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THE EQUITABLE REMEDIAL RIGHTS DOCTRINE

SOON after the principle of *Erie Railroad v. Tompkins* [1] had been extended to suits in equity,[2] some federal courts established a competing rule by reviving the doctrine of equitable remedial rights. Invoking this concept equitable remedies have been administered by federal courts in diversity cases, without always following the practice of courts of the state in which they

1. 304 U. S. 64 (1938). The legal literature upon the effect of this decision has been collected in 1 MOORE, FEDERAL PRACTICE (Supp. 1945) 47, note 1; see Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins* (1946) 55 YALE L. J. 267, 271. The *Erie* rule has been generally limited in its application to suits arising under diversity and alienage jurisdiction. D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U. S. 447 (1942); *accord:* Clearfield Trust Co. v. U. S., 318 U. S. 363 (1943); Deitrick v. Greaney, 309 U. S. 190 (1940); Board of Commissioners v. U. S., 308 U. S. 343 (1939). For the suggestion that state statutes of limitations will govern cases predicated upon general federal question jurisdiction see *infra* note 78.

2. In Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938), decided one week after *Erie R. R. v. Tompkins*, the Court said, "The doctrine [of the *Erie* case] applies though the question of construction [of an insurance contract] arises not in an action at law, but in a suit in equity." *Id.* at 205. Cases reiterating and extending the Ruhlin principle have been collected in York v. Guaranty Trust Co., 143 F. (2d) 503, 525, note 42 C(C.. A. 2d, 1944) *rev'd*, 326 U. S. 99 (1945).

were sitting.[3] In *Black and Yates v. Mahogany Ass'n*,[4] for example, an injunction was sought in the District Court for the District of Delaware to restrain a rival wood dealer from trade libel. Delaware law afforded a right of action for damages to a person who received legal injury from the disparagement of his goods but did not authorize enjoining a continuing libel. The Third Circuit Court of Appeals reversed a judgment of the District Court dismissing the complaint and ordered the injunction to issue, holding that ". . . in so far as equitable remedies are concerned federal courts are to grant them in accordance with their own rules which have been developed out of the English Chancery practice." [5] In addition to certain holdings of the Third Circuit,[6] examples of the use of this device to avoid state law may be found in cases of the Second,[7] Fourth [8] and Eighth [9] Circuits. Most courts, however, have not utilized this concept of remedial rights, but have followed state law as to the type of relief to be granted.[10] On the theory that

3. The problem of remedial rights must be maintained in its perspective. The limited aim of this discussion is to force an elimination of whatever remains of the doctrine. The somewhat extensive citations of examples of the doctrine, *infra* notes 6–9, 94–99 have been included to define its ramifications and not to magnify the extent of its use.

4. 129 F. (2d) 227 (C. C. A. 3d, 1942), *cert. denied*, 317 U. S. 672 (1942).

5. *Id.* at 233. Circuit Judge Biggs continued, "The rule of Erie R. Co. v. Tompkins being determinative of substantive rights, there is still preserved to the federal courts a uniform basis for granting equitable remedies in cases in which substantive rights have arisen under state laws." *Ibid.* See Overfield v. Pennroad Corp., 146 F. (2d) 889, 923, note 55 (C. C. A. 3d, 1944) (dissent).

6. Maxwell v. Enterprise Wall Paper Mfg. Co., 131 F. (2d) 400 (C. C. A. 3d, 1942); First Camden Nat. Bank & Trust Co. v. Aetna Cas. & Sur. Co., 132 F. (2d) 114 (C. C. A. 3d, 1942), *cert. denied*, 319 U. S. 749 (1943); Orth v. Transit Inv. Corp., 132 F. (2d) 938 (C. C. A. 3d, 1942). The Delaware District Court has been persistent in upholding the remedial rights rationale. Homewood v. Standard Power & Light Corp., 55 F. Supp. 100 (D. Del. 1944); Goldman v. Postal Telegraph, 52 F. Supp. 763 (D. Del. 1943); Dunn v. Wilson & Co., 51 F. Supp. 655 (D. Del. 1943); see Perrott v. U. S. Banking Corp., 53 F. Supp. 955, 957 (D. Del. 1944); Barrett v. Denver Tramway Corp., 53 F. Supp. 198, 201 (D. Del. 1944); Bailey v. Tubize Rayon Corp., 56 F. Supp. 418, 422 (D. Del. 1944); S.E.C. v. Fiscal Fund, Inc., 48 F. Supp. 712, 715 (D. Del. 1943); Dunn v. Wilson & Co., 53 F. Supp. 205, 208 (D. Del. 1943).

7. York v. Guaranty Trust Co., 143 F. (2d) 503 (C. C. A. 2d, 1944), *rev'd*, 326 U. S. 99 (1945); see Schwarz v. Artcraft Silk Hosiery Mills, Inc., 110 F. (2d) 465, 467 (C. C. A. 2d, 1940). Another device is used in Griffith v. Bank of New York, 147 F. (2d) 899 (C. C. A. 2d, 1945), *cert. denied*, 325 U. S. 874 (1945); see *infra* note 63.

8. Purcell v. Summers, 145 F. (2d) 979 (C. C. A. 4th, 1944).

9. Herzbergs, Inc. v. Ocean Acc. & Guar. Corp., 42 F. Supp. 52 (D. Nebr. 1941), *aff'd*, 132 F. (2d) 438 (C. C. A. 8th, 1943). In a suit for reformation of an insurance contract the federal court adopted the classification of "remedial" used by the state court for purposes of their own conflict of law doctrine and then applied the remedial rights rationale to this borrowed characterization. See COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS (1942) 163–5 for critique of such practices.

10. The use of the equitable remedial rights doctrine has been uniformly disapproved. *First Circuit*, National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 140 F. (2d) 618 (C. C. A. 1st, 1944). *Second Circuit*, Zachs v. Aronson, 49 F. Supp. 696 (D. Conn. 1943); U. S. v. Certain Lands in Highlands, N. Y., 49 F. Supp. 962

equitable remedies involve more than a question of procedure, these courts have applied the rule of the *Erie* case. The Fifth [11] and Tenth [12] Circuits, for instance, have stated that by bringing a suit in a federal court the litigant may obtain no remedies other than those afforded him by local statutes and decisions.[13]

As the Supreme Court has not yet fully clarified the status of remedial rights,[14] individual instances of usage of the doctrine still occur. In many of these cases the courts clearly have not been conscious of any issue involving the selection of equitable remedies, but have concerned themselves principally with substantive law. The test of the doctrine, however, lies in a comparison of the federal remedy actually granted with the relief obtainable in the state court, and not in whether the selection was deliberately made in terms of the equitable remedial rights rationale.

Appraisal of the remedial rights concept is complicated by an undefined and ambiguous terminology which pervades most decisions. The termi-

(S. D. N. Y. 1943); Smith v. Aeolian Co., 53 F. Supp. 636 (D. Conn. 1943); Bohn v. American Export Lines, Inc., 42 F. Supp. 228 (S. D. N. Y. 1941); Palmer v. Palmer, 31 F. Supp. 861 (D. Conn. 1940). *Third Circuit*, Maryland Casualty Co. v. City of Pittsburg, 51 F. Supp. 459 (W. D. Pa. 1943); Moreschi v. Mosteller, 28 F. Supp. 613 (W. D. Pa. 1939); Kravas v. Great Atl. & Pac. Tea Co., 28 F. Supp. 66 (W. D. Pa. 1939). *Fourth Circuit*, King v. Richardson, 46 F. Supp. 510 (M. D. N. C. 1942). *Fifth Circuit*, Park v. Park, 37 F. Supp. 185 (N. D. Ga. 1941), *rev'd on other grounds*, 123 F. (2d) 370 (C. C. A. 5th, 1941) and cases cited *infra* note 11. *Sixth Circuit*, McAndrews v. Bellknap, 141 F. (2d) 111 (C. C. A. 6th, 1944); Pitcairn v. Rumsey, 32 F. Supp. 146 (W. D. Mich. 1940). *Seventh Circuit*, Elastic Stop Nut Corp. v. Greer, 62 F. Supp. 363 (N. D. Ill. 1945); Ross v. Service Lines, 31 F. Supp. 871 (E. D. Ill. 1940). *Ninth Circuit*, Robinson v. Linfield College, 42 F. Supp. 147 (E. D. Wash. 1941), *aff'd*, 136 F. (2d) 805 (C. C. A. 9th, 1943), *cert. denied*, 320 U. S. 795 (1943); Bruun v. Hanson, 103 F. (2d) 685 (C. C. A. 9th, 1939); Howell v. Deady, 48 F. Supp. 104 (D. Ore. 1939). *Tenth Circuit*, Meyer v. City of Eufaula, 132 F. (2d) 648 (C. C. A. 10th, 1942), see *infra* note 12.

