ins. Co. v. Conway*, 102 F. (2d) 743 (C.C.A. 10th 1939); *Carter Oil Co. v. Mitchell*, 100 F. (2d) 945 (C.C.A. 10th 1939). But see

stance, the Supreme Court, in a recent case involving title to land, has held that the state rule as to the burden of proof must be applied.⁵⁴ In the burden of proof cases, there is sometimes the argument that the burden of proof follows the cause of action; but state rules are also applied as to *res ipsa loquitur*⁵⁵ and presumptions,⁵⁶ to which this argument is inapplicable. The likelihood that in some cases these matters will affect the outcome of the litigation, despite the way in which counsel conduct the case, makes it desirable to call these things substantive in order to reach the same result that a state court would reach.⁵⁷ The fact that a Federal Rule may be involved should make little difference, as the inconvenience of looking to a state rule is slight in this case.

Rule 8(c) is not the only rule with substantive aspects.⁵⁸ Rule 3 provides that an action is commenced by the filing of a complaint; this has the effect of stop-

Guardian Life Ins. Co. of America v. Clum, 106 F. (2d) 592, 595 (C.C.A. 3d 1939), cert. den. 309 U.S. 666 (1940).

⁵⁴ *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). The court held that the Texas rule, allocating the burden of proof that the holder of the record legal title was not a bona fide purchaser so as to cut off an equitable claim, was a "valuable assurance in favor of title." The Court relied in part on the case of *Central Vermont R. Co. v. White*, 238 U.S. 507 (1915), in which it was held that in an action under the Federal Employers' Liability Act in a state court the federal rule of burden of proof of contributory negligence must be applied. That case may have been so decided because the Supreme Court considered that in Vermont the burden of proof was not the result of a procedural rule, but followed a part of plaintiff's "cause of action." *Ibid.*, at 512. But cf. *Pariso v. Towse*, 45 F. (2d) 962, 964 (C.C.A. 2d 1930): in following a state statute the federal court must also follow the "procedure" (as to burden of proof) adopted by the state court in its administration.

⁵⁵ *Sierocinski v. Du Pont De Nemours Co.*, 118 F. (2d) 531 (C.C.A. 3d 1941); *Martin & Co. v. Cobb*, 110 F. (2d) 159 (C.C.A. 8th 1940); *Liggett & Myers Tobacco Co. v. De Lape*, 109 F. (2d) 598 (C.C.A. 9th 1940); *Allison v. Great A. & P. Tea Co.*, 99 F. (2d) 507 (C.C.A. 4th 1938); *Coca-Cola Bottling Co. of Henderson v. Munn*, 99 F. (2d) 190 (C.C.A. 4th 1938) (refers also to Conformity Act); see *Hagan & Cushing Co. v. Washington Power Co.*, 99 F. (2d) 614 (C.C.A. 9th 1938).

⁵⁶ *Montgomery v. Hutchins*, 118 F. (2d) 661 (C.C.A. 9th 1941); *Sierocinski v. Du Pont De Nemours Co.*, 118 F. (2d) 531 (C.C.A. 3d 1941); *Peterson v. Sheridan*, 115 F. (2d) 121 (C.C.A. 8th 1940); *Rast v. Mutual Life Ins. Co. of New York*, 112 F. (2d) 769 (C.C.A. 4th 1940); *Stephenson v. Grand Trunk Western R. Co.*, 110 F. (2d) 401, 410 (C.C.A. 7th 1940), cert. granted 310 U.S. 623 (1940), cert. dismissed 311 U.S. 720 (1940); *Equitable Life Assurance Society v. McDonald*, 96 F. (2d) 437 (C.C.A. 9th 1938), cert. den. 305 U.S. 624 (1938).

⁵⁷ Perhaps it is on occasion questionable whether the difference in rules has such an effect, however. A federal court in Iowa must now instruct the jury that the burden of proof as to contributory negligence is on the plaintiff, *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C.C.A. 8th 1941), but that there is a presumption that he used due care, even though there is no evidence on the issue in his favor and some against him. *Peterson v. Sheridan*, 115 F. (2d) 121 (C.C.A. 8th 1940). Here the burden of proof and the presumption practically cancel each other.

