PROCEDURAL ASPECTS OF THE NEW STATE INDEPENDENCE

CHARLES E. CLARK
Circuit Judge, United States Circuit Court of Appeals for the Second Circuit

When with some misgivings I at length accepted sentence to the bench, I was disturbed by the thought that thereafter I was not expected to have any opinions except such as the West Publishing Company might entomb in "the too little-read Federal Reporter."\(^1\) My friends, however, seemingly refused to share my perturbation, but maintained an annoying air of equanimity, if not downright relief, at the prospect. But they offered me the solace that I could at least still talk on procedure, since there was nothing to fight over in that field and it didn’t make much difference how procedural points were decided anyhow. I did take comfort in that suggestion and hope, therefore, that it may excuse my presence here. For I could hardly presume to join a conference dealing with profound problems of constitutional law to talk merely procedure except on the excuse that that’s either all I know or all I dare talk about. And if you feel that you are descending from the heights to the depths of the law or perhaps from the sublime to the ridiculous, please be charitable and recall the famous saying of a great English judge that rules of practice are but the handmaid, rather than the mistress, of justice.\(^2\) One ought not expect a handmaid to be as fascinating as a mistress.

What I shall hope to do in the course of this brief talk, thus necessarily barren of opinions or ideas, is to call attention to a few questions which have developed as a result of the recent federal emphasis upon application of state law in our system of national courts. Naturally we must begin with Mr. Tompkins' unfortunate error in getting tangled up with the Erie Railroad—unfortunate certainly for himself, if not for us "lower" federal judges.\(^3\) Many commentators have remarked on the anomaly that procedural uniformity in the federal courts should have been attained at long length at the very time of this emphatic declaration of complete subservience to state substantive law. But anomalies are not unusual in the law,

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\(^1\) The expression is Judge William Clark's in Townsend v. United States, 106 F. (2d) 273 (C. C. A. 3d, 1939), though I understand he and his famous publishers are in some disagreement whether it should be "the little-read" or "the too little-read" Federal Reporter.


\(^3\) Erie R. Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188 (1938).
especially when they flow out of the initial and basic one implicit in a federal system—a system wherein two sovereignties, the state and the national, each operate with kingly force in the same territory at the same time. Perhaps, indeed, we betray our lack of understanding of problems necessarily inherent in our governmental system by thinking of those recent developments as really presenting an anomaly; for they are but new angles of, or perhaps only a new and slightly shifted emphasis on, old problems.

In what I have just said I have probably indicated my own thesis so adequately that there is little more for me to say. I continue because I fear that some decisions tend to treat the application of the Tompkins case to procedural matters, and particularly to the new federal rules of civil procedure, as a simple matter of using a rather arbitrary yardstick to test their validity or effect. It apparently comes to this that, if a federal rule seems to affect the substantial rights of the parties, or to be an important factor in the outcome of the case, then ipso facto it must be set aside at once for the state procedure. It should be added that not all decisions do treat the matter as thus one of blacks and whites, and that the law reviews have done a distinct service to the profession and the bench in carefully analyzing the issues involved.\(^4\) Personally I am clear that here we must be particularly on our guard against hasty and wide-sweeping conclusions, and that for all-embracing categories we must substitute limited holdings applicable in the main only to the special circumstances of particular cases. If we do not do this, I believe we will find ourselves not only ignoring some of the deeper implications of our problem as they affect the interrelation of the state and national courts, but also undermining the recently developed leadership of the federal courts in procedural reform. Indeed, I venture to make a plea that we do not give up the gains recently achieved in effective federal law administration too lightly or except as we are persuaded that the state interest to which we yield is one of substantial and immediate worth—is, in truth, more than a mere abstract generality. Before the Tompkins decision there was no easy general answer to problems of adjustment of a federal system which must give proper scope to state law. There isn't now, after the decision. And we shall not find one by trying to think there is, though we may warp and restrict the new federal rules in the process.

The immediate issue is formed by asking, What is the effect of 
*Erie Railroad v. Tompkins* on the new rules? Of course, an easy answer, supporting the rules as is, is possible. We may say that the

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\(^4\) The articles and comments are already too numerous for citation; several are referred to below.
decision only requires the federal courts to follow state law in matters of substantive right, and since the Court has authoritatively declared matters included in the new rules to be procedural by the mere fact of such inclusion, there's an end of the matter. But general rules have always been subject to test in litigation between parties, and, as the cases already show, these rules cannot expect any other fate. Moreover, they will be subject to interpretation, and restrictions set upon them in the course of interpretation may be as serious as outright disaffirmance.

