that the federal courts were the best tribunals for the enforcement of civil rights secured by the Constitution. Furthermore, in not providing for a minimum jurisdictional amount, Congress evidently assumed every case involving invasion of civil rights by state authorities to be sufficiently important to deserve the attention of the federal courts. Allegations of unconstitutional action by federal officers would seem to call for similar treatment.

The ever present danger is that behind the decision on the jurisdiction there may lie a determination on the merits. Extension of Subsection 24(14) to suits against federal officers not only would relieve the courts of an insoluble problem of valuation, but would remove this temptation to decide hard cases without giving the parties a hearing on the merits.

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

EQUITY

The general proposition that federal courts should apply the doctrine of Erie R. Co. v. Tompkins to reach the same result as would be reached by the local state court must here be qualified by a few considerations peculiar to equity. In the first place, it is not entirely clear that the Erie doctrine applies to equity cases at all. The Rules of Decision Act provides that "the laws of the several States ... shall be regarded as rules of decision in trials at common law." In Neves v. Scott it was stated, without reference to the then nine-year-


36 The purpose of this pecuniary requirement is commonly said to be the prevention of clogging of the federal judicial machinery with petty cases. Hughes, Federal Practice 312 (1931). It has also been suggested that this provision prevents small litigants from setting in motion machinery too expensive for their pocketbooks. But this theory does not seem consistent with the strict application of the statute by the courts. The desire to permit the small litigants to sue corporations without having his case drawn into the federal courts, certainly was a factor in increasing the jurisdictional amount to $3,000. 46 Cong. Rec. 1074, 1075 (1911).

37 See Smithers v. Smith, 204 U.S. 632, 645-46 (1907); cf. Federal Jurisdictional Amount Requirement in Injunction Suits, 49 Yale L. J. 274, 283 (1939). It may be noted that several cases to test the right to WPA jobs have been accepted by the federal district courts without question of jurisdictional amount. Rok v. Legg, 27 F. Supp. 243 (Cal. 1939); Block v. Sassa- man, 26 F. Supp. 105 (Minn. 1939); Spang v. Roper, 13 F. Supp. 840 (Pa. 1936). But the district courts, being able to determine jurisdiction on their own motion, 18 Stat. 472 (1875) as amended, 28 U.S.C.A. § 80 (1927), have no discretion in granting or denying jurisdiction. Wetmore v. Rymer, 169 U.S. 115, 122 (1898).

* This is the final instalment of this note. Part I appears in 9 Univ. Chi. L. Rev. 113 (1941).

79 304 U.S. 64 (1938).


81 13 How. (U.S.) *268 (1851).
old decision of *Swift v. Tyson*, that federal courts are independent of state decisions in matters depending on the "principles of general equity jurisprudence." If, then, the *Erie* case was merely a reinterpretation of the Rules of Decision Act, overruling *Swift v. Tyson*, it should have had no effect on the law as applied to suits in equity in the federal courts. If, however, the *Erie* case is a constitutional interpretation, there is little room for doubt that it applies in equity. Moreover, the principle of the Rules of Decision Act had long been recognized by federal courts of equity in applying state statutes, in spite of statements to the effect that the rule of decision in equity is the same in all courts of the United States.

Since the *Erie* case, state decisions have been applied both by the Supreme Court and by lower federal courts to numerous suits in equity.86 *Ruhlin v. New York Life Ins. Co.*, sometimes cited for the proposition that the *Erie* case is applicable in equity, does not establish the principle as far as purely equitable issues are concerned, since the particular question involved might equally well have arisen in a suit at law. But in *Cities Service Oil Co. v. Dunlap*, the Court held that state decisions must be applied to a purely equitable issue, the burden

83 This seems the more accurate interpretation of the decision. See Hart, The Business of the Supreme Court at the October Terms, 1937 and 1938, 53 Harv. L. Rev. 579, 606–11 (1940).


87 304 U.S. 202 (1938).

88 The construction of an insurance contract.

89 308 U.S. 208 (1939).
of proof of bona fide purchase in a counterclaim to reform a conveyance. In *Russell v. Todd*, however, the Court stated that "the Rules of Decision Act does not apply to suits in equity." In view of the fact that the Court proceeded to decide that case on the basis of a state statute of limitations rather than on the doctrine of laches, the statement may perhaps be taken simply as reiterating that the act does not in terms include equity; but it does cast some doubt on the whole question.

In the second place, there may, in equity, be greater reluctance to allow state rules to control "procedural" matters with substantive aspects than is found in actions at law, though under the Federal Rules the independence of equity procedure is now no greater than that of law procedure. The reason is largely historical. While the federal law courts for many years adapted their procedure to state practice under the Conformity Act, that act never applied to equity. Instead, it was provided that procedure in equity should be "according to the principles, rules, and usages which belong to courts of equity," subject to rules of court, and this provision was taken to refer to the English chancery practice.