⁵⁸ Rule 23(b), with regard to stockholders' derivative suits, is perhaps an even more outstanding case; but consideration of that rule is reserved for a later discussion, dealing more particularly with equity.

ping the running of a state statute of limitations. In the single case in which the point has arisen, the rule was followed, even though service of process was not made within the time required by the state statute, and the period of limitation had meanwhile run.⁵⁹ But it would seem that the statute of limitations, as to which the state law undoubtedly controls, is itself a matter of giving notice, guarding against harassing the defendant with a stale claim. To the defendant it can make little difference whether the complaint has been filed but not served, or whether it simply has not been filed. The state rule as to serving of the complaint is just as important to him as is the state statute of limitations.⁶⁰

Another rule affecting the running of state statutes of limitations is Rule 15(c), providing that if the claim or defense asserted in an amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," the amendment relates back to the date of the original pleading. Despite the broad language purposely⁶¹ used by the Rule in specifying what sort of claims shall relate back, it has been held that if the claim in the amendment states a new "cause of action" it will not relate back, state law being used to determine whether the amendment constituted a new "cause of action."⁶² Since this Rule is one designed to cure errors of counsel, the assumption that counsel has foreseen the developments of the case and has correctly applied the Federal Rule is scarcely applicable in determining whether or not this is merely a rule of practice. If federal courts follow a broad, uniform interpretation of this Rule, there will be differences between the state and federal courts in determining whether a claim stated in an amended pleading is barred by the statute of limitations, and the outcome of the case will certainly be affected. But if narrower, state "cause of action" concepts are allowed to restrict this rule, it may become necessary for counsel to plead theories of re-

⁵⁹ *Gallagher v. Carroll*, 27 F. Supp. 568 (N.Y. 1939).

⁶⁰ Moore has suggested, using the analogy of decisions in the field of conflict of laws, that only the period of limitations is the substantive part of a statute of limitations, while the method by which the running of the statute is halted is procedural. 1 Moore and Friedman, *Moore's Federal Practice* § 3.06 (1938), note 34 *supra*. But in *Michigan Ins. Bank v. Eldred*, 130 U.S. 693 (1889) (considering situation before Conformity Act), the federal court applied the requirement of service along with the state statute of limitations. See also *Fearing v. Glenn*, 73 Fed. 116 (C.C.A. 2d 1896) (because Rhode Island statute of limitations applicable in New York, Rhode Island rule as to commencement of action also applied in New York). The Advisory Committee considered that the matter was left open. Advisory Committee, Note 4 on Rule 3, *Federal Rules of Civil Procedure*, 28 U.S.C.A. foll. § 723(c) (1941).

⁶¹ 1 Moore and Friedman, *Moore's Federal Practice* § 15.08 (1938); *Sunderland*, *The New Federal Rules*, 45 W. Va. L. Q. 5, 15 (1938).

⁶² *Whitham Construction Co. v. Remer*, 105 F. (2d) 371 (C.C.A. 10th 1939) (state decision that administrator's action for wrongful death is not *res judicata* on the survival of deceased's tort claims, determines that amendment claiming survival of tort does not relate back in wrongful death action); cf. *Kansas Gas & Electric Co. v. Evans*, 100 F. (2d) 549 (C.C.A. 10th 1938), cert. den. 306 U.S. 665 (1939) (before Rules effective). But see *White v. Holland Furnace Co.*, 31 F. Supp. 32 (Ohio 1939); *Perry v. Southern R. Co.*, 29 F. Supp. 1006 (Tenn. 1939), app. dismissed 114 F. (2d) 368 (C.C.A. 6th 1940).

covery and of defense in the original pleadings, while the Rules themselves require only a simple narrative statement of the grounds of the claim,⁶³ and a broad interpretation has generally been given to the term "cause of action" in the federal courts.⁶⁴ Furthermore, provisions in the Rules for pre-trial conference⁶⁵ and for liberal deposition and discovery practice⁶⁶ give opposing counsel a greater opportunity to know the facts and possible claims, so that there is less chance of surprise by amendment to the pleadings. Thus the relation of Rule 15(c) to others of the Federal Rules and the inconvenience of allowing it to be controlled by state law will probably make it more desirable to characterize the Rule as "procedural" in spite of its substantive aspects.

Rule 13(a), making compulsory any counterclaim arising out of the transaction or occurrence which is the subject matter of the opposing claim, may make a judgment in the federal court *res judicata* as to issues which would not have been foreclosed by a state court's judgment in the same action. While this point has not yet been litigated as to a matter governed by the Rules,⁶⁷ it seems that the Rule should be applied. Though *res judicata* is certainly a rule of substantive law, in the sense that the same judgment must be given the same effect in both state and federal court, each court should be able to decide for itself how many matters should be brought before it in a particular action. A compulsory counterclaim seems to be a matter which counsel familiar with the Rule should be able to keep from prejudicing the rights of his client.