Before considering more in detail some of the questions raised by the Tompkins case with respect to various of the rules, perhaps we may pause for a moment to consider what is the effect of this decision outside its effect on the rules. I mention the question because I have heard the thesis advanced that its substantial results are largely limited to those which may be found with respect to the procedural rules. This thesis is supported by argument that the central principle of the case was being followed in substantial effect in the federal courts before its pronunciation by the Court. Now this argument must not be too broadly stated, for we know that cases presenting the issue were recurring appearing on the docket of the Court. I need to recall that the Tompkins case itself was a reversal of my own court. And my own judicial experience has been too brief to justify too confident conclusions. All I can say is that though hardly a case is now so friendless that appealing counsel does not eventually call upon this decision for support, yet day after day we are forced of necessity to apply state law in all the large volume of commercial litigation we have before us, particularly that resulting from the bankruptcy jurisdiction, and we could not do any-

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5 In the light of the limitations of the enabling act of June 19, 1934, c. 651, 48 Stat. 1064 (1934), 28 U. S. C. §§ 723b, 723c (1934), and the stated purpose of the rules to govern procedure, Rules 1 and 82, with the Advisory Committee's notes thereto.

6 Compare the recent ruling in Melek v. Collins, 30 F. Supp. 159 (S. D. Cal. 1939), that Rule 4(f) for service of process anywhere in the state is invalid. And compare criticism in Commentary (1939) 2 Fed. Rules Serv. 4f. 21 and in (1940) 53 Harv. L. Rev. 883. See Schwarz v. Artcraft Silk Hosiery Mills, Inc., 110 F. (2d) 465 (C. C. A. 2d, 1940). The validity of Rule 35(a) for compulsory physical or mental examination of a party has been sustained against attack by Sibbach v. Wilson & Co., 108 F. (2d) 415 (C. C. A. 7th, 1939), but certiorari has been prayed for. [Certiorari was granted by the Supreme Court on April 8, 1940, two days after Judge Clark's address.—Ed.]

7 In Francis v. Humphrey, 25 F. Supp. 1, 5 (E. D. Ill. 1938), it was said that even if the state rule of burden of proof of contributory negligence must prevail, yet the federal rule of pleading under 8(c) might still have its own limited scope. And in Sampson v. Channell, 110 F. (2d) 754, 737 (C. C. A. 1st, 1940), Judge Magruder suggests that the Supreme Court might have adopted a rule of burden of proof which would have been valid and conclusive of the case at bar, but Rule 8(c) was one only "of pleading."

thing else even had Tompkins never gotten in the way of the Erie train. With us the bulk of litigation, outside such purely federal topics as patent or admiralty law, concerns transactions occurring in New York. Hence we find ourselves steadily applying the New York law of fraudulent conveyances, registration of chattel mortgages, trust receipts, stock corporations, and so on and so forth—in a large number of instances even before the New York courts have themselves announced the law. A large share of these matters turns on New York statutes; as to many, we would be hard put to it to find a "federal law" on them. It would be unthinkable to apply other than New York law, and I can now recall not a single instance where the point would seem even doubtful.

Let me say with emphasis that I regard this trend not only as natural and inevitable, but also as most desirable. It would indeed be a reproach on our law if a litigant could obtain some advantage in fundamental rights through the mere chance that he was entitled to sue in the federal courts. The very need of consistency and impartiality in our law calls for the application of the Tompkins doctrine. Even though that result might be forthcoming in any event, the impetus given by the Court's pronouncement desirably accelerated the trend. Granting all that, we may still say also that uniform and simple federal procedure represents an outstanding gain which should not be lightly cast aside. The new federal rules constituted a reform made by lawyers for lawyers. Its success to date has been literally phenomenal. The ease with which both attorneys and judges have adjusted themselves to the changes and the zeal with which they have taken advantage of the new developments surpass anything which has happened before. Usually a long period of adjustment, of pain and indecision, has followed any major reform of practice. Not so in the present instance. Indeed, two commentators, after referring to the use made of the discovery procedure by practitioners, remark further that "remarkably enough, the judges, casting off the old shackles, have applied the new scope of examination almost literally. Federal discovery is in operation." There is hardly a breath of dissent.