Again, there has been the limitation that state law may not change the line of demarcation between law and equity in the federal courts; this limitation is distinct from those rules, previously discussed, against allowing state law to restrict the jurisdiction of federal courts as such. Since it prevented the application of some state statutes in federal courts of equity prior to the *Erie* case, it is probable that it will likewise restrict the applicability of state decisions.

Much of the language in the opinions concerning the necessity for maintaining this "uniformity of equity jurisdiction" stems from the hostility to equity

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90 309 U.S. 280, 287 (1940).
96 See Mason v. United States, 260 U.S. 545, 557 (1923).
97 Developments in the Doctrine of *Erie Railroad Co. v. Tompkins*, I, 9 Univ. Chi. L. Rev. 113, 115-17 (1941).
98 See Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 209 (1938): "Hitherto ... counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts. . . . ."
99 Note 102 infra.
practice in some of the states at the time of the formation of the Constitution. At that time several states had no courts of equity; in Pennsylvania, for example, equitable doctrines were administered through common law forms, and there were no equitable remedies. It was only after a struggle in Congress at the time of the first Judiciary Act that the federal courts were given chancery powers in general terms without the serious restrictions that were advocated by the representatives of the states opposed to equity. A federal district court in a state without a court of equity would, if it followed the local practice, have been allowing state law to restrict the powers won for it by this struggle in Congress; for this reason it was early decided that the scope of cases heard in equity in the federal courts should be uniform throughout the United States.

Today, the more substantial reason for maintaining a certain uniformity in federal equity jurisdiction is the requirement of the Seventh Amendment that the right of trial by jury shall not be denied in suits at common law. State systems, not limited by this amendment, may sometimes make triable in equity matters which, at the time of the formation of the Constitution, were triable only at law. The extension of federal equity jurisdiction to include suits of this type would, of course, prejudice the right to trial by jury. This has been the basic reason for many refusals to apply state statutes in federal courts of equity. Thus a statute giving a simple contract creditor the right to have a receiver appointed for an insolvent corporation, a statute allowing a creditor who has not reduced his claim to judgment to sue to have a conveyance set aside as fraudulent, and a statute permitting one out of possession to bring suit to quiet title against one in possession, have been held to deprive a defendant of his right to jury trial if applied in the federal equity court. But in a suit to quiet title, both parties being out of possession, the state statute was applied in the federal court, as the remedy of ejectment was not available.


For this reason it was provided by statute that “suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.” Rev. Stat. § 723 (1875), 28 U.S.C.A. § 384 (1928). It is clear that this provision has to do with drawing the line between an action at law and a suit in equity in the federal court, since the legal remedy must be one available in the federal, rather than the state court. Smyth v. Ames, 169 U.S. 466, 516 (1898); Robinson v. Campbell, 3 Wheat. (U.S.) *212, *222 (1818); see Atlas Life Ins. Co. v. Southern, Inc., 306 U.S. 563, 569 (1939).


At the same time, state statutes not extending the jurisdiction of equity to the prejudice of the right to trial by jury as it existed at the time of the framing of the Constitution, but simply giving new "substantive rights," were frequently applied in federal courts of equity prior to the *Erie* case. Thus a state statute declaring that a deed void on its face constituted a cloud on title has been applied in a suit to cancel the deed, though under the original chancery practice such a suit would not lie. An Illinois statute giving the owner of the equity of redemption twelve months after foreclosure of the mortgage in which to redeem must be applied in the federal courts as a substantive right, in spite of the procedural aspect. A statute giving a right to have a usurious contract canceled without offer to repay the loan has been applied, and a statute fixing the damages to be recovered for conversion of mineral resources has been applied in a suit to recover the land.

Although, in some respects, the Federal Rules of Civil Procedure may be said to "unite" law and equity, the right to trial by jury is still a valid reason for maintaining the distinction and refusing to allow state law to affect it; the enabling act and the Federal Rules themselves provide that the right must be preserved. The variations in state laws affecting the jurisdiction of equity, which might disturb the uniform administration of the new one form of action in the federal courts, still persist, especially in the varying adoption of codes of practice uniting law and equity. Though a plaintiff is now expressly permitted by Rule 18(b), for example, to "commingle law and equity" by stating a claim for money and a claim to have a fraudulent conveyance set aside, this is a product of the Federal Rules, not of any state law, and regardless of local practice the right to trial by jury must be preserved in hearing the claim for money.

Finally, there are the peculiarities arising from the long-established federal rule that a plaintiff in a stockholder's derivative suit in equity must have been a stockholder at the time of the alleged injury. This rule is contrary to that in


*111* Brine v. Insurance Co., 96 U.S. 627 (1877).

*112* Missouri, Kansas & Texas Trust Co. v. Krumseig, 172 U.S. 351 (1899).

