Conflict of Laws—Local and Transitory Action—State Precedents Characterizing Action Ignored by Federal Court—[Federal].—The defendant, a New Jersey corporation, excavated on the plaintiff's land, situated in New York, and carried off soil, sand, and gravel. The plaintiff, a resident of New York, brought action in the federal court in New Jersey. The complaint contained counts in trespass and conversion. At a pre-trial conference the defendant moved to dismiss the complaint for lack of jurisdiction, although the plaintiff abandoned the count in trespass. *Held*, on the basis of federal precedents, that the gravamen of the complaint was the conversion of the soil, setting forth a transitory cause of action, for which the court had jurisdiction. *Rackow v. United Excavating Co.*[1]

The court, in basing its decision on federal precedents, made no mention of the applicability of the doctrine of *Erie R. Co. v. Tompkins*.[2] While states are powerless to limit the jurisdiction of the federal courts,[3] it does not follow that federal courts may not be bound by appropriate state law excluding foreign "local actions" from the courts of the state.[4] By deciding the question in the instant case on the basis of federal precedents, the court, in effect, has characterized the problem as one of "procedure" rather than "substance" for the purpose of the *Erie* doctrine.

The common-law doctrine of local action, which excludes from the domestic courts cases involving the trial of title to foreign land,[5] has been frequently criticized,[6] but, before the *Erie* case, was generally followed by the federal courts in actions based on injuries to real property.[7] Mr. Chief Justice Marshall,

[1] 67 F. Supp. 699 (N.J., 1946). [2] 304 U.S. 64 (1938).

[3] Stephenson V. Grand Trunk Western R. Co., 110 F. 2d 401 (C.C.A. 7th, 1940); Martineau v. Eastern Air Lines, 64 F. Supp. 235 (Ill., 1946); cf. Boyd v. Bell, 64 F. Supp. 22 (N.Y., 1945).

[4] The doctrine of local action excludes from the domestic courts the trial of title to foreign immovables. The related doctrine of forum non conveniens gives trial courts discretion to try cases involving foreign law where such trial would seriously inconvenience the defendant or the court itself. Williams v. Green Bay & W. R. Co., 326 U.S. 549 (1946). Canadian Malting Co. v. Paterson Steamships Ltd., 285 U.S. 413 (1932); Heine v. New York Life Ins. Co., 45 F. 2d 426 (1930); Collard v. Beach, 81 App. Div. 582, 81 N.Y. Supp. 619 (1903); Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929). As to applicability in federal courts of the forum non conveniens doctrine of the state courts, see Weiss v. Routh, 149 F. 2d 193 (C.C.A. 2d, 1945); 14 Univ. Chi. L. Rev. 97 (1946), noting Gilbert v. Gulf Oil Corp., 153 F. 2d 883 (C.C.A. 2d, 1946).

[5] As to the history of the origins of the rule, see Sack, Conflicts of Laws in the History of the English Law (1937); Rheinstein, The Place of Wrong, 19 Tulane L. Rev. 4, 165 (1944).

[6] Kuhn, Local and Transitory Actions in Private International Law, 66 U. of Pa. L. Rev. 301 (1918); Kuhn, Comparative Commentaries on Private International Law 305 (1937) Hancock, Torts in the Conflicts of Laws 96 (1942); Goodrich, Handbook of the Conflict of Laws 229 (2d ed., 1938); Goodrich, Tort Obligations and the Conflict of Laws, 73 U. of Pa. L. Rev. 19 (1924); see also Recovery of Damages for Injuries to Land Lying beyond the Jurisdiction, 11 Col. L. Rev. 262 (1911); and The Nature of the Right of Action Arising from Tortious Injury to Foreign Real Estate, 16 Col. L. Rev. 323 (1916).

[7] Ellenwood v. Marietta Chair Co., 158 U.S. 105 (1895); Livingston v. Jefferson, 15 Fed, Cas. 660, No. 8,411 (C.C. Va., 1811); Kentucky Coal Lands Co. v. Mineral Development Co.,

in the leading case of *Livingston v. Jefferson*,[8] followed the English precedents, expressing, however, some criticism of the rule. He indicated that the true distinction between local and transitory actions should be between proceedings in rem, aiming at an adjudication of title, and damage suits in personam. Except in Louisiana[9] and Minnesota,[10] the doctrine has been uniformly followed in the state courts, although sometimes with reluctance.[11] Actions based on severance of such things as timber, stones, sand, or crops from the realty have sometimes been declared to be transitory, however, because the objects once severed have become personal property.[12] This distinction has aided parties who were unable to obtain service of process on defendants in the jurisdiction in which the land was situated. However, the exception has not extended to all cases which were not in rem,[13] but merely to those which were treated as essentially involving conversion.