11. Fakouri v. Cadais, 147 F. (2d) 667 (C. C. A. 5th, 1945) (federal court held empowered to set aside probate decree only if state court could grant same remedy); *accord*, Park v. Park, 123 F. (2d) 370 (C. C. A. 5th, 1941); Wells Fargo Bank & Tr. Co. v. Titus, 41 F. Supp. 171 (S. D. Tex. 1941), *rev'd on other grounds*, 134 F. (2d) 223 (C. C. A. 5th, 1943); *cf.* Howard v. U. S., 125 F. (2d) 986 (C. C. A. 5th, 1942); see Commercial Nat. Bank v. Parsons, 144 F. (2d) 231 (C. C. A. 5th, 1944), *cert. denied*, 323 U. S. 796 (1945); Metropolitan Life Ins. Co. v. Haack, 50 F. Supp. 55 (W. D. La. 1943). But see Rambo v. U. S., 145 F. (2d) 670, 672 (C. C. A. 5th, 1945), *cert. denied*, 325 U. S. 858 (1945).

12. Meyer v. City of Eufaula, 132 F. (2d) 648 (C. C. A. 10th, 1942). In a suit to foreclose a lien upon property of delinquent municipal improvement bondholders federal equity was held to be without power to grant foreclosure as such a remedy was not authorized by Oklahoma law. The court specifically denunciates the remedial rights rationale invoked by appellant. *Id.* at 652–3. For a similar unequivocal rejection, see Bruun v. Hanson, 103 F. (2d) 685, 696 (C. C. A. 9th, 1939).

13. This same idea has been stated conversely "A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality." *Ex parte* McNiel, 13 Wall. 236, 243 (U. S. 1871).

14. See *infra* section III.

nological problem is integrated with the legal one of determining the value of precedent. For purposes of this discussion the two are dissociated.

II

Precedent. Federal independence in the grant of equitable remedies has been based upon pre-1938 decisions concerning federal enforcement of state statutes [15] which attempted to (1) blend law and equity in the state courts, (2) substitute an equitable action for a legal one, (3) impair the right of the federal court to hear a suit by vesting exclusive jurisdiction of such causes in a particular state court, (4) prevent federal cognizance of a suit by the creation of an adequate remedy at law in the courts of the state, (5) control federal equity practice and procedure and (6) render equitable relief inappropriate by changing the substantive requirements for an equitable remedy. Reëxamined in the light of the new Federal Rules of Civil Procedure [16] and the *Erie* decision, these cases appear inadequate as precedents for the equitable remedial rights rationale.

Since 1818 the federal courts have refused to apply state statutes which commingled law and equity.[17] In the leading case, *Robinson v. Campbell*,[18] the defendant to an action of ejectment sought to interpose an equitable defense converted into a legal defense by a Tennessee statute. The Supreme Court held the statutory defense unavailable to a litigant in the federal court saying, ". . . the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country [England] from which we derive our knowledge of those principles. . . ." [19] Whatever their relevance to remedial rights

15. Under Swift v. Tyson, 16 Pet. 1 (U. S. 1842), only in cases involving state statutes, property and local law were the federal courts required to follow state law. Since, on the federal equity side, state legislation regulating court practice was not controlling, see *infra* note 35, the problem then as now was to separate state "substantive" statutes from "procedural" ones. Upon cases of statutory categorization the equitable remedial rights doctrine was founded. Cases based upon this dichotomy between "substance" and "procedure," however, may be misleading today since under *Erie v. Tompkins* the policy emphasis has shifted to uniformity within a state. Therefore early classifications must be critically reanalyzed. For a discussion of federal common law under *Swift v. Tyson* see 1 MOORE, FEDERAL PRACTICE (1938) 74–103.

16. FED. R. CIV. P. following 28 U. S. C. § 723c (1940); authorized by 48 STAT. 1064 (1934), 28 U. S. C. § 723b, c, (1940).

17. York v. Guaranty Trust Co., 143 F. (2d) 503, 521–2 (C. C. A. 2d, 1944).

18. 3 Wheat. 212 (U. S. 1818).

19. *Id.* at 222. The line between law and equity may have been maintained originally for the sake of tradition alone. Von Moschzisker, *Equity Jurisdiction in the Federal Courts* (1927) 75 U. OF PA. L. REV. 287, 295–6; Comment (1936) 49 HARV. L. REV. 950, 955. Also, state code procedure could not be adopted because the procedure of the federal courts on their law side conformed to state practice, while in equity it was governed by rules promulgated by the Supreme Court, see *infra* note 35. But the need for preserving the Constitutional right to a jury trial was always a factor in the separation. See A. M. DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) 662; Comment (1941) 41 COL. L. REV. 104, 107. See *infra* note 25 and text accompanying.

problems, the cases which maintained this distinction between law and equity despite state code reform [20] appear to be directly overruled by the federal unification of law and equity into one form of action.[21]

The new Rules also abrogate those cases which refused to enforce state legislation authorizing an equitable remedy in situations where a remedy at law already existed in the federal forum.[22] This problem was typified by *Whitehead v. Shattuck*: [23] pursuant to an Iowa statute a claimant, out of possession of land, brought suit to quiet title against the person in possession. The Iowa statute was held unenforceable in the federal court and the suit dismissed on the ground that the action of ejectment afforded relief in these circumstances.[24] Underlying this decision [25] is the consideration that

20. Livingston v. Story, 9 Pet. 632 (U. S. 1835) (Louisiana Civil law procedure did not affect federal court); Bennett v. Butterworth, 11 How. 669 (U. S. 1850) (Texas statutory blending of law and equity inoperative in federal court); Fenn v. Holme, 21 How. 481 (U. S. 1858) (Mississippi merger of law and equity ineffective in federal court); Thompson v. Railroad Companies, 6 Wall. 134 (U. S. 1867) (Code procedure of Ohio not followed); see *In re* Sawyer 124 U. S. 200, 210 (1888).

21. "There shall be one form of action to be known as 'civil action.' " FED. R. CIV. P., Rule 2. Varying interpretations have been accorded this Rule which was designed to obliterate all distinctions between law and equity. Compare the discussion of Justice Thurman Arnold in Groome v. Steward, 142 F. (2d) 756 (App. D. C. 1944) with Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188 (1942). See 1 MOORE, FEDERAL PRACTICE (1938) § 2.04; 3 *id.* (Supp. 1945) 28-34.

22. Scott v. Neely, 140 U. S. 106 (1891) (statutory creditor's bill as substitute for law action on contract claim dismissed); Cates v. Allen, 149 U. S. 451 (1893) (same); Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923) (statutory receivership in lieu of contract action refused); Henrietta Mills v. Rutherford County, 281 U. S. 121 (1930) (suit authorized by statute to enjoin collection of state tax instead of action for recovery of payment dismissed); Matthews v. Rodgers, 284 U. S. 521 (1932) (same). Both the *Henrietta Mills* and *Rodgers* cases would be prohibited today by the Johnson Act, 50 STAT. 738 (1937), 28 U. S. C. § 41 (1) (1940). Compare with them the situation where the remedy at law in the federal courts is inadequate. Cummings v. National Bank, 101 U. S. 153 (1879) (statutory suit for injunction against collection of state tax sustained); City Bank Farmers Trust Co. v. Schnader, 291 U. S. 24 (1934) (same); *cf.* Stratton v. St. Louis Southwestern R. Co., 284 U. S. 530 (1932). There are strong considerations of comity which pervade these state tax cases. This policy eventually led to the Johnson Act which now prevents such problems from arising.

23. 138 U. S. 146 (1891).

24. In Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405 (1884), an Indiana statute identical with the Iowa statute in the *Whitehead* case was held to merely change the substantive requirements of the remedy of quiet title and so was enforceable in the federal courts. In this case the suit was brought by a person out of possession of land but since an injunction to restrain waste was involved ejectment did not lie as an alternative remedy; *accord*, Clark v. Smith, 13 Pet. 195 (U. S. 1839) and cases cited *infra* note 40.