*113* Mason v. United States, 260 U.S. 545 (1923).

*114* But cf. Russell v. Todd, 309 U.S. 280 (1940) (case turned on question whether state statute applied only to suits at law, or to equity as well). See dissent of Clark, J., in the same case in the lower court, 104 F. (2d) 169, 175 (C.C.A. 2d 1939).


*117* It can hardly be thought that the *Erie* decision has changed the interpretation of the Seventh Amendment so as to allow state law to determine when the right to trial by jury exists in the federal courts.
many states,\textsuperscript{118} and is now a part of Rule 23(b) of the Federal Rules of Civil Procedure.\textsuperscript{119} While the desirability of the federal rule has been much questioned, especially when put in the form of a procedural rule,\textsuperscript{120} there was, of course, before the \textit{Erie} case, usually no argument for applying the state rules, since they were expressed in state decisions.\textsuperscript{121} Since the \textit{Erie} case, however, the problem arises whether state decisions to the contrary should be applied in a federal court. If Rule 23(b) is for the purpose of preventing collusion in obtaining federal jurisdiction\textsuperscript{122} or equity jurisdiction,\textsuperscript{123} a refusal to follow state law is justified;\textsuperscript{124} but if the rule is a substantive principle of equity, it seems that under the analysis presented herein the state law should control.\textsuperscript{125}

The rule operates harshly as a safeguard to federal equity jurisdiction; for if this is its ground, it amounts to a conclusive presumption that there is collusion

\textsuperscript{118} 13 Fletcher, Corporations §§ 5980–81 (perm. ed. 1932), lists Alabama, California, Idaho, Illinois, Montana, New Hampshire, New Jersey, New York, Pennsylvania, Utah, and England as applying the "majority rule" that a subsequent stockholder may recover; Colorado, Georgia, Indiana, Iowa, Kentucky, Maryland, Nebraska, New Mexico, and Washington as applying the "federal and minority rule."

\textsuperscript{119} The rule first appeared as a dictum in Hawes v. Oakland, 104 U.S. 450, 461 (1881); it shortly became Rule 94 of the Equity Rules of 1882, then Rule 27 of the Equity Rules of 1912.

\textsuperscript{120} J Foster, Federal Practice 80 (6th ed. 1920); Seasongood, Right of a Stockholder Suing on Behalf of a Corporation to Complain of Misdeeds Occurring Prior to His Acquisition of Stock, 21 Harv. L. Rev. 195 (1908).


\textsuperscript{122} Hawes v. Oakland, 104 U.S. 450 (1881). The fear was that a corporation, not being able to sue its true opponent in the federal court because of lack of diversity of citizenship, would get a stockholder from another state to sue it and the true opponent in a stockholder's suit in the federal court.

\textsuperscript{123} Quincy v. Steel, 120 U.S. 241 (1887). If the corporation's right against the true opponent is one triable at law, the true opponent is, in a stockholder's suit, deprived of his right to trial by jury.

\textsuperscript{124} From this aspect Rule 23(b) resembles the restriction that "no district court shall have cognizance of any suit . . . to recover on any promissory note or other chose in action in favor of any assignee, . . . unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." Rev. Stat. § 629 (1875), 28 U.S.C.A. § 41(1) (1927). Rule 23(b) is not restricted in its operation, however, to cases in which the plaintiff's predecessor in ownership could not have sued in the federal district court.

\textsuperscript{125} 2 Moore, Federal Practice § 23.05, at 2253 (1938); "Substance" and "Procedure" in Federal Equity—The Labor Injunction and the Stockholder's Suit, 41 Col. L. Rev. 104, 115–21 (1941). Apart from the jurisdictional aspect, it is hard to see how Rule 23(b) can be "procedural" under any criterion. See Developments in the Doctrine of \textit{Erie Railroad Co. v. Tompkins}, 1, 9 Univ. Chi. L. Rev. 113, 118–27 (1941). The Rule is somewhat like Rule 17(a), which requires that the plaintiff be the "real party in interest;" but if under some collusive arrangement the plaintiff is suing on behalf of a stockholder who did not himself have a right to sue in the federal court, Rule 17(a) itself applies—the situation is not peculiar to stockholders' suits.
between the plaintiff and the corporation simply on a showing of subsequent transfer of the stock. Such an ironclad safeguard seems unnecessary, since the plaintiff must aver in his complaint, verified by oath, that the action is not collusive to confer jurisdiction on a court of the United States, and must show his demands on the corporation. Thus the court can ascertain whether or not there is collusion and will dismiss the complaint if there is.