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12 Pike and Willis, Federal Discovery in Operation (1940) 7 U. of Chi. L. Rev. 297, 327.
13 That my old friend Professor McCaskill is pleading so longingly for the halcyon days of the common law in Jury Demands in the New Federal Pro-
Now we can emphasize the point that procedure is only a means to an end, that of achieving substantive justice, not an end in itself, and yet find values in it. That a case may progress steadily and expeditiously to its rational conclusion without mistakes at best wasteful of time and money, at worst preventing a just adjudication, is of the utmost importance to the litigants. But the two parties to a case are not the only ones interested. All other litigants whose cases may be delayed by gluts in the court calendar, and the public which bears the ultimate cost of litigations, are most directly interested. Until, therefore, we are shown that a specific state policy of substance is being thwarted, I submit that we should follow the carefully formulated principles of the new procedure.

We are justified in taking this position because no abstract and formal differentiation between substance and procedure is possible. In fact almost any borderline case will necessarily present elements both substantive and procedural in nature. A wise teacher pointed this out some years ago with particular reference to a field where this problem had already caused much difficulty. In his famous article, "'Substance' and 'Procedure' in the Conflict of Laws," Professor Walter Wheeler Cook demonstrated that no arbitrary line between the two concepts was possible, since the decisions treated the same matter at times as one, at times as the other, of the two, as the purposes for which definition is made may vary. The problem, then, is not one of discovering the location of a preexisting "line," but of deciding where on sound principles of policy a line shall be drawn. And this involves the delicate task of balancing interests, which is the way problems of federal and state adjustment have been met from the beginning and which is the essence of the judicial process.

If, on the other hand, we try to say that anything possessing an element of substantive law is beyond the federal rules, the result is staggering. The number of the federal rules about which such issue may be raised is indeed large. Thus, with respect to the very first two rules, wherein the fundamental reform of the union of law and equity is set forth, it might be argued that a litigant who could rely on a bare legal right until he could be forced before a court of equity has something of substantive value to himself, at the very least of nuisance value. We may perhaps recall that there were the state

cedure (1940) 88 U. of Pa. L. Rev. 315 (where he finds I am guilty of a new crime or disease—"mergeritis"), seems to me, by the very nostalgia of the plea, to accentuate the fact that the new procedure is working. Cf. Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure (1940) 88 U. of Pa. L. Rev. 645.

14 Supra note 2.
15 (1933) 42 Yale L. J. 333, 336.
court decisions, now for the most part forgotten, which even held that a litigant in an equity case had a constitutional right to a trial by a chancellor, not a jury.\textsuperscript{18} Then Rule 3, dealing with the commencement of suit by the filing of a complaint with the clerk, may affect the time of running of state statutes of limitation.\textsuperscript{17} Perhaps we may skip over the rules providing for a simple system of pleading the ultimate facts, though the New York lawyers certainly seem to think that particularization on motion, separate statement, and the whole hierarchy of pleading objections familiar in state practice should be theirs to use in the federal courts.\textsuperscript{18} But we shall have to pause when we come to rules dealing with the burden of pleading and proving particular issues, for they raise the whole question. They are the stock examples to which every one turns for illustration of the problem.

Rule 8(c), following precedents in England, Connecticut, and New York, which have shown the usefulness of definite rules as to the duty to plead certain oft-recurring defenses, provides that a party must affirmatively set forth certain defenses there listed. Those include such defenses as accord and satisfaction, payment, release, the statute of limitations, and the statute of frauds. Included among these is contributory negligence. The rule does not in terms refer to the burden of proof, but it is usual, though not invariable, for the burden of proof to accord with the burden of pleading.\textsuperscript{19} In general, the two rules are settled by like principles which turn upon considerations of fairness and equity as to who should advance and support the issue if it is to be presented at all.

Now the rule adopted in probably the greater number of states has been that the burden of both pleading and proving the contributory negligence of the plaintiff has been upon the defendant, and this has been the settled rule of the federal courts.\textsuperscript{20} Indeed, the leading case of Central Vermont Ry. v. White,\textsuperscript{21} held that this rule should

\textsuperscript{18} Compare such a case as Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827 (1889), with Brown v. Greer, 16 Ariz. 215, 141 Pac. 841 (1914); and see CLARK, CODE PLEADING (1928) 60-61.

\textsuperscript{17} (1938) 51 HARV. L. REV. 1087; 1 MOORE'S FEDERAL PRACTICE (1938) 238-256.