25. The actual decision was based upon Section 16 of the Judiciary Act of 1789, 1 STAT. 82 (1789), 28 U. S. C. § 384 (1940) which forbade suits in equity in any case where a plain, adequate and complete remedy could be had at law. As originally introduced this section would have served to limit relief in equity to those cases where there was *no* remedy at law, but as enacted the section was only declaratory of the law as it then existed and served to protect the common law right to jury trial. The Seventh Amendment did not assume this function until 1791, two years later. As a politic measure to insure the integrity of law courts from equity encroachment, Section 16 was unnecessary in the federal courts where there

an equity proceeding would have deprived the litigants of their Constitutional guarantee of jury trial "in suits at common law." [26] Today, however, if an *issue* arises in a factual context which was formerly a legal cause of action, under Rule 38 jury trial may be obtained upon that issue regardless of how the action is framed.[27] Since the right of jury trial is thus assured, the state-created remedy should no longer be unavailable in the federal courts because of a possibility of alternative legal relief.[28]

Two further lines of cases, sometimes cited as authority for the equitable remedial rights doctrine, have established that a state statute cannot impair federal jurisdiction either directly, by giving exclusive jurisdiction of certain causes to a particular state court,[29] or indirectly, by creating an adequate

were never two competing court systems but one court sitting alternately at law and in equity. Warren, *History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 96–7; see Boyce's Executors v. Grundy, 3 Pet. 210, 215 (U. S. 1830); Whitehead v. Shattuck, 138 U. S. 146, 150–1 (1891); Schoenthal v. Irving Trust Co., 287 U. S. 92, 94 (1932); Denison v. Keck, 13 F. (2d) 384, 386 (C. C. A. 8th, 1926). But *cf.* Note (1927) 27 COL. L. REV. 66, 68, note 7, suggesting that Section 16 was intended to limit federal equity power.

26. U. S. CONST. AMEND. VII.

27. The word "issue" in Rule 38 was deliberately chosen to deemphasize the distinction between legal and equitable forms of action. See James, *Trial by Jury and the New Federal Rules of Procedure* (1936) 45 YALE L. J. 1022, 1032, 1036; 3 MOORE, FEDERAL PRACTICE (1938) 3013–9 (basic nature of issue controls jury trials).

28. Section 16 of the Judiciary Act should no longer create a bar to such a suit. The Federal Rules Committee Note to Rule 2, April, 1937 Draft, stated that Section 16 was thereby superseded. However, the final Committee Note described the section as modified. See 1 MOORE, FEDERAL PRACTICE (1938) 108. Draftsmen of the proposed new Judicial Code, U. S. CODE Title 28, report that Section 16 [28 U. S. C. § 384 (1940)] will be left out completely in the new revision. Two cases under the new Rules have considered the effect of an alternate remedy at law upon an equity action. In Keene v. Hale-Halsell Co., 118 F. (2d) 332 (C. C. A. 5th, 1941), a creditor's bill was filed against the debtor's widow before the contract debt had been reduced to judgment. In sustaining jurisdiction over the action, the court said "Nor will the suit then be defeated by the decision of Scott v. Neely [or] Cates v. Allen. . . . The reasons there given for dismissing the bill, or remanding it, were that the existence and amount of the debt made a law issue, and a jury trial of it could not be afforded the debtor in equity; and that the creditors had not exhausted their remedies at law. These reasons will not be good in this case if they be urged by the administratrix, for the Rules of Civil Procedure will now apply, and under them all remedies, legal and equitable, are available, and a jury trial of issues that constitute a case at common law in the meaning of the Constitution may easily be separately had." *Id.* at 335. But see the *obiter dictum* in Harlan v. Sparks, 125 F. (2d) 502, 506 (C. C. A. 10th, 1942), a case in which the effect of the Rules was not considered. However, state statutory enlargement of an equitable remedy to encompass a legal cause of action must be subject to the qualification that it will be inoperative to create federal jurisdiction. White v. Sparkhill Realty Corp., 280 U. S. 500 (1930). This limitation would only arise when the complaint for such an equity action was drawn to include a general federal question and has no application to diversity cases. So the decisions other than the tax cases, *supra* note 22, cannot be justified on this ground. See 1 MOORE, FEDERAL PRACTICE (1938) 184–5.

29. Suydam v. Broadnax, 14 Pet. 67 (U. S. 1840) (law action against administrator of insolvent estate sustained despite state statute prohibiting the action); Union Bank of Tenn. v. Jolly's Adm'rs, 18 How. 503 (U. S. 1855) (recovery on judgment creditor's bill not barred by statute requiring all suits against administrators to be brought in probate court); Water-

remedy at law in the state court.[30] *Payne v. Hook*,[31] wherein a bill in a federal court to obtain a distributive share of an estate was sustained notwithstanding a Missouri statute giving exclusive jurisdiction of suits against administrators to the county courts of probate, demonstrates the former type of statute; and in *United States v. Howland* [32] a statutory remedy at law in the courts of Massachusetts was held inoperative to defeat the jurisdiction of a federal court to entertain an equitable suit by the government for an accounting and a mandatory injunction to aid the collection of taxes. Properly construed, these cases seem valid authority only for the proposition that state legislation cannot prevent litigants, who meet the statutory requirements of federal jurisdiction, from entering the courts of the United States, and appear to be irrelevant as to what type of equitable remedy the federal courts may grant.[33]

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man v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33 (1909) (statute giving exclusive jurisdiction to suits against executors did not bar suit for an accounting); see Pennsylvania v. Williams, 294 U. S. 176, 181 (1935); *cf.* Gordon v. Washington, 295 U. S. 30, 35–6 (1935).

30. McConihay v. Wright, 121 U. S. 201 (1887) (state statutory remedy of ejectment did not prevent bill quia timet in federal court); Mississippi Mills v. Cohn, 150 U. S. 202 (1893) (creditor's bill sustained irrespective of adequate state legal remedy); Smyth v. Ames, 169 U. S. 466 (1898) (injunction against enforcement of state statute not barred by statutory legal remedy in state courts). The cases following *Smyth v. Ames* have established that the adequate remedy at law must exist in the federal court to bar equitable relief. Chicago, B. & Q. R. R. v. Osborne, 265 U. S. 14 (1924); Risty v. Chicago, R. I. & Pac. Ry., 270 U. S. 378 (1926); *cf.* Di Giovanni v. Camden Fire Ins. Ass'n, 296 U. S. 64 (1935) (bill in equity to cancel insurance policies did not lie where adequate remedy at law in federal courts was barred for lack of jurisdictional amount in controversy). When the adequate state legal remedy also exists in the federal court, equitable relief has been consistently refused. Compare Singer Sewing Machine Co. v. Benedict, 229 U. S. 481 (1913) (injunction against collection of state tax expressly forbidden by state statute also refused by federal courts because adequate legal remedy was available in both tribunals) with Henrietta Mills v. Rutherford County, 281 U. S. 121 (1930).

31. 7 Wall. 425 (U. S. 1868).

32. 4 Wheat. 108 (U. S. 1819).