Moreover, it would seem that if the rule is really jurisdictional, dismissal should be without prejudice, or, if the suit had been removed from a state court, it should be remanded. But in at least one case the Supreme Court has held that it was proper to dismiss the suit rather than remand it to the state court, saying that the plaintiff's failure to comply with the rule did not deprive the federal court of jurisdiction. Though the point has never been decided, it seems that the dismissal, being for want of equity rather than want of jurisdiction, was res judicata. But the fact that the rule has in some instances not been applied to cases coming before the federal courts on a federal question does indicate that the rule is to protect the diversity jurisdiction, collusion to obtain diversity of citizenship being irrelevant if there are other grounds of federal jurisdiction.

126 Rule 23(b)(2).
127 Rule 23(b)(3). A stockholder must, of course, exhaust every remedy within the corporation before bringing a derivative suit. Quincy v. Steel, 120 U.S. 241 (1887); Long v. Stites, 88 F. (2d) 554 (C.C.A. 6th 1937), cert. den. 307 U.S. 706 (1937); 2 Moore, Federal Practice § 23.05, at 2265 et seq. (1938).
130 Cf. Oceanic Steam Navigation Co., Ltd. v. Compania Transatlantica Española, 134 N.Y. 467, 31 N.E. 987 (1892) (same effect to be given to judgment in federal court as to judgment in state court, though plaintiff would not have recovered in state court); Crescent City Live Stock Co. v. Butchers' Union Slaughterhouse Co., 120 U.S. 141 (1887) (disregard of federal judgment in state court presents federal question). In Venner's later derivative suit against the Great Northern and James J. Hill, Venner v. Great Northern R. Co., 117 Minn. 447, 136 N.W. 271 (1912), Venner made no claims for the wrongs alleged in the previous federal suit. Possibly, however, the statute of limitations had run, or a settlement of the previous claims had been made. See 2 Moore, Federal Practice § 22.05, at 2251 n. 12 (1938), and Sears, The New Place of the Stockholder (1929), for a characterization of Venner as a well-known strike-suitor. This, however, far from being collusion, is champerty, a matter of substantive public policy.
132 Even though there is a federal question to support federal jurisdiction, there might still be collusion to obtain equity jurisdiction. In the cases cited note 131 supra, however, the claims asserted were all equitable, so this additional complication did not arise.
The fact that several states have adopted the rule indicates that it does not depend entirely on the protection of federal jurisdiction, or even of equity jurisdiction, since the states are not bound by the Seventh Amendment. One decision was clearly based on a policy against champerty; another decision stated that the rule had nothing to do with the peculiarities of federal jurisdiction.

Since the *Erie* case, lower federal courts have followed the rule, though with some doubt, despite conflict with local decisions, except in a case where jurisdiction was based on a federal question. One court, however, was in great doubt about the matter. This court felt that the *Erie* decision makes local decisions as well as local statutes affecting the substantive rights of suitors applicable in a federal court of equity; but because the requirement was embodied in a rule promulgated by the Supreme Court, it held that it was not for a district court to put it aside.

**THE FEDERAL FIELD**

The *Erie* rule covers only those cases where formerly the federal courts, under the *Swift v. Tyson* doctrine, used their own judgment on matters of so-called general law; in cases where the Constitution and laws of the United States apply, state law controls only in so far as the federal law leaves room for it. Nor need one point to an express provision in a federal statute in order to prevent the application of state law. In a limited group of cases, the mere fact that there has been some federal regulation of the matter is said to have brought the

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33 Note 118 supra. See, for example, Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N.W. 1024 (1903) (no right in plaintiff); Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634 (1907) (champerty); Neff v. Gas & Electric Shop, 232 Ky. 66, 22 S.W. (2d) 265 (1929) (no right in plaintiff).


matter within the "federal field," thus preventing the application of state law.  

This federal field doctrine in no way detracts from the validity of the proposition that under the *Erie* case the federal court should reach the same result as would the local state court, since the state courts must also apply the federal law in the federal field.  

The doctrine does, however, present a possibility of cutting down the effect of the *Erie* case.  

It is not likely that the doctrine will be used to restrict the effect of the *Erie* case to any great extent, however. In only two types of cases—those dealing with transactions of interstate railroad carriers and of interstate telegraph companies—has it received any general application. Even in these situations, it has been applied only to those aspects of the business fairly close to the federal regulation. Thus, under the doctrine, state law nullifying the limitation of liability in bills of lading, on free passes, or on telegraph messages has been refused effect. Likewise, what constitutes compensable harm for failure or mistake in delivering an interstate message or shipment, and the privilege of a telegraph company in sending a libelous interstate message, are matters with-

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141 Central Vermont R. Co. v. White, 238 U.S. 507 (1915) (in action under Federal Employer's Liability Act, 35 Stat. 65 (1909), 45 U.S.C.A. § 51 (1928), state court must apply federal rule as to burden of proof even though that rule is nowhere mentioned in the statute); Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920):  


143 Kansas City Southern R. Co. v. Van Zant, 260 U.S. 459 (1923). The Hepburn Act, 34 Stat. 584 (1907), 49 U.S.C.A. § 1(7) (1929), designates the classes of persons who may receive free passes, but makes no provision as to the liability of the railroad to them.  