\textsuperscript{19} I have discussed this point of view elsewhere. See Clark, The Bar and the Recent Reform of Federal Procedure (1939) 25 A. B. A. J. 22; PROCEEDINGS OF THE NEW YORK SYMPOSIUM ON THE FEDERAL RULES (1938) 240, 243; see also Pike, Objections to Pleadings under the New Federal Rules of Civil Procedure (1937) 47 YALE L. J. 50, 62-65.

\textsuperscript{20} The issue of payments seems to be the only substantial variation. CLARK, CODE PLEADING (1928) 195-196, 417-419.


\textsuperscript{22} 238 U. S. 507, 55 Sup. Ct. 865, 59 L. ed. 1433 (1915).
be applied in Vermont in a case under the Federal Employers Liability Act in preference to the state rule, since a plaintiff had a right to such a course, which was more than procedural and was substantive under that Act. And the case now is perhaps the most freely cited precedent against federal uniformity on proving contributory negligence.

The problem under the Tompkins case is acute because a number of important and populous states have the rule which places the burden of showing freedom from contributory negligence upon the plaintiff. These include the state of New York, except in death cases, and the state of Illinois. A federal court sitting in Illinois has already ruled that in an action there governed by Illinois law, the burden of proof of lack of contributory negligence is upon the plaintiff—a decision which has been widely cited, but which, as I say with all deference, seems to me to leave some stones not overturned and therefore not to constitute the final word on the subject. Other decisions are rather conflicting, and commentators have presented a variety of points of view. Recently Judge Hincks has been called upon to rule on this question in the light of Connecticut law, and since this law, in my opinion, presents a real laboratory case for consideration, or perhaps experimentation, I may be pardoned for examining it with some care.

In Connecticut the historic rule has been that in a negligence action the plaintiff, in proving that the defendant was the proximate cause of his injury, must show that he himself is free from negligence. Under this analysis an allegation charging defendant with negligence said in effect that the defendant's negligence was the proximate cause of the injury, thus excluding any contributory negligence of the plaintiff, and no other allegation was necessary. Nevertheless the lawyers, who doubtless had purchased and read pleading form books, came often to include the unnecessary allegation that the plaintiff was in the exercise of due care at the time of the accident. You will soon see how this striving for perfection by the lawyers became their undoing. There came a case where the defendant autoist succeeded in killing his victim and thus destroyed the only eye-witness to the accident other than himself. Naturally the administrator in bringing suit for wrongful death was unable to show that his intestate

was in the exercise of due care. He was therefore non-suited, and on appeal the decision was affirmed, though Chief Justice Wheeler wrote a stirring dissent condemning the backwardness and harshness of the ruling.\(^{25}\) That was in 1930. In 1931, the legislature had responded to the demand for change by providing that in death cases the burden of this issue should be on the defendant.\(^{26}\)

One might think that this substantial reform had been accomplished and questions about it put at rest. Nevertheless shortly thereafter in a death case the lawyer made the unnecessary allegation that his intestate was in the exercise of due care. The court took him at his word and charged directly contrary to the statute on the ground that the plaintiff had assumed the burden of proof of due care by pleading it. That decision was upheld by the supreme court of our state, on the ground of invited error, that is, that the plaintiff had invited the error which the trial court had committed.\(^{27}\) The present distinguished Chief Justice took me to task for venturing some criticism of the case, pointing out that it was the theoretical and professorial point of view which led me to do so.\(^{28}\) Now that I have become a judge I can confess to more sympathy with the view which endeavors to sustain a trial court's ruling during a long and hard-fought case. I still wonder, however, whether the state's policy solemnly declared by the legislature had not been somewhat lightly set aside because of a lawyer's mistake in pleading not wisely, but too well.

At any rate, in the light of this history, can we say that the burden of proof of contributory negligence in non-death cases is so vital a state policy that it overrides the federal rule? This would be anomalous when the state supreme court holds that even a declaration by the legislature on the subject may be set aside by the parties themselves. It has said further that the statute is "procedural in its character rather than one affecting substantive rights" and merely raises a presumption of due care, shifting the burden of proof; hence it applies to pending actions.\(^{29}\) Judge Hincks said that when the court of last resort of the state had held that the burden of proof of contributory negligence was no part of the substantive law of the state,

\(^{25}\) Kotler v. Lalley, 112 Conn. 86, 151 Atl. 433 (1930). \(^{26}\) Cf. (1931) 40 Yale L. J. 484.