The measure of damages is clearly a matter of substantive law in which state law controls;⁶⁸ in many cases under the *Erie* rule the state measure of damages has been applied.⁶⁹ But in two cases involving damages recoverable on an in-

⁶³ 1 Moore and Friedman, *Moore's Federal Practice* § 8.07 (1938). ⁶⁴ *Ibid.*, at § 2.04.

⁶⁵ Rule 16, Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941).

⁶⁶ Rules 26-37, Federal Rules of Civil Procedure, 28 U.S.C.A. foll. § 723c (1941).

⁶⁷ See *Coos Bay Lumber Co. v. Collier*, 104 F. (2d) 722, 725 (C.C.A. 9th 1939) (question not decided, as federal and state rules then in accord); cf. *Farrington v. Stoddard*, 115 F. (2d) 96 (C.C.A. 1st 1940) (joinder of claims; follows state rule of no mandatory joinder of action for death damages and for tort liability from same accident).

⁶⁸ State statutes fixing the measure of damages were applied in federal courts prior to the *Erie* case. *Mason v. United States*, 260 U.S. 545 (1923).

⁶⁹ *City of Texarkana v. Arkansas Louisiana Gas Co.*, 118 F. (2d) 289 (C.C.A. 5th 1941); *Grand Trunk Western R. Co. v. Nelson Co.*, 116 F. (2d) 823 (C.C.A. 6th 1941), rehearing den. 118 F. (2d) 252 (C.C.A. 6th 1941); *New York Life Ins. Co. v. Griesedieck*, 116 F. (2d) 559 (C.C.A. 8th 1941), cert. den. 312 U.S. 704 (1941); *Prudential Ins. Co. of America v. Land Estates*, 110 F. (2d) 617 (C.C.A. 2d 1940); *Land Oberoesterreich v. Gude*, 109 F. (2d) 635 (C.C.A. 2d 1940), cert. den. 311 U.S. 670 (1940); *American Optometric Ass'n v. Ritholz*, 101 F. (2d) 883 (C.C.A. 7th 1939), cert. den. 307 U.S. 647 (1939); *Small v. Kiel*, 101 F. (2d) 444 (C.C.A. 8th 1939); *Bissonette v. Nat'l Biscuit Co.*, 100 F. (2d) 1003 (C.C.A. 2d 1939); *Brabham v. Mississippi*, 97 F. (2d) 251 (C.C.A. 5th 1938), cert. den. 305 U.S. 636 (1938); cf. *Six Companies v. Joint Highway Dist.*, 311 U.S. 180 (1940) (effect to be given liquidated damages clause). But compare the treatment of measure of damages in the field of retroactive laws, *Funkhouser v. Preston Co.*, 290 U.S. 163 (1933) (measure of damages relates only to remedy); cf. note 34 supra.

junction bond⁷⁰ and another on costs recoverable in a foreclosure of tax liens,⁷¹ the state law was held not to apply as to the inclusion of attorney's fees.⁷² The reasons given for these decisions are that an injunction bond is part of the machinery of the federal court, which must construe its own orders;⁷³ and that the power to award costs has traditionally been a "general power of a court of equity" not cut off even by a state statute.⁷⁴ Nevertheless, differences between state and federal courts in such matters are to be regretted; they may make a material pecuniary difference to the litigants. The freedom from state law of procedure in federal courts of equity,⁷⁵ which is in part the historic basis for independent allowance of extraordinary items of costs and difference in conditions of injunction bonds, is now no greater than the freedom of procedure in the combined federal court of law and equity; and we have seen that other items thought procedural or substantive before the *Erie* decision have been subject to reexamination.

On the other hand, in at least one instance a federal court's application of state law appears to be subject to criticism. In *Waggaman v. General Finance Co.*,⁷⁶ the court applied the Pennsylvania rule that in the absence of pleading and proof of foreign law, it shall be presumed to be the same as the law of Pennsylvania. This disregards the rule that federal district courts take notice of the laws of all the states.⁷⁷ It seems that the court should have considered the matter "procedural," as have other federal courts since the *Erie* decision.⁷⁸ It

⁷⁰ *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 104 F. (2d) 105 (C.C.A. 2d 1939), cert. den. 308 U.S. 599 (1939); *Travellers Mut. Casualty Co. v. Skeer*, 24 F. Supp. 805 (Mo. 1938), app. dismissed 106 F. (2d) 1017, 1018 (C.C.A. 8th 1939). In both cases attorney's fees were disallowed, contrary to the state rule.