144 Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919). The field was occupied by the 1910 amendment to the Interstate Commerce Act, 36 Stat. 544 (1911), 49 U.S.C.A. § 1(2) (1929), extending the act to telegraph companies; classification of messages was there provided for, but limitation of liability was not mentioned.  

145 Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920) (state statute fixing penalty for failure to deliver telegram promptly may not be applied by state court in a case involving an interstate telegram); Western Union Tel. Co. v. Spight, 254 U.S. 17 (1920) (state court may not allow damages for mental anguish for failure to transmit interstate telegram accurately).  

146 Southern Express Co. v. Byers, 240 U.S. 612 (1913) (state court may not award damages for mental anguish for failure to deliver promptly, especially in view of limitation of liability in bill of lading).  

in the federal field. But matters having to do, not with the way in which inter-
state railroads or telegraph companies conduct their business, but rather with
their liability for injuries due to negligence of their servants, are governed by
state law. Thus, questions relating to the liability of a railroad for personal in-
jury due to its negligence, or of a telegraph company for an assault by its ESPECIAL
agent, are governed by state law.

Moreover, the Supreme Court's way of dealing with the doctrine in the re-
cent case of Moore v. Illinois Central R. Co. perhaps indicates that the whole
document is in disfavor. In that case, the circuit court of appeals held that whether
the rights of a railway laborer were governed by the union's written contract
with the company or by the laborer's oral contract with the company was a
federal field matter, and that the oral contract, with the shorter statute of limi-
tations, was controlling. The Court, in reversing the decision, made no men-
tion of the federal field doctrine, but simply held that, since the state statute of
limitations was in any event controlling, the state court's application of that
statute in the same case must control. At any rate, the failure of the Court
even to mention the federal field doctrine may indicate that the question is still
open.

From other points of view, however, there are indications that the doctrine
may be given a more extended application. There are certainly other federal
statutes, such as the Civil Aeronautics Act and the Motor Carriers Act, by

(1934), 47 U.S.C.A. § 202(a) (Supp. 1941), providing that no common carrier shall make un-
reasonable discriminations, and §§ 206 and 207, providing for liability in case of violation.

48 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

49 Pacific Tel. & Tel. Co. v. White, 104 F. (2d) 923 (C.C.A. 9th 1939). The court held that
the company was liable for punitive damages, though there was no express authorization or
ratification of the servants' acts, with no mention of whether there was any federal statute
affecting the question. But cf. Western Union Tel. Co. v. Aldridge, 66 F. (2d) 26 (C.C.A. 9th
1933), in which the court held, on the grounds both of "general law" and the federal field, that,
irrespective of state law, punitive damages could not be awarded for disclosure of the contents
of a telegram by an employee, in the absence of authorization or ratification. See 89 A.L.R. 356
(1934), annotating telegraph company's liability for punitive damages; federal field not con-
considered.

50 312 U.S. 630 (1941).

51 Illinois Central R. Co. v. Moore, 112 F. (2d) 959 (C.C.A. 5th 1940). The Railway Labor
agreements, was held to have occupied the field.

52 On a previous appeal to the Supreme Court of Mississippi before the case was removed
to the federal court on amended pleadings, that court had held that the longer statute of limi-
tations applied, the suit being based on the written contract. Since this decision was one of
reversal and remand, and not a final adjudication, the federal court was not bound by it as the


54 49 Stat. 543 (1936), 49 U.S.C.A. § 301 (Supp. 1941). Of course there are many other
federal regulations which could be likewise extended, but these acts are mentioned as being
which Congress appears to have taken over the fields affected by the acts to much the same extent as it has done through its legislation regarding railroads and telegraph companies. Moreover, there is some tendency toward considering matters relating to contracts with the Federal Government as being in the federal field, even though not specifically covered by legislation\(^5\)--a matter which could become of considerable importance in view of the rapidly increasing number of Federal Government contracts. Finally, in *Jackson County v. United States*,\(^6\) a suit to recover taxes illegally collected from an Indian ward of the Government, the Court held that the state law did not control as to the right to recover interest prior to judgment on the taxes withheld.\(^7\) Since the Indian was immune from taxation by virtue of the treaty with her tribe,\(^8\) the matter was held to be "ultimately attributable to the Constitution, treaties, or statutes of the United States."\(^9\)

most like those which have been the basis of the previous federal field cases. However, the Court has recently indicated that even these statutes will not be broadly construed so as to exclude state law. In *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940), holding that a state statute regulating an interstate motor carrier was not superseded by regulations of the Interstate Commerce Commission, the Court said, "Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated....This is especially the case when public safety and health are concerned." Cf. *Townsend v. Yeomans*, 301 U.S. 441 (1937) (Tobacco Inspection Act does not exclude state statute fixing charges for handling and selling tobacco). While these cases involve state regulatory statutes, it is to be expected that under the Erie decision the same treatment will be accorded state decisions accomplishing similar objectives.