\(^{28}\) (1935) 9 Conn. B. J. 282, 290.

the Tompkins case required him to treat the matter as one of procedure and follow Rule 8(c) in a non-death case. And who with this background is willing to attack that result? As a matter of fact, a law review commentator urged that very result for New York cases, on the ground that the New York state courts had held the issue procedural.

The final chapter in the Connecticut story needs to be stated, for the Connecticut legislature, always obliging to its litigants and its judges, has just amended its statute again to place the burden of contributory negligence on the defendant in all cases, whether of death or of personal injury or property damage. That is the one solution which can confidently be recommended to everybody.

I suggest again that this shows that a rule, which obviously has some effect upon substantive rights and just as obviously has to do with the manner in which the case is brought before and presented to the courts, does affect both substance and procedure, and that we cannot decide in which category it must go for present purposes without weighing other matters of policy. May it not be sound to do as Judge Hincks has done and to try to ascertain how strongly substantive the rule is regarded in the state itself, by its legislature and courts? This will not be an easy task, leading always to a clear-cut conclusion, but it is one which does give proper value to the conflicting interests here present.

The complications of this problem can be increased by asking, if any state law governs, which one it is. That is a question which is going to obtrude itself quite often on the courts. For negligence cases usually are in the federal courts only because the parties are citizens of different states and hence very often the accident will have happened in a state other than the one wherein the federal court is actually sitting. Under the present state of district court law, what would be the answer if a Connecticut defendant is sued in the District Court of Connecticut for an accident occurring in Illinois? In the Connecticut district the burden of proving contributory negligence is procedural; in Illinois it is not. The issue may be varied by stating the converse situation or in other details, but I am quite sure you can picture those variations without my help and have an answer ready at hand for each situation. Let me suggest again the

31 (1939) 87 U. of Pa. L. Rev. 344.
33 See Sampson v. Channell, 110 F. (2d) 754 (C. C. A. 1st, 1940). See also Pike and Fischer, What Law Governs Matters of "Substance" in Federal Practice (1939) 2 Fed. Rules Serv. 13; and Tunks, supra note 20. In Sampson v. Channell, Judge Magruder refers to the fact that the state courts have generally
thought I have offered that, unless the state policy is clear and compelling, there would seem to me no reason for rejecting the federal rule. In other words, the burden should be on the party who asks its disaffirmance to demonstrate that state policy so requires.

But, before I leave this subject, I feel that with some fear and trepidation I must turn to consideration of the Supreme Court’s own most recent pronouncement on the matter of burden of proof. It has been thought that in the case of Cities Service Oil Co. v. Dunlap, decided last December, the Court has put these matters at rest by holding the matter of burden of proof to be one of substance. Now I presume that in the short time I have been on the bench I have as high record of error as any judge, and I am therefore almost predisposed to error here. Nevertheless I do not believe that is so, even though the Court supported its decision by saying that Central Vermont Ry. v. White, “considered an analogous situation and pointed out the principle presently applicable.” For it seems to me the same problem arises which I have stressed above, namely, How seriously did the state courts view the particular issue, which was that of a bona fide purchaser for value without notice of land? The court below admitted that the state law as to this burden was different from that applied by the trial court, but relied on the exceptional character of the state law and the fact that the rule of the federal courts and of most of the states was otherwise. This was not a proper basis for disregarding the state rule, and the Supreme Court, taking the circuit court at its word as to what the state rule was, therefore reversed.

Now I wonder if an actual exploration of the state law might not have dredged up some of the points I have referred to as presented by the Connecticut doctrine of contributory negligence. The state in question was Texas. I do not want to be dogmatic about the matter, for I cannot pretend to have made a complete analysis of Texas decisions, and I refer to the point only by way of example. But it

held rules allocating the burden of proof of contributory negligence to be procedural in nature, but he then says that the result must be otherwise in the federal courts under the Tompkins doctrine. Nevertheless his actual decision is in accord with the views of the state courts and supports the arguments set forth in the text, for it places the burden on the defendant, contrary to the law of Maine, where the accident sued on occurred. This result was reached because the action was tried in the federal court in Massachusetts, and the supreme judicial court of that state insists that the rule is procedural and the burden must be on the defendant, even though the law of the place of the accident may be otherwise. Judge Wilson concurred in the result only; Judge Peters dissented.

34 308 U. S. 208, 60 Sup. Ct. 201, 84 L. ed. (adv. op.) 185 (1939), noted (1940) 8 Geo. Wash. L. Rev. 860 and (1940) 26 Va. L. Rev. 375.