33. In the *Erie* decision, the court states: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." 304 U. S. at 78. Since federal jurisdiction is statutorily defined and based upon Article III of the Constitution, the refusal to allow curtailment by state statute has been reaffirmed since the *Erie* case. Blacker v. Thatcher, 145 F. (2d) 255 (C. C. A. 9th, 1944), *cert. denied*, 324 U. S. 848 (1945) (Montana statute giving exclusive jurisdiction of suits against executors to state courts of probate); Miami County Nat. Bank v. Bancroft, 121 F. (2d) 921 (C. C. A. 10th, 1941) (same); City of Hollis v. Carrell, 42 F. Supp. 893 (W. D. Okla. 1941) (foreclosure of delinquent municipal improvement bonds sustained despite state statute vesting exclusive jurisdiction in state court); Peterson v. Demmer, 34 F. Supp. 697 (N. D. Tex. 1940) (suit removed to federal court from state court given exclusive jurisdiction of the cause by statute); Vanderwater v. City Nat. Bank, 28 F. Supp. 89 (E. D. Ill. 1939) (same); see Crowley v. Allen, 52 F. Supp. 850, 852 (N. D. Cal. 1943) (suit by U. S. officer). Similarly, the principle that an adequate legal remedy in the state courts cannot indirectly bar federal jurisdiction has been reiterated. The Maccabees v. City of North Chicago, 125 F. (2d) 330 (C. C. A. 7th, 1942), *cert. denied*, 317 U. S. 693 (1943) (federal court sustained suit for injunction and accounting although state equity court dismissed same because of ad-

In like manner, decisions that the federal courts are not bound by statutes regulating the equity practice of state courts, seem to offer little support for the remedial rights doctrine.[34] Whereas, at law, state rules of procedure were adopted and followed, the federal courts from the beginning of the judiciary system independently patterned their procedure on the equity side after English chancery practice.[35] The refusal in the past to be controlled by state law governing equitable procedure has been sanctioned by, and continued after, the *Erie* case.[36]

It must be noted that whereas the holdings of the last three lines of cases still survive, *Erie Railroad v. Tompkins* has overruled any *obiter* statements which may be found therein to contravene its policy.[37] A critical re-analysis of prior dicta is required before they may be used as persuasive authority in the equitable remedial rights cases.[38]

While reluctant to enforce state statutes creating remedies or remedial rights, federal courts applying in equity the rule of *Swift v. Tyson*,[39] uniformly protected substantive rights created or declared by state legisla-

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equate legal remedy); *cf.* Mutual Ben. Health & Acc. Ass'n v. Teal, 34 F. Supp. 714 (E. D. S. C. 1940) (defending a contract claim by beneficiaries in state court not a bar to federal suit for injunction against them from continuing the suit).

34. In Boyle v. Zacharie, 6 Pet. 648 (U. S. 1832) on a motion to quash execution, an injunction was held inoperative as a supersedeas notwithstanding a Maryland statute to that effect. Story, J. said, ". . . acts of Maryland . . . regulating . . . Chancery proceedings . . . are of no force in relation to the Courts of the United States." *Id.* at 657. *Accord:* Dodge v. Tulleys, 144 U. S. 451 (1892) (on foreclosure of security for a loan, held that attorney fees awarded by federal court of equity cannot be limited by state law).

35. Conformity to state practice in equity was not feasible as some of the states had no equity courts or system to be followed. To remedy this difficulty the Judiciary Act contained the first Process Act, 1 STAT. 93 (1789) which provided only at law should the "modes of process" be the same as in the state courts. The Conformity Act, 17 STAT. 196 (1872), continued this scheme. In equity the Supreme Court continually regulated practice, copying the English Chancery procedure. See Von Moschzisker, *Equity Jurisdiction in the Federal Courts* (1927) 75 U. OF PA. L. REV. 287.

36. In Sprague v. Ticonic Nat. Bank, 307 U. S. 161 (1939) the allowance of counsel fees and expenses was held to lie within historic equity practice and procedure of federal courts and as such was not controlled by state law; *accord*, Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist., 106 F. (2d) 966 (C. C. A. 8th, 1939). Both cases reaffirm Dodge v. Tulleys, 144 U. S. 451 (1892).

37. In Guaranty Trust Co. v. York, 326 U. S. 99, 112 (1945), the Court states: "Dicta may be cited characterizing equity as an independent body of law. To the extent that we have indicated, it is. But in so far as these general observations go beyond that, they merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin. And so, before the true source of law that is applied by the federal courts under diversity jurisdiction was fully explored, some things were said that would not now be said."

38. "Prior to *Erie R. Co. v. Tompkins* it was not necessary, as we have indicated, to make the critical analysis required by the doctrine of that case of the nature of jurisdiction of the federal courts in diversity cases." *Id.* at 110.

39. 16 Pet. 1 (U. S. 1842).

tures.[40] Since these cases did not involve issues of remedy, they seem inapposite to the remedial rights decisions.

To maintain the precedent value of these lines of cases in the face of the *Erie* decision, some federal courts have resorted to statutory construction of the Judiciary Act of 1789.[41] It is argued that the equitable remedial rights doctrine rests upon Section 11 [42] of that Act which conferred equity jurisdiction upon the federal courts, and that the *Erie* case destroyed only the legal and equitable exceptions to Section 34,[43] the Rules of Decision Act, and did

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40. Clark v. Smith, 13 Pet. 195 (U. S. 1839) (statutory change of substantive requirements of quiet title relief); *same holding*, Holland v. Challen, 110 U. S. 15 (1884); Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405 (1884); Frost v. Spitley, 121 U. S. 552 (1887); Wehrman v. Conklin, 155 U. S. 314 (1894); Cowley v. Northern Pac. R. R., 159 U. S. 569 (1895); Barden v. Land & River Imp. Co., 157 U. S. 327 (1895); Lawson v. U. S. Mining Co., 207 U. S. 1 (1907); Denison v. Keck, 13 F. (2d) 384 (C. C. A. 8th, 1926); *accord*, *Ex parte* McNiel, 13 Wall. 236 (U. S. 1871) (right to pilotage created by N. Y. statute); Brine v. Insurance Co., 96 U. S. 627 (1877) (statutory right of redemption enforced); Gormley v. Clark, 134 U. S. 338 (1890) (Illinois "Burnt Records Act" defined quiet title requirements after Chicago fire); Mo., Kan. & Tex. Trust Co. v. Krumseig, 172 U. S. 351 (1899) (cancellation of usurious contract awarded according to local statutes); Louisville & N. R. R. v. Western Union Tel. Co., 234 U. S. 369 (1914) (definition of cloud on title by Missouri statute); see Case of Broderick's Will, 21 Wall. 503, 519–20 (U. S. 1874); Mason v. United States, 260 U. S. 545, 557–8 (1923). *Clark v. Smith*, *supra*, and other cases have observed that if the state legislature created a substantive right and at the same time the remedy to enforce it and if the remedy was consistent with the ordinary modes of proceeding in chancery, a federal court might enforce both. *Accord:* Nic Projector Corp. v. Movie-Jecktor Co., 16 F. Supp. 605, 606 (S. D. N. Y. 1935); Ingold v. Ingold, 30 F. Supp. 347, 348 (S. D. N. Y. 1939). The rule of *Swift v. Tyson* that the federal courts were free from state law on matters of equity jurisprudence or general commercial law has been overruled by the *Erie* case. Examples of this former independence are Neves v. Scott, 13 How. 268 (U. S. 1851) (on a question of construction of a trust from marriage articles executed in Georgia, held that relevant decision of Georgia Supreme Court was not controlling); Noonan v. Lee, 2 Black 499 (U. S. 1862) (foreclosure of mortgage before last installment was due held not available despite state decisions permitting it); Guffey v. Smith, 237 U. S. 101 (1915) (on bill for accounting and injunction, decisions of Illinois court concerning the effect of a surrender clause in an oil lease were not controlling); *cf.* Kirby v. Lake Shore & M. S. R. R., 120 U. S. 130 (1887), *overruled*, Guaranty Trust Co. v. York, 326 U. S. 99, 112 (1945).

41. Act of Sept. 24, 1789, c. 20, 1 STAT. 73.

42. 1 STAT. 78 (1789), 28 U. S. C. § 41(1)(1940).