\(^5\) *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941) (state law does not control as to the award of interest as damages for "delayed payment of a contractual obligation to the United States"); *Byron Jackson Co. v. United States*, 35 F. Supp. 665 (Cal. 1940) (state law invalidating liquidated damages clause does not apply in suit against United States under the Tucker Act), noted in 44 Harv. L. Rev. 1070 (1941); see *Kolker v. United States*, 40 F. Supp. 972, 973 (Md. 1941). Contra: *United States v. Brookridge Farm*, 111 F. (2d) 461 (C.C.A. 10th 1940) (whether government hospital had broken contract to buy milk and effect of second contract, governed by state law); *Keifer & Keifer v. RFC*, 97 F. (2d) 812 (C.C.A. 8th 1938), rev'd on other grounds 306 U.S. 381 (1939) (state law that bailee cannot exempt himself from liability for negligence must be applied, though bailee is government corporation); cf. *Carr v. United States*, 28 F. Supp. 236 (Ky. 1939) (state law that loss of farm profits is too speculative an element of damages controls in suit against government to recover damages for land taken).

\(^6\) 308 U.S. 343 (1939).

\(^7\) However, in both this case and in *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941), note 153 supra, the same rule as that followed by the local court was in fact applied, But cf. *Deitrick v. Grenaney*, 309 U.S. 190, 200 (1940) (state law immaterial when illegality of note is a "legal consequence" of federal statute).

\(^8\) 12 Stat. 1191 (1863).

\(^9\) There is also the possibility of applying the federal field doctrine even where there is no legislation at all, simply because a matter is one on which Congress might legislate under the Constitution. See *Bikle, The Silence of Congress*, 41 Harv. L. Rev. 200 (1927). The present Court's approach to questions involving the applicability of state statutes in which
NOTES

SOURCES OF STATE LAW

Where there is a direct holding on the point by the state court of last resort, the federal court, of course, has no problem in reaching the same result as would have been reached by the state court. In the absence of such a holding, however, the result which would probably be reached by the state court is not so clear. Nevertheless, "state law," for this purpose, is not limited to that found in direct holdings. The Supreme Court has held that, in cases "balanced with doubt," a federal court must follow a considered dictum of the highest court of the state. This course has been followed by the lower federal courts, both in accepting dicta of the state court and in drawing inferences from state decisions not directly in point.

Where the only decisions are those of intermediate appellate courts of the state, not binding on the state supreme court or on other intermediate appellate courts, even less indication of the probable result of the litigation in a state court might have legislated does not indicate, however, that this will be made the basis of any general doctrine. Compare Just v. Chambers, 312 U.S. 383 (1941), same case in lower court, The Friendship II, 113 F. (2d) 105 (C.C.A. 5th 1940), noted in 40 Col. L. Rev. 1434 (1940) (state statute creating survival of tort liability of decedent applied in an action in admiralty), with Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) (emphasizing the need for uniformity of law in admiralty). See also Graves v. New York ex rel. O'Keefe, 306 U.S. 496 (1939) (employee of federal agency has no implied immunity from state income tax).

There is always the possibility, however, that the state court might overrule its previous direct holdings. The federal court must consider this possibility, but it must follow closely the indications given by the state court. Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103 (1939); Moore v. Illinois Central R. Co., 312 U.S. 630 (1941); cf. Vandenberg v. Owens-Illinois Glass Co., 311 U.S. 538 (1941), note 186 infra.

Hawks v. Hamill, 288 U.S. 52 (1933).

In re Pointer Brewing Co., 105 F. (2d) 478 (C.C.A. 8th 1939). But see New England Mutual Life Ins. Co. v. Mitchell, 118 F. (2d) 414, 419 (C.C.A. 4th 1941). In Transbel Investment Co. v. Roth, 36 F. Supp. 396 (N.Y. 1940), the court went so far as to follow a dictum which had been repeated for a hundred years, but distinguished by the state court in every case in which the question seemed to be presented.