The *Erie* rule, that federal courts must follow the state law in diversity of citizenship cases, applies only to matters which the federal courts deem "substantive." A federal court is not bound by characterization of a rule as substantive or procedural by the courts of the state in which it is sitting.[14] Character-

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191 Fed. 899 (C.C. Ky., 1911); McKenna v. Fiske, 1 How. (U.S.) 240 (1843); Potomac Milling & Ice Co. v. Baltimore & O. R. Co., 217 Fed. 665 (D.C. Md., 1914).

[8] 15 Fed. Cas. 660, No. 8,411 (C.C. Va., 1811).

[9] Holmes v. Barclay, 4 La. Ann. 63 (1869). It should be remembered that civil-law traditions are influential in Louisiana.

[10] Little v. Chicago, St. P., M. & O. Ry. Co., 65 Minn. 48, 67 N.W. 846 (1896).

[11] In Potomac Milling & Ice Co. v. Baltimore & O. R. Co., 217 Fed. 665, 668 (D.C. Md., 1914) the court said: "Where he [Marshall] did not dare to go, others may well hesitate to venture." In New York the doctrine has been abolished by statute. N.Y. Real Property Law (McKinney, 1945), c. 50, § 536.

[12] United States v. Ute Coal & Coke Co., 158 Fed. 20 (C.C.A. 8th, 1907); Stone v. United States, 167 U.S. 178 (1897); Ellenwood v. Marietta Chair Co., 158 U.S. 105 (1895).

[13] Note 7 supra.

[14] See Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945); Sampson v. Channell, 110 F. 2d 754, 762 (C.C.A. 1st, 1940); Zell v. American Seating Co., 138 F. 2d 641, 643 (C.C.A. 2d, 1943).

When a state court would refuse jurisdiction, the decisions of the lower federal courts are not in harmony as to whether the federal courts should be bound. In an action for wrongful death occurring in another state, the Seventh Circuit Court held that the district court had jurisdiction, even though the state in which it was sitting had a statute prohibiting the bringing of actions in its courts for damages for wrongful death occurring outside the state. Stephenson v. Grand Trunk Western R. Co., 110 F. 2d 401 (C.C.A. 7th, 1940). However, in a more recent case, the District Court for the Southern District of New York was held to be bound by New York law in a suit against directors of a Virginia corporation since internal affairs of a foreign corporation could not be litigated in a New York court. Weiss v. Routh, 149 F. 2d 193 (C.C.A. 2d, 1945).

The recent United States Supreme Court decision in Angel v. Bullington, 67 Sup. Ct. 657 (1947), decided after the decision in the principal case, does not clearly resolve the conflict. A North Carolina statute prohibited deficiency judgments. After bringing an action for a deficiency judgment on a Virginia transaction in the North Carolina courts, and being denied recovery because of the statute, the plaintiff brought suit in the federal district court. The

ization by a state court of a problem as substantive or procedural is never made for the purpose of determining whether the problem should be decided under state or federal law. To reason by analogy from state court decisions may thus be misleading where a federal court engages in characterization for that purpose.[15] Reasoning retrospectively one may say that a problem is characterized as substantive when federal and state court decisions coincide and procedural where they differ. The anticipated result may thus influence the court's determination as to characterization.[16]

With respect to the analogous doctrine of forum non conveniens some federal courts have said that there is involved simply a question of their own jurisdiction with respect to which state law cannot control.[17] Indeed, where the refusal of a state court to try a case is based upon considerations of its own convenience, e.g., the crowded state of its docket,[18] no reason exists why the federal courts should follow suit. Where, however, the state courts refuse to take the case because the trial would seriously inconvenience the defendant,[19] federal courts should hesitate to act differently. Similarly, the refusal of a state court to

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Supreme Court, reversing, held that the matter was res judicata and that the federal courts were bound by the interpretation of the North Carolina Supreme Court in the first suit. Where the action is first brought in a federal court, some doubt would appear to remain as to the application of this decision. Since the application of the doctrine of res judicata appears somewhat strained in the Angel case, perhaps a tendency to apply the Erie doctrine to similar situations prompted the extension. Thus, even where the action originates in a federal court, the indication is that in the future the Supreme Court may apply the Erie doctrine to such situations. See note on the Circuit Court decision in the Angel case in 13 Univ. Chi. L. Rev. 195 (1946). See also Tunks, Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins, 34 Ill. L. Rev. 271 (1939); Ailes, Substance and Procedure in the Conflict of Laws, 39 Mich. L. Rev. 392 (1941).