43. 1 STAT. 92 (1789), 28 U. S. C. § 725 (1940). The Rules of Decision Act, while limited by its own terms to "trials at common law," was deemed to be merely declaratory of the rule which in any event would have governed the federal courts and therefore was equally applicable to equity suits. Mason v. U. S., 260 U. S. 545, 557–8 (1923); see Hawkins v. Barney's Lessee, 5 Pet. 457, 464 (U. S. 1831); 1 MOORE, FEDERAL PRACTICE (1938) 76. However a dictum that Section 34 is inapplicable to suits in equity appears in Russell v. Todd, 309 U. S. 280, 287 (1940) and again in the concurring opinion of D'Oench, Duhme & Co. v. FDIC, 315 U. S. 447, 467 (1942). This statement has been utilized by judges favoring the remedial rights doctrine. Eastern Wine Corp. v. Winslow-Warren, Ltd., 137 F. (2d) 955, 960 (C. C. A. 2d, 1943), *cert. denied*, 320 U. S. 758 (1943) (Frank, J.); McClaskey v. Harbison-Walker Refractories Co., 138 F. (2d) 493, 496 (C. C. A. 3d, 1943) (Biggs, J.); *cf.* Carson v. Long-Bell Lumber Corp., 73 F. (2d) 397, 404 (C. C. A. 8th, 1934), *cert. denied*, 294 U. S. 707 (1935); Brill v. W. B. Foshay Co., 65 F. (2d) 420, 424 (C. C. A. 8th, 1933), *cert. denied*, 290 U. S. 643 (1933).

not reach Section 11.[44] Section 11, however, merely gave the federal courts power to grant equitable relief.[45] The problem of remedial rights revolves not around the *power* to grant equitable remedies but around the *propriety* of doing so.[46] In addition, this difference in statutory source still cannot validate those past cases which were either not in point or devitalized by the Federal Rules. Finally, *Erie Railroad v. Tompkins* would seem to transcend the problem of statutory construction to overrule all principles contrary to its policy.[47]

Despite the inadequacy of the statutory argument and lack of decisional support for the continuation of the equitable remedial rights doctrine, federal courts have employed several methods of utilizing the early cases as precedent. The simplest device has been the string citation of cases decided before 1938 as primary authority for the concept, without further discussion of their validity or relevance.[48] Another practice has been the non-critical transposition of statements from a pre-*Erie* case into an unrelated legal context.[49] Recent dicta have also been used as precedent without consideration of their original purpose.[50] When thus reduced to their essentials, all these devices appear illogical.

Terminology. The determination of the precedent value of a decision or a dictum depends upon an understanding of its terms. Confusion has been caused in past cases by a non-critical usage of two concepts. The first is the

44. Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938) was likewise considered as not in point towards overruling the remedial rights doctrine. York v. Guaranty Trust Company of New York, 143 F. (2d) 503, 525 (C. C. A. 2d, 1944).

45. Once federal jurisdiction has attached to a cause, the power to grant relief, *i.e.*, to carry the action to its conclusion, may be conceded. Section 11, *loc. cit. supra* note 42, was the first statute to define federal jurisdiction. Other Congressional enactments conferring it are listed in 3 MOORE, FEDERAL PRACTICE (1938) 3457–72.

46. The difference between these two constructions of "equity jurisdiction" is discussed *infra*, p. 411.

47. See 1 MOORE, FEDERAL PRACTICE (Supp. 1945) 122–5.

48. The Second Circuit Court of Appeals in York v. Guaranty Trust Co., 143 F. (2d) 503, 522, note 28 (C. C. A. 2d, 1944) blanketly lists thirteen early cases as precedent for remedial rights.

49. In Kelleam v. Maryland Casualty Co., 312 U. S. 377, 381–2 (1941) the Supreme Court bases its decision upon a quotation from Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497 (1923), to the effect that ". . . a remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute. . . ." In the latter case the statement was employed to protect the right of the corporation to a jury trial; in the former, no question of jury trial was present. The lack of connection between the two should render inapposite the *Pusey* quotation. See Comment (1923) 33 YALE L. J. 193; Note (1941) 50 YALE L. J. 1094.

50. In Black and Yates v. Mahogany Ass'n, 129 F. (2d) 227 (C. C. A. 3d, 1942), *cert. denied*, 317 U. S. 672 (1942), the court considered that some remarks made in Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 164 (1939), preserved federal independence in awarding equitable remedies. The *Sprague* dictum concerned the historic freedom of courts of equity in awarding counsel's fees. Since the counsel was considered an officer of the court, such matters have traditionally been procedural. The Supreme Court was not thereby making an exception of equitable remedies from the *Erie* rule and the inference of the Third Circuit Court of Appeals seems unjustified.

phrase "equity jurisdiction" when employed in a statement that the equity jurisdiction of the federal courts can be neither enlarged nor diminished by state legislation. Four interpretations are found for "jurisdiction" when used in this connection and a sharp analysis of former decisions is necessary to determine the sense in which the phrase was employed therein. First, if the phrase means the power to hear the suit, *i.e.*, federal jurisdiction, the statement is irrelevant to remedial rights.[51] Second, if "equity jurisdiction" refers to the equity side of the court as strictly separated from its law side, the statement is both obsolete under the Federal Rules and not in point in remedial rights cases.[52] Third, if the statement refers only to equity practice or procedure it is also not relevant authority.[53] The fourth meaning of "equity jurisdiction" is the judicial discretion as to the type of equitable relief to be granted.[54] It is this interpretation which is sought to be established to support the remedial rights doctrine—that the propriety of awarding an equitable remedy cannot be controlled by state statute. None of the cases in which one of the first three constructions is indicated could logically support the fourth proposition.

The term "remedial" provides a second source of terminological confusion. While it sometimes refers to the ultimate relief granted by a court,[55] frequently the term is synonymous with "adjective" or "procedural."[56] In addition to this dual meaning of "remedial," the phrase "remedial right" has been used in decisions as a legal conclusion without definition of its premises. Thus the Supreme Court has declined to enforce state statutes

51. Payne v. Hook, 7 Wall. 425, 430 (U. S. 1868); McConihay v. Wright, 121 U. S. 201, 206 (1887); Mississippi Mills v. Cohn, 150 U. S. 202, 204 (1893); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 43 (1909); see 1 T. A. STREET, FEDERAL EQUITY PRACTICE (1909) 17–18.

52. See A. M. DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) 662–3; J. C. ROSE, JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS (1938) 202; Harlan v. Sparks, 125 F. (2d) 502, 506 (C. C. A. 10th, 1942).

53. Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 164 (1939).

54. "While jurisdiction, in its proper sense, means authority to hear and decide a cause, it is common to speak of jurisdiction in equity or the jurisdiction of a court of equity as not relating to the power of the court to hear and determine a cause but as to whether it ought to assume the jurisdiction and hear and decide the cause." Miller v. Rowan, 251 Ill. 344, 348–9, 96 N. E. 285, 287 (1911); see Pennsylvania v. Williams, 294 U. S. 176, 181 (1935); Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 568 (1939); Von Moschzisker, *Equity Jurisdiction in the Federal Courts* (1927) 75 U. OF PA. L. REV. 287, 291–2; Comment (1923) 33 YALE L. J. 193; *cf.* Gordon v. Washington, 295 U. S. 30, 36–7 (1935); Fordham, *The Self-Determination of Equity* (1936) 30 ILL. L. REV. 716.

55. "Remedial rights are those which a person has to obtain some appropriate remedy when his primary rights have been violated by another." 1 POMEROY, EQUITY JURISPRUDENCE (1941) 119; see W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 150.

56. Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497 (1923); Kelleam v. Maryland Casualty Co., 312 U. S. 377, 382 (1941); Henrietta Mills v. Rutherford County, 281 U. S. 121, 127 (1930); see Guaranty Trust Co. v. York, 326 U. S. 99, 115–6 (1945) (dissent of Rutledge, J.). This ambiguity of terms has served to identify "remedy" and "procedure" for purposes of the *Erie* rule.

held to confer a "remedial right," in the sense of "procedural right," while effectuating those creating substantive rights as required by *Swift v. Tyson*, where there was no difference in operative effect between the statutes. For example, the Delaware statute in *Pusey & Jones Company v. Hanssen* [57] which allowed an unsecured simple contract creditor of an insolvent corporation to apply for a receiver before reducing his claim to judgment was held unenforceable because it conferred a "remedial right." [58] In contrast, a Nebraska statute which authorized a claimant out of possession of his land to bring suit to quiet title against his rivals was held in *Holland v. Challen* [59] to create only a new substantive right and to be enforceable. As both statutes merely granted traditional [60] equitable remedies in fact situations wherein they were not previously available, the inconsistency in the use of the concept "remedial right" becomes apparent.[61] Originally, the difference in

57. 261 U. S. 491 (1923).

58. The Delaware statute "does not give rise to any substantive right in the creditor. . . . It makes possible a new remedy because it confers upon the Chancellor a new power. . . . Whatever its exact nature, the power enables the Chancellor to afford a remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the federal courts sitting in equity." *Id.* at 499. Aside from reiteration for the sake of emphasis this *ratio decidendi* offers no clue to the decision upon the legal level.

59. 110 U. S. 15 (1884). The statute dispensed with the general equity rule that, in order to maintain a bill to quiet title, the party must be in possession and that his title should be established at law or founded on undisputed evidence or long-continued possession. In this case the suit was brought by one out of possession against another out of possession so the alternative of ejectment did not lie.