Ringling Bros.-Barnum & Bailey, Inc. v. Olvera, 119 F. (2d) 584 (C.C.A. 9th 1941); Crab Orchard Improvement Co. v. Chesapeake & Ohio R. Co., 115 F. (2d) 277 (C.C.A. 4th 1940), cert. den. 312 U.S. 702 (1941); American Life Ins. Co. v. Hutcheson, 109 F. (2d) 424 (C.C.A. 6th 1940), cert. den. 316 U.S. 652 (1940); Jensen v. Canadian Indemnity Co., 98 F. (2d) 469 (C.C.A. 9th 1938), cert. den. 307 U.S. 622 (1939) (the court, sitting in California, consulted a Massachusetts case which had been cited with approval by the California court). In American Nat'l Ins. Co. v. Belch, 100 F. (2d) 48 (C.C.A. 4th 1938), the court was convinced by another Virginia decision called to its attention on rehearing that the Virginia court followed a theory of interpretation of the phrase "accidental death" different from that adopted by the Supreme Court, and so reversed itself on the rehearing. See also Yoder v. Nu-Enamel Corp., 177 F. (2d) 485, 489 (C.C.A. 8th 1947): "Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed."
court is given. Furthermore, a federal court might feel unduly subordinated if compelled to follow such decisions. Nevertheless, they are an indication of the state law on the subject, and the Supreme Court has recently held that they must be followed. It has even been intimated that the decision of a nisi prius court might control; and in Fidelity Union Trust Co. v. Field, two decisions of the New Jersey Court of Chancery, a court of first instance, were held controlling. However, the New Jersey Court of Chancery has state-wide jurisdiction and is generally of greater importance than an ordinary nisi prius court.

If there are no applicable or clear state decisions, or if the parties do not contend for state law and there is no indication of state law to the contrary, many federal courts have felt free to follow federal and general decisions, or to use their own judgment. Academically, of course, in such a situation the surest way of finding what result the state court would reach would be to send the case over to the state court; strange as it may seem, that device has actually been employed. In Thompson v. Magnolia Petroleum Co., a bankruptcy proceeding, the question arose as to whether the trustee had the fee simple title to certain oil lands. The Supreme Court held that, since there was no clear state decision on the point, the trustee should institute suit in the Illinois state court.

167 311 U.S. 169 (1940).
169 See Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 113 n. 1 (1938): "Most of the issues in the case involve questions of common law, and hence are within the scope of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). But no claim has been made that the local law is any different from the general law on the subject, and both parties have relied almost entirely on federal precedents."
to determine the point.\textsuperscript{172} Since then, the federal courts, without mention of the *Magnolia* case, have continued to search for state law in dicta,\textsuperscript{173} in inferences from other decisions,\textsuperscript{174} and in lower state court cases,\textsuperscript{175} and in the absence of state court decisions have followed federal decisions or their own judgment.\textsuperscript{176} The Supreme Court has recently indicated, however, that the *Magnolia* decision has not been forgotten.\textsuperscript{177}

One instance which might prove an exception to the general rule that a federal court should reach the same result as a state court would have reached may arise in cases concerning the effect to be given state decisions overruling previous decisions. In *Gelpcke v. Dubuque*,\textsuperscript{178} decided eighty years ago, it was held

\textsuperscript{177} Some of the difficulties of such a proceeding are illustrated by Ohio Oil Co. v. Thompson, 120 F. (2d) 831 (C.C.A. 8th 1941). The question arose as to whether the state court should also consider counterclaims of the oil company against the trustee. On petition of the trustee, the federal district court prohibited the oil companies from bringing such counterclaims in the state proceedings; the circuit court of appeals held that only the Supreme Court has jurisdiction to review the district court's construction of the Supreme Court's mandate.

\textsuperscript{178} Transbel Investment Co. v. Roth, 36 F. Supp. 396 (N.Y. 1940).


\textsuperscript{176} Carter Oil Co. v. Welker, 112 F. (2d) 299 (C.C.A. 7th 1939), rehearing den. June 19, 1940 (three months after the *Magnolia* decision), cert. granted 311 U.S. 633 (1940) (closely resembles the *Magnolia* case, except that the administration of the bankruptcy jurisdiction was involved in the latter case; see note 177 infra); Gallup v. Caldwell, 120 F. (2d) 90 (C.C.A. 3d 1941); Sidis v. F-R Publishing Corp., 113 F. (2d) 806 (C.C.A. 2d 1940), cert. den. 311 U.S. 711 (1940).

\textsuperscript{177} Railroad Com'n v. Pullman Co., 312 U.S. 496 (1941) (where no decision of state court indicating whether action of state commission was within its statutory power, case must be sent to the state court for determination of that point, before Supreme Court will consider the constitutionality of the action of the commission). See The *Pullman* Case: A Limitation on the Business of the Federal Courts, 54 Harv. L. Rev. 1379 (1941). The Pullman case has since been followed in Green v. Phillips Petroleum Co., 119 F. (2d) 466 (C.C.A. 8th 1941), cert. den. 62 S.Ct. 72 (1941).

It may be significant that in both the *Magnolia* and the *Pullman* cases federal courts of special powers were involved; in the *Magnolia* case the bankruptcy court retained control through the trustee and his possession of the property, while in the *Pullman* case the court alluded to the discretionary powers of a court of equity. The doctrine of forum non conveniens, however, might serve much the same purpose in a federal court of law. See The *Pullman* Case: A Limitation on the Business of the Federal Courts, 54 Harv. L. Rev. 1379, 1389 (1941). It may also be significant that both cases involved peculiarly local problems, one a question of real property law, the other the statutory powers of a state regulatory commission. Cf. Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929), commented on in Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1928*, 43 Harv. L. Rev. 33, 62 (1929).