[15] Cook, Logical and Legal Bases of the Conflict of Laws 157-60 (1942). In Sampson v. Channell, 110 F. 2d 754, 762 (C.C.A. 1st, 1940), the court said: "This result [application of state law to burden of proof in diversity case] may seem to present a surface incongruity, viz., the deference owing to the substantive law of Massachusetts as pronounced by its courts requires the federal court in that state to apply a Massachusetts rule as to burden of proof which the highest state court insists is procedural only. The explanation is that reasons of policy . . . . make it desirable for the federal court in diversity of citizenship cases to apply the state rule, because the incidence of burden of proof is likely to have a decisive influence on the outcome of litigation; and this is true regardless of whether the state court characterizes the rule as one of procedure or substantive law."

[16] Tunks, op. cit. supra note 14, at 301; Developments in the Doctrine of Erie Railroad Co. v. Tompkins, 9 Univ. Chi. L. Rev. 113, 119 (1942). For cases bearing on federal courts' handling of questions of substance and procedure under the Erie rule, see Palmer v. Hoffman, 318 U.S. 109 (1943); Klaxon v. Stentor, 313 U.S. 487 (1941); Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Gilbert v. Gulf Oil Corp., 153 F. 2d 883 (C.C.A. 2d, 1946), noted in 14 Univ. Chi. L. Rev. 97 (1946); Weiss v. Routh, 149 F. 2d 193 (C.C.A. 2d, 1945).

[17] Koster v. Lumbermens Mutual Casualty Co., 153 F. 2d 888 (C.C.A. 2d, 1946); Overfield v. Pennroad Corp., 113 F. 2d 6 (C.C.A. 3d, 1940); Stephenson v. Grand Trunk Western R. Co., 110 F. 2d 401 (C.C.A. 7th, 1940); Stepp v. Employers Liability Assurance Corp., 30 F. Supp. 588 (Tex., 1939).

[18] See, for instance, Collard v. Beach, 81 App. Div. 582, 81 N.Y. Supp. 619 (1903).

[19] See Baltimore Mail S.S. Co. v. Fawcett, 269 N.Y. 379, 199 N.E. 628 (1936).

try a case involving title to land situated in another state may be motivated by reasons of convenience to itself, or may rest upon inconvenience to the defendant or a desire not to invade the sovereignty of another state. The *Erie* rule of uniformity in diversity cases would seem applicable when the latter reasons motivate the state's policy of not hearing such cases. It may also be argued that the purpose of the *Erie* doctrine is to prevent the accident of citizenship from determining the outcome of litigation.[20] The only necessary limit to this policy is the impossibility of a federal court's changing its constitution or practice from case to case. But since the readiness or refusal to try a case does not necessitate any such change, no reason exists why the state rule should not be followed.

In the principal case, if the court had felt itself bound to follow the law of New Jersey, the state in which it was sitting, the result might well have been different.[21] In *Karr v. New York Jewell Filtration Co.*[22] it was decided by a New Jersey court that an action for damages to real property in the District of Columbia, due to excavation on adjoining property, could not be heard in a New Jersey court. While the court in the instant case might have been able to distinguish the *Karr* case, the court should at least have considered it and other New Jersey cases. Moreover, the circumstances may be reversed, and the state rule may allow the courts of the state in which the federal court is sitting to hear cases which the federal court would be bound to dismiss as local actions under federal precedents.[23] In any case it would seem that the determination is "substantive" and, therefore, it is inappropriate for a federal court to grant to a plaintiff that access to court which is refused him by the state court, even though such conformity may result in a complete denial of justice. Perhaps the frequent injustice of the doctrine of local actions would thus be highlighted with the result of inducing the states to bring about the necessary change.

Constitutional Law—Exports and Imports Clause—State Sales Tax on Goods Sold for Foreign Shipment Unconstitutional—[Federal].—The plaintiff, a producer and vender of oil in California, made a contract for the sale of oil with the New Zealand government, the terms of which provided that the price was to be f.o.b. Los Angeles, payment in London, delivery into the vendee's carrier at the Los Angeles harbor. California assessed a retail sales tax[1] against

[20] See Weiss v. Routh, 149 F. 2d 193, 195 (C.C.A. 2d, 1945): ". . . . we are to remember the purpose of conformity in "diversity cases." It is that the accident of citizenship shall not change the outcome: a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does."

[21] Karr v. New York Jewell Filtration Co., 78 N.J.L. 198, 73 Atl. 132 (1909); Van Ommen v. Hageman, 100 N.J.L. 224, 126 Atl. 468 (1924); cf. Hill v. Nelson, 70 N.J.L. 376, 57 Atl. 411 (1904); Doherty v. Catskill Cement Co., 72 N.J.L. 315, 65 Atl. 608 (1905).

[22] 78 N.J.L. 198, 73 Atl. 132 (1909). [23] Notes 9, 10, and 12 supra.

[1] The tax statute provides that "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ per cent of the gross receipts of