60. *Quaere:* When the remedy created is one which did not belong to the English courts of chancery in 1789 and is one hitherto unknown in federal equity, may the state statute then be properly labeled "remedial?" The Delaware District Court, which favors the remedial rights doctrine, see *supra* note 6, held that a Delaware statute empowering its chancellors to order or review an election of corporate directors did "provide a remedy" and was "remedial." Perrott v. U. S. Banking Corp., 53 F. Supp. 953 (D. Del. 1944) (statute held unenforceable). On the doctrinal level such a conclusion seems justified by the novelty of the remedy. However, the term "remedial" in this connection does not mean "adjective" or "procedural" as in the *Pusey & Jones* case. It is used in its Hohfeldian sense to refer to the right to judicial relief. Thus the state statute may properly be said to create a remedy but it does not follow *ipso facto* that state law may be disregarded. Christiansen v. Christiansen, 62 F. Supp. 341 (N. D. Tex. 1945) (statutory suit upon return of former owner to recover an estate transferred under legal presumption of his death arising from seven years absence held controlled by state law).

61. The cases applying the *Pusey & Jones* decision were no more explicit as to when a statute was "remedial" and when "substantive." Guardian Savings & Trust Co. v. Road Imp. Dist. No. 7, 267 U. S. 1 (1925) (statute allowing bondholders of Improvement District to apply for receiver held to create substantive right); see McLaughlin v. Western Union Tel. Co., 7 F. (2d) 177, 183 (E. D. La. 1925), *aff'd*, 17 F. (2d) 574 (C. C. A. 5th, 1927); Grover v. Merritt Development Co., 7 F. (2d) 917, 918–21 (D. Minn. 1925); Adams v. Jones, 11 F. (2d) 759, 760 (C. C. A. 5th, 1926), *cert. denied*, 271 U. S. 685 (1926); Henrietta Mills v. Rutherford County, 32 F. (2d) 570, 574 (C. C. A. 4th, 1929), *aff'd*, 281 U. S. 121 (1930). But see First Nat. Bank v. Horuff, 65 F. (2d) 318 (C. C. A. 5th, 1933). The confusion of this distinction exists after the *Erie* case. Compare SEC v. Fiscal Fund, Inc., 48 F.

treatment might have been justified as protecting the right to jury trial.[62] Since today the Federal Rules assume this protective function, decisions based solely upon the question-begging[63] term "remedial right" are no longer significant.[64]

Supp. 712 (D. Del. 1943) (state statute authorizing liquidation of corporation held "remedial") and Wall & Beaver St. Corp. v. Munson Line, 58 F. Supp. 101 (D. Md. 1943) (federal court may liquidate corporation although state court not so empowered) with Smith v. Aeolian Co., 53 F. Supp. 636 (D. Conn. 1943) (statute authorizing courts to dissolve corporation held "substantive"); see Sun Oil Co. v. Burford, 130 F. (2d) 10, 18 (C. C. A. 5th, 1942), *rev'd*, 319 U. S. 315 (1943) ("state statutory authority to bring a suit may be a substantive right"); Schwarz v. Artcraft Silk Hosiery Mills, Inc., 110 F. (2d) 465 (C. C. A. 2d, 1940) (state statute which creates new cause of action, as distinguished from a new remedy, is enforceable); Rambo v. U. S., 145 F. (2d) 670 (C. C. A. 5th, 1945), *cert. denied*, 325 U. S. 858 (1945) (partition statute held "remedial").

62. In the *Pusey & Jones* case the simple contract creditor's "adjective right" was to sue at law on his contract. The appointment of the receiver would have foreclosed the company its right to defend that action before a common law jury. As an example of "remedial," *i.e.*, procedural statutes, Mr. Justice Brandeis discusses Whitehead v. Shattuck, 138 U. S. 146 (1891), wherein jury trial was also the controlling factor. See Comment (1923) 33 YALE L. J. 193.

63. The avoidance of state law is none the less violative of the *Erie* policy if accomplished by directly labeling the rights "procedural" rather than through the employment of the term "remedial" and the remedial rights rationale. In Griffith v. Bank of New York, 147 F. (2d) 899 (C. C. A. 2d, 1945), *cert. denied*, 325 U. S. 874 (1945), the Second Circuit Court of Appeals sustained a collateral attack upon a consent judgment of the New York supreme court notwithstanding the fact that another state court had dismissed a similar suit and held the consent judgment immune to collateral attack. The *stare decisis* effect of this state decision denying equitable discretion was circumvented by stating, *id.* at 904: ". . . since the matters here involved are procedural, the doctrine of *Erie R. Co.* v. *Tompkins* . . . is not involved." This conslusion seems to have been justified by the citation of cases decided before the *Erie* decision in which federal equity courts had set aside, enjoined enforcement of, or ignored state judgments. Thus the use of "procedural" seems to beg the question. The *Griffith* decision, however, appears abrogated as the exercise of equitable discretion to entertain a suit has since been held to be controlled by state law. Weiss v. Routh, 149 F. (2d) 193 (C. C. A. 2d, 1945). Compare with this summary disposal of contrary state law, the statement of Judge Clark in Palmer v. Palmer, 31 F. Supp. 861, 865 (D. Conn. 1940), "When diversity exists and the matters in controversy exceed $3,000, a federal court may properly consider an attack made upon the decrees of a state court of probate. But the federal court may grant relief only when similar relief would be available in the state courts of the district. . . . Accordingly this action must be viewed as though it were brought in the Superior Court for Connecticut. I therefore limit myself to consideration of such grounds of attack upon the probate decrees as would be considered by that court." See Note (1945) 54 YALE L. J. 687, 694–6 suggesting that the Second Circuit might have accomplished exactly the same results in the *Griffith* case by using the equitable remedial rights rationale. For another use of circular terms, see Fraser v. U. S., 145 F. (2d) 139 (C. C. A. 6th, 1944), *cert. denied*, 324 U. S. 842 (1945) (whether communication is privileged is "evidentiary" hence "remedial").

64. The Supreme Court is still attempting to distinguish between the two types of statutes. Guaranty Trust Co. v. York, 326 U. S. 99 (1945), is the most recent doctrinal exposition: "In Pusey & Jones Co. v. Hanssen, *supra*, the Court had to decide whether a Delaware statute had created a new right appropriate for enforcement in accordance with traditional equity practice or whether the statute had merely given the Delaware

III

The Supreme Court has not yet resolved these conflicting doctrines and settled the equitable remedial rights problem. Shortly after the *Erie* case, the Court, on two occasions, said that federal equitable remedies were those possessed by English chancery courts in 1789.[65] In *Russell v. Todd*[66] it left open the question of the effect of state law upon federal selection of remedies. However, in *Kelleam v. Maryland Casualty Company*[67] the continuation of the remedial rights doctrine was impliedly sanctioned when, on the basis of federal law, the Court refused to grant two remedies specifically authorized by Oklahoma statutes.[68]

The latest decision, *Guaranty Trust Company of New York v. York*,[69] though limiting the use of the doctrine, still preserves to the federal courts an independent determination of the appropriate equitable remedy. In October, 1931, Guaranty, as trustee for noteholders of a failing corporation, cooperated in a plan to repurchase the outstanding notes. In January, 1942, ten years and three months later, York brought a class action on behalf of all non-accepting noteholders in the Southern District of New York, solely because of diversity of citizenship, alleging a breach of trust by Guaranty and seeking an accounting. The New York statute of limitations for such actions was ten years. The Second Circuit Court of Appeals[70] reversed a summary judgment for Guaranty and held that a statute of limitations does not affect substantive rights but merely bars the remedy; and that, on the basis of the remedial rights doctrine, the federal court was free to apply its own doctrine of laches.[71] The Supreme Court reversed, holding that ". . . if

Chancery Court a new kind of remedy. . . . Although traditional equity notions do not give a simple contract creditor an interest in the funds of an insolvent debtor, the State may, as this Court recognized, create such an interest. . . . But the Court construed the Delaware statute merely to extend the power to an equity court to appoint a receiver on the application of an ordinary contract creditor. By conferring new discretionary authority upon its equity court, Delaware could not modify the traditional equity rule in the federal courts that only someone with a defined interest in the estate of an insolvent person, *e.g.*, a judgment creditor, can protect that interest through receivership. But the Court recognized that if the Delaware statute had been one not regulating the powers of the Chancery Court of Delaware but creating a new interest in a contract creditor, the federal court would have had power to grant a receivership at the behest of such a simple contract creditor, as much so as in the case of a secured creditor." *Id.* at 106–7, note 3. These words are also meaningless.

65. Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 568 (1939); Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 164 (1939).

66. 309 U. S. 280 (1940).

67. 312 U. S. 377 (1941), 50 YALE L. J. 1094.

68. The actual decision seems proper from the standpoint of comity since the identical issues were already being litigated in an action in the Oklahoma courts. The grounds of the decision might, however, have been a discretionary withholding of equity jurisdiction rather than an evasion of the state statutes through the remedial rights doctrine.

69. 326 U. S. 99 (1945).

70. 143 F. (2d) 503 (C. C. A. 2d, 1944).

71. *Id.* at 521–528. The court held the suit not barred by laches because (1) York had only obtained her notes in 1934 and (2) she had unsuccessfully attempted to enter another action against Guaranty in 1940.

a plea of the statute of limitations would bar recovery in a State Court, a federal court ought not afford recovery." [72] Although the equitable remedial rights doctrine was held inapplicable in this instance, Mr. Justice Frankfurter sanctioned its use in other situations by saying: "This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a state court." [73]

From the holding of the case it is at least clear that a federal court may no longer grant an equitable remedy in diversity actions where *no* relief would be available in the courts of the state. Moreover, the court said that in no case should the remedy granted by the federal court "lead to a substantially different result" from that obtainable in the state courts.[74] The opinion stressed the policy of the *Erie* rule and clearly stated that past terminological classifications were not to be considered where the result would be a conflict with that policy.[75] Finally, Mr. Justice Frankfurter inveighed against the creation of "an exception to *Erie Railroad v. Tompkins* on the equity side of a federal court." [76]

Despite this strong emphasis on uniformity within a state, the Court has left a wide area of operation for a rule which seems inconsistent with the *Erie* policy. By citing the *Pusey & Jones* case as an example of the correct application of the doctrine,[77] the opinion indicated that the outcome of litigation is not "substantially" affected by the federal court's refusal to follow a state statute authorizing a simple contract creditor to apply for a receiver without reducing his claim to judgment. If the federal judiciary retains this much independence in remedy selection, the question arises whether the *York* test will require local law to be followed in other situations where different remedies are available in the two court systems. For example, may the federal court grant specific performance or an injunction

72. 326 U. S. 99, 110 (1945).

73. *Id.* at 105. "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it." *Id.* at 106.

74. "In essence, the intent of that decision [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Id.* at 109.

75. "*Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology." "And so, putting to one side abstractions regarding 'substance' and 'procedure' . . ." "A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties." *Id.* at 109–10.

76. *Id.* at 111.

77. *Id.* at 106–7, note 3. See *supra* note 64.

where only money damages are available in the state courts? The answer to these and other questions, however, must await the treatment of the *York* rule in future cases.[78]

IV

Clarification of the equitable remedial rights rationale depends upon the premise that there are *three*,[79] not *two* distinct jural concepts which comprise any litigation: (1) *substantive rights*, which exist in the abstract and are possessed by one person against those owing him a correlative duty; (2) *remedies*, the relief afforded by the court to redress the infringement of a substantive right; and (3) *procedure*, the mechanics of the judicial process by which the substantive rights are determined and the remedies are administered and enforced.[80] It is submitted that *Erie Railroad v. Tompkins* requires that remedies be grouped either with the first category or with the third so that, accordingly, state law or federal law shall dictate their issuance.[81] The choice is not compelled by doctrinal considerations and should be made on policy grounds.

78. Most of those cases which to date have interpreted the *York* decision treat only the applicability of state statute of limitations in federal equity suits. Holmberg v. Armbrecht, 150 F. (2d) 829 (C. C. A. 2d, 1945) extended the rule beyond diversity cases. "The essence of [the *York*] holding is that . . . there should be no distinction in limitation periods in diversity cases. . . . And no sound reason is offered why such a distinction should be made when, as here, the right sought to be enforced is created by a federal statute." *Id.* at 832. Kithcart v. Metropolitan Life Ins. Co., 150 F. (2d) 997 (C. C. A. 8th, 1945) (state statutes of limitations govern federal equity suits under diversity jurisdiction); *accord*, Sheehan v. Municipal Light & Power Co., 151 F. (2d) 65 (C. C. A. 2d, 1945). In Weiss v. Routh, 149 F. (2d) 193 (C. C. A. 2d, 1945) the exercise of judicial discretion for a court of equity to entertain the suit was held to be controlled by state law. "Outcome" of a litigation "extends as much to determining whether the court shall act at all, as to how it shall decide, if it does." *Id.* at 195.

79. See W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923) 150; W. W. COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS (1942) 171–2; 1 POMEROY, EQUITY JURISPRUDENCE (1941) 119–20.

80. The tendency in the past has been to identify remedies and procedure—a view favored by judges desiring to uphold the remedial rights doctrine. See, *e.g.*, 3 BOUVIER, LAW DICTIONARY (1914) 2870 ("Remedy" defined as "the means employed to enforce a right or redress an injury"); Guaranty Trust Co. v. York, 326 U. S. 99, 115 (1945) (dissent). However, this prior association of the two concepts is irrelevant to characterization for purposes of the *Erie* rule. The majority opinion of the *York* case in applying the *Erie* rule distinguishes remedy, the "right to recover" from procedure, "the manner and the means by which a right to recover, as recognized by the State, is enforced." *Id.* at 108–9. But Mr. Justice Frankfurter, with some of the judges and commentators favoring the remedial rights rationale, desires to maintain the three classes as separate categories to be controlled by state law, independent federal common law, and the Federal Rules respectively. The policy of the *Erie* decision, however, seems to force a dichotomy instead of a three-fold classification.

81. Because the terms "substance" and "procedure" have special meanings in terms of legal consequences under the *Erie* rule, their use is avoided. Also, since the judicial response provides the only meaningful criterion of definition, it seems immaterial how the group to which remedies are appended is denominated. If it is desired that remedies be called "sub-

The policy behind the *Erie* rule—uniformity within a state—would seem clearly to direct that remedies be classed with "substantive rights" and controlled by state law.[82] Those rights [83] which are not distinguishable in terms of any of the above three definitions should also be categorized according to the *Erie* policy: state law must control if the position of the parties at the completion of their litigation would differ from what it would be after a state trial because of the legal rules applied.[84] Such a scheme would leave those rights that are distinctly "procedural" to the determination of the federal courts.[85] For example, a state arbitration statute would seem to be clearly procedural, since it prescribes not what ultimate relief will be afforded to the parties, but merely the means by which their rights will be adjudicated.[86] Similarly, a statutory method by which state courts are to

stantive," it should be remarked that the latter term is being used according to the *Erie* syntax, a usage different from its meaning in the three categories, *supra*.

82. It also seems that the two must be classed together because theoretically "substance" cannot be set over against "remedy" as being mutually exclusive terms. So far as "substantive" means operative to create rights and duties, it depends wholly upon the existence of a societal remedy or sanction. Insofar as society withholds a remedy or sanction, a statute creates no rights or duties. See ANSON, CONTRACTS (Corbin's ed. 1930) 110–1; SALMOND, JURISPRUDENCE (1920) 437.

83. The term "rights" as used here does not refer to merely "substantive rights," but includes any of the three classes defined by Hohfeld, *op. cit. supra* note 79, *i.e.*, substantive rights, remedial rights, and procedural rights.