\textsuperscript{178} 1 Wall. (U.S.) 175 (1863).
that such decisions should not be applied to cases in which contracts had been
entered into or property rights acquired in reliance on the law as established by
the preceding decisions.\textsuperscript{79} The doctrine was later extended to apply to cases in
which, at the time the "rights of the parties accrued," the law of the state on the
point in question was not settled, though prior to suit in the federal court an
otherwise applicable state decision had been handed down.\textsuperscript{80}

There seems, however, to be little vitality left in the doctrine of the Gelpcke
case. The Supreme Court, being unwilling to say that the Constitution pre-
vanted state courts from applying their overruling decisions retroactively,\textsuperscript{81}
could not on appeal from the state courts compel them to follow the federal
rule, and serious conflicts developed.\textsuperscript{82} In recent decisions there has been a
tendency to forget the doctrine.

In \textit{Marine Bank v. Kalt-Zimmers Co.},\textsuperscript{83} a decision by the Wisconsin court
construing the Uniform Negotiable Instruments Act adopted by that state was
held to control the case, although the Wisconsin decision was made after the
pledge in question and was probably in conflict with the weight of authority.\textsuperscript{84}
Likewise, the Court has held that state decisions interpreting other state statutes
in what seems to have been an entirely unexpected manner after action by the
parties to the case at hand must be given effect by federal courts.\textsuperscript{85} And it has

\textsuperscript{79} See Thayer, The Case of Gelpcke v. Dubuque, 4 Harv. L. Rev. 311 (1891); Rand, \textit{Swift v. Tyson
versus Gelpcke v. Dubuque}, 8 Harv. L. Rev. 328 (1895); How Far Do State Decisions
Owen, 26 Iowa 243, 250–53 (1868), the series of Iowa decisions leading up to the Gelpcke case
is reviewed, and suspicious circumstances are hinted at in connection with the original decision
the overruling of which by the Iowa court resulted in the conflict over the Gelpcke case.

\textsuperscript{80} Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910); Great Southern Fire Proof Hotel Co. v.
Jones, 193 U.S. 532 (1904).

\textsuperscript{81} Railroad Co. v. McClure, 10 Wall. (U.S.) 511 (1870); Tidal Oil Co. v. Flanagan, 263 U.S.
444 (1924); cf. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)
(state court's action in applying previous decisions to present case, but stating that for the fu-
ture they were overruled, held constitutional).

\textsuperscript{82} Local officials found themselves subject to directly contradictory state court injunc-
tions and federal court mandamus. Riggs v. Johnson County, 6 Wall. (U.S.) 166 (1867);
Butz v. Muscatine, 8 Wall. (U.S.) 575 (1869). Moreover, bitter feelings arose between state
and federal courts over this conflict. Gelpcke v. Dubuque, 1 Wall. (U.S.) 175, 206 (1863): "We
shall never immolate truth, justice, and the law, because a State tribunal has erected the altar
and decreed the sacrifice." Ex parte Holman, 28 Iowa 88, 168 (1869): "Woe is the day when
one court will aid, nay originate an attack on the integrity and public virtue of another
court. . . ."

\textsuperscript{83} 293 U.S. 357 (1934).

\textsuperscript{84} Marine Bank v. Kalt-Zimmers Co., 70 F. (2d) 815 (C.C.A. 7th 1934) (same case in the
lower court). In reversing the decision, the Supreme Court did not disagree with this conclu-
sion of the lower court.

\textsuperscript{85} Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940); Hawks v. Hamill, 288 U.S. 52
(1933).
recently been held that if, after a federal district court has decided a case in accordance with a long line of decisions of the state court, the state court overrules its previous decisions while the federal case is pending on appeal, the new state decision must be followed by the appellate court.\textsuperscript{86} In these cases, it is true, the circumstances were not such that the objection against retroactivity was so strong as it was in \textit{Gelpcke v. Dubuque}; nevertheless, they do indicate a trend away from the doctrine of the \textit{Gelpcke} case. It has been suggested that, under the \textit{Erie} case, the question as to how an overruling decision should be applied in a later case is itself a matter of substantive law;\textsuperscript{87} as to which the state law should control.\textsuperscript{88}

\textsuperscript{86} Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941), same case in lower court noted in 50 Yale L. J. 315 (1940); City Co. of New York, Inc. v. Stern, 312 U.S. 666 (1941). These cases may be compared with the earlier case of Burgess v. Seligman, 107 U.S. 20 (1882) (Supreme Court not bound to reverse circuit court on the basis of a supervening decision of state court).


\textsuperscript{88} See Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), note 181 supra, for a case in which the state court did not apply its overruling decision retroactively.