⁷¹ *Mercantile-Commerce Bank & Trust Co. v. Arkansas Levee District*, 106 F. (2d) 966 (C.C.A. 8th 1939). Attorney's fees were allowed, contrary to the state rule.

⁷² *Cf. American Optometric Ass'n v. Ritholz*, 101 F. (2d) 883 (C.C.A. 7th 1939), cert. den. 307 U.S. 647 (1940) (state law governs as to right to recover attorney's fees as damages in suit at equity).

⁷³ *Traveller's Mut. Casualty Co. v. Skeer*, 24 F. Supp. 805 (Mo. 1938), app. dismissed 106 F. (2d) 1017, 1018 (C.C.A. 8th 1939).

⁷⁴ *Dodge v. Tulleys*, 144 U.S. 451, 457 (1892); cf. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 160 (1939) (power of equity, but no mention of state law).

⁷⁵ *Von Moschzisker, Equity Jurisdiction in the Federal Courts*, 75 U. of Pa. L. Rev. 287, 295 (1927).

⁷⁶ 116 F. (2d) 254 (C.C.A. 3d 1940).

⁷⁷ *Owings v. Hull*, 9 Pet. (U.S.) *607, *625 (1835): "We are of opinion that the Circuit Court [for the District of Maryland] was bound to take judicial notice of the laws of Louisiana." See *Hanley v. Donoghue*, 116 U.S. 1 (1885); *Goodrich, Conflict of Laws* § 80, p. 195 (2d ed. 1938).

⁷⁸ *Gallup v. Caldwell*, 120 F. (2d) 90 (C.C.A. 3d 1941); *Cray, McFawn & Co. v. Hegarty, Conroy & Co.*, 27 F. Supp. 93 (N.Y. 1939), aff'd without discussion of this point, 109 F. (2d) 443 (C.C.A. 2d 1940).

has to do with the method by which the foreign law is to be brought before the court and so is a rule to which counsel can adapt themselves. The convenience of the rule, and its tendency to cure errors of counsel in cases where the problem was not recognized or the law of the wrong state considered at the trial stage, should commend it to a court which has frequently to deal with transactions foreign to the state in which it sits. When the local law states that the foreign law is applicable, a federal court should use the most expeditious means of applying it.*

INSECURITY UNDER THE SOCIAL SECURITY ACT

The Social Security Act¹ was designed to provide safeguards for the "security of the men, women, and children of the Nation."² Some of the eleven titles, such as those dealing with unemployment³ and old age⁴ insurance, the Congress saw fit to have administered directly by the federal government. In other instances, however, the Congress left a large area of discretion to the state legislatures. With respect to problems of old age assistance,⁵ aid to dependent children,⁶ and aid to the blind,⁷ the act makes use of the grant-in-aid device;⁸ the states receive the federal funds upon conforming to certain conditions. The Social Security Board was established to insure adherence to these stated conditions and may refuse to certify a state plan which does not conform to them. While the conditions as stated do not seem complicated or vague, the board's methods of administering the act have introduced considerable conflict and confusion. State legislators have had difficulty in determining what sort of plans will meet the board's interpretation of these requirements. Plans which seem to meet all the formal conditions have not received the approval of the board. Plans which have received the approval of the board have not been administered in accordance with their terms; through the board's power to withhold funds, other and inconsistent provisions have been, in practical effect, read into the plans.

The conditions, in the order in which they are stated in the statute, are:

* The second part of this note, dealing with other problems arising out of the decision in *Erie R. Co. v. Tompkins*, will appear in the February issue.

¹ 49 Stat. 620 (1935), amended by 53 Stat. 1360 (1939), 42 U.S.C.A. § 301 (Supp. 1940).

² Economic Security Act, Hearings before the Committee on Ways and Means on H.R. 4120, 74th Cong. 1st Sess. (1935), at 13.

³ Title 3.

⁵ Title 1.

⁴ Title 2.

⁶ Title 4.

⁷ Title 10.

⁸ Address of E. Clague, Associate Director of the Bureau of Research and Statistics of the Social Security Board, before the Public Charities Association of Pennsylvania, Pittsburgh, Pa., May 6, 1936: ". . . the act is founded upon a tried and proven method known as Federal grants-in-aid, a method which offers opportunities for assistance to states without undermining their sense of responsibility."