35 Supra note 21.

is my impression that Texas also holds to the doctrine of invited error and that unnecessary pleading may lead to assumption of a burden of proof not otherwise resting upon the pleader. Certainly I do not see how the case of Boswell v. Pannell, \(^{37}\) decided by the Supreme Court of Texas in 1915, is to be otherwise explained, for it appears to me to hold that defendant had pleaded himself into the burden of proving himself an innocent purchaser for value. The court points out that the defendant had the benefit of this affirmation before the jury, which may have been a distinct help to him. And this is the same issue which was in the Dunlap case. Perhaps the Texas court views the issue no more seriously than does the Connecticut court that of contributory negligence.

The Dunlap case, with certain variations, might be made to present other aspects of the same problem. Therein complainant sued to quiet title to a strip of oil land, relying on a chain of title wherein was a deed conveying the land in question if the bounds, but not the distances, cited in it prevailed. Defendant relied on a chain of title where the distance stated in this deed would govern, to wit, 440 yards, instead of 506 yards. Could defendant have raised substantially the issue he desired by a simple denial, and then reliance on proof of the facts and circumstances under which the deed was given as 'explaining its meaning'? At any rate, he did not try to do so, but pleaded that the bounds stated in the deed were inserted therein by mistake and inadvertence. Complainant replied simply that it was a bona fide purchaser for value without notice. These were all the pleadings, on the basis of which the district court held that complainant had the burden of proof of its innocence, to be now reversed by the Supreme Court. I refer to this matter only to suggest that the way a case is pleaded often will go far to determine the way it must be presented at trial. That is particularly true in view of the union of law and equity. Matters which in the old days required a separate bill of reformation now at most come in as an equitable defense in the answer, and it may be possible to squeeze them into a mere denial. \(^{38}\) How far do such vagaries in pleading, inevitable under a fairly simple and unregulated system of allegation, go to determine our substantive rules? I do not regard it as particularly desirable that a court should adjust its rules of burden of proof and presumption to the way the parties plead, but I wonder if to a certain extent it is not inevitable. At any rate, without necessarily going that far, we can have these possibilities in mind in weighing


\(^{38}\) Cf., Clark, Trial of Actions under the Code (1925) 11 Corn. L. Q. 482.
whether a federal rule regulating the procedural steps is to be not followed.

I wish there were time to discuss other matters concerning other federal rules left perhaps more or less in doubt by the Tompkins case. I can refer to only one more, a most interesting one indeed, as it seems to me. One would think that the rules for free amendment of pleadings, having had such a long basis in procedural reform generally and in the federal statutes themselves, would now be beyond the realm of permissible doubt. Yet a distinguished circuit court of appeals has already ruled that Rule 15(c), providing that, when the claim asserted in the amended pleading arises out of "the conduct, transaction, or occurrence" set forth in the original pleading, the amendment shall relate back to the date of the original pleading, does not apply when state decisions have said that two or more different causes of action arise out of a single transaction or occurrence. The matter there under consideration was one involving different claims for wrongful death. This decision, too, may be far-reaching, not merely because it goes against what seemed to be fairly well settled rules of amendment, but also because it brings back into the new federal rules the concept of cause of action, which had been definitely outlawed in favor of emphasis upon not the legal right, but the occurrence or transaction which might give rise to various legal rights. The implications of the decision may be rather serious if it cannot be confined rather strictly to its facts as based upon a particular Oklahoma statute as defined and construed by the courts of that state.

I recall that Messrs. Frankfurter and Landis, in their well-known essay on "The Business of the Supreme Court," stated that from the beginning of our government in 1789 until the time when they wrote controversy had been continuous and prolonged as to the proper orbit of federal and state action. I dare say that the two partners—and particularly the senior member as justice of the Supreme Court—have had occasion to see the continuance of this issue even to the present moment. For one I do not look for any complete adjustment of the problems of which I have spoken. As you can see, instead I shudder at the prospect of any attempt at finality. I suggest once more that in mere matters of getting things done in courts, as well as elsewhere, we achieve more if we can round off all sharp


points and if we can allow for considerable play in the joints of our machine. If in fact we are bound by matters of constitutional right on these problems, I fear we shall just about be compelled to give up hopes of achieving any degree of procedural efficiency. If, however, we have here, as I believe, only a question of practical ways and means to reach expeditiously fair and just results between parties litigant, then I expect we will continue to get along adjusting these issues of state and national policy in much the same way as we have done these many years.