84. This is the *York* test set up by Mr. Justice Frankfurter, 326 U. S. 99 at 109. See *supra*, note 74.

85. The doctrinal definitions of substantive rights, remedy and procedure are to be applied *in limine*, reserving the test of the *Erie* policy only for those rights remaining in the penumbra which cannot be so categorized. See R. H. THOULESS, HOW TO THINK STRAIGHT (1939) 129, for logical justification of such a method. The beneficial provisions of the Federal Rules, *e.g.*, pre-trial examination and the right of the judge to comment upon the evidence, may be thereby preserved. Instances where the verbal definition of "procedure" as the judicial *means* as contrasted with the jural *ends* (remedy) furnishes an adequate criterion of characterization are: Johnson v. Riverland Levee Dist., 117 F. (2d) 711 (C. C. A. 8th, 1941) (State "Levee District Code" providing "complete law and code of procedure" with mandamus as the remedy held procedural); U. S. v. Soucy, 60 F. Supp. 500 (D. Minn. 1945) (state statute prescribing method of instituting suit for contribution in state court held inoperative in federal suit); Gillson v. Vendome Petroleum Corp., 35 F. Supp. 815 (E. D. La. 1940) ("executory process," a summary device for mortgage foreclosure, held procedural); *cf.* Fleitas v. Richardson, 147 U. S. 538 (1893). Similarly matters involving the federal judiciary system only may be properly characterized as "procedural" so as to make state law inapplicable to them. *In re* Real Estate Mortgage Guar. Co., 55 F. Supp. 749 (E. D. Pa., 1944) (on issue of surcharge of a receiver appointed by a federal court state law held not controlling as receiver's bookkeeping is administrative matter of appointing court); Crosley Corp. v. Hazeltine Corp., 122 F. (2d) 925 (C. C. A. 3d, 1941), *cert. denied*, 315 U. S. 813 (1942) (injunction against a litigation of the same issues in another district court pending judgment in prior identical action was awarded according to federal law). But see Courmier v. Superior Oil Co., 60 F. Supp. 542, 543–4 (W. D. La. 1945) (suit to set aside previous judgment of same federal court governed by state law).

86. However, all courts have not observed this distinction. For instance, "The right created under the Pennsylvania statute for arbitration is purely remedial, for all that the act has done is to add an additional remedy. . . . Therefore this court will not enforce a

appraise stock,[87] and the necessity of the *cestui* as a party to a suit by his trustee,[88] involve only the workings of the judicial process.[89]

Strong policy arguments can be made that nationwide uniformity of legal rules is desirable in particular fields regulated by federal acts,[90] such as an investor's law based upon securities regulations, and in situations where interstate problems are litigated in a diversity suit.[91] But however attrac-

state statute purely remedial in nature." Voutrey v. General Baking Co., 39 F. Supp. 974, 975–6 (E. D. Pa. 1941); *accord*, Karno-Smith Co. v. School District of Scranton, 44 F. Supp. 860 (M. D. Pa. 1942); see Murray Oil Products Co. v. Mitsui & Co., 146 F. (2d) 381, 383 (C. C. A. 2d, 1944); The Maccabees v. City of North Chicago, 125 F. (2d) 330, 333 (C. C. A. 7th, 1942); California Prune & Apricot Growers' Ass'n v. Catz American Co., 60 F. (2d) 788 (C. C. A. 9th, 1932) (pre-*Erie*); 1 MOORE, FEDERAL PRACTICE (Supp. 1945) 112. But see Pathe Lab. Inc. v. Du Pont Film Mfg. Corp., 3 F. R. D. 11 (S. D. N. Y. 1943) (arbitration statute called "procedural").

87. Galdi v. Jones, 141 F. (2d) 984 (C. C. A. 2d, 1944); Piccard v. Sperry Corp., 120 F. (2d) 328 (C. C. A. 2d, 1941). In Root v. York Corp., 56 F. Supp. 288 (D. Del. 1944) the equitable remedial rights rationale was used to avoid following a Delaware stock appraisal statute similar to the Connecticut statute held procedural in the above two cases.

88. First Trust & Savings Bank v. Iowa-Wis. Bridge Co., 98 F. (2d) 416 (C. C. A. 8th, 1938), *cert. denied*, 305 U. S. 650 (1938). The Equity Rules were said to confer only "remedial rights" so were unaffected by state law, *id.* at 420; see 1 T. A. STREET, FEDERAL EQUITY PRACTICE (1909) § 512. But see Summers v. Hearst, 23 F. Supp. 986 (S. D. N. Y. 1938) (Equity Rule 27 termed procedural not remedial).

89. Resort to the remedial rights doctrine in these cases, *supra* notes 86–8, seems unnecessary to explain a refusal to follow state law. Analysis of the nature of the rights involved in terms of the three classes of definitions seems a more logical method of accomplishing the same result.

90. Other "federal specialties," *i.e.*, fields in which national uniformity of jurisprudence may be accomplished upon existing United States statutes, have been collected in Note (1944) 44 COL. L. REV. 915, 922–5 and are beyond the scope of this discussion. For a suggested method of limitation of the *Erie* principle in areas of substantive law, see Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins* (1946) 55 YALE L. J. 267, 280–5.

91. The use of the equitable remedial rights rationale in this situation is demonstrated by Purcell v. Summers, 145 F. (2d) 979 (C. C. A. 4th, 1944). In a class action by members of a newly consolidated church against certain dissident former members an injunction was granted by a federal court notwithstanding the fact that the supreme court of the state had, on the basis of state law, previously refused an injunction to other members of the class in an almost identical suit. In this instance the doctrine was applied to enable the federal court to adjudicate a question involving two organizations spread throughout several states independently of the law of any one of them. In unfair competition suits the same policy problem arises, Black & Yates v. Mahogany Ass'n, 129 F. (2d) 227 (C. C. A. 3d, 1942), *cert. denied*, 317 U. S. 672 (1942) (nationwide trade libel); see Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trademarks and Unfair Competition* (1942) 42 COL. L. REV. 955. But see Philco Corp. v. Phillips Mfg. Co., 133 F. (2d) 663 (C. C. A. 7th, 1943) (the need for national uniformity of legal rules stressed but state law followed); Skinner Mfg. Co. v. General Foods Sales Co., 52 F. Supp. 432, 438–40 (D. Nebr. 1943); Grocers Baking Co. v. Sigler, 132 F. (2d) 498, 501 (C. C. A. 6th, 1942). For a complete repudiation of the use of the remedial rights concept to achieve national common law, see National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 504 (D. Mass., 1942), *aff'd with approval*, 140 F. (2d) 618 (C. C. A. 1st, 1944) (Congressional enactment, not judicial legislation, is required). The situation where a constitutional question arises in a diversity suit is a corrolary to the

tive such developments may appear, they should be accomplished through means other than the remedial rights rationale.[92] The contention that the doctrine is unsuited for this purpose does not condemn national uniformity in these fields, but merely decries the employment of such tenuous distinctions and classifications as a basis for such a substantial result.

It remains to be seen whether the test of the *York* case—affecting the "final outcome" of the litigation—will put remedies in either category, or at least bring consistency of treatment among the courts. Examination of post-*Erie* decisions [93] discloses that the remedies of receivership,[94] exoneration on a bond,[95] injunction,[96] partition,[97] election of corporate officers,[98] and reformation of a contract [99] have been granted or denied contrary to state law; while

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nterstate problem. The federal courts have then claimed the privilege to grant a remedy not available in the state court in analogous situations. See Goldman v. Postal Telegraph, Inc., 52 F. Supp. 763, 770 (D. Del., 1943); Hottenstein v. York Ice Mach. Corp., 136 F. (2d) 944, 953 (C. C. A. 3d, 1943). *Quaere:* should the remedies differ between the two court systems merely because of the additional issue of constitutionality? See Holmberg v. Armbrecht, 150 F. (2d) 829 (C. C. A. 2d, 1945) which suggests a negative answer.

92. Under the Reed opinion in the *Erie* case, 309 U. S. at 90, Congress might, by amending the Rules of Decision Act, specifically provide for situations in which national common law seemed desirable. Another legislative device might be to change the jurisdictional requirements of the federal courts to allow such suits on grounds other than diversity and alienage. See Comment (1941) 41 COL. L. REV. 104. The contrary view, abolition of diversity jurisdiction altogether, is expressed in Mr. Justice Frankfurter's dissent in Burford v. Sun Oil Co., 319 U. S. 315, 336 (1943) and sources therein cited. But until such enactments are effected, the *Erie* decision must govern the policy of federal jurisdiction.

93. While perhaps the intent of many of these decisions was merely to award remedies consonant with substantive rights with no particular stress on federal or state remedies, the fact remains that there is no consistency in when state law will be followed.

94. Kelleam v. Maryland Casualty Co., 312 U. S. 377 (1941); Orth v. Transit Inv. Corp., 132 F. (2d) 938 (C. C. A. 3d, 1942); SEC v. Fiscal Fund, Inc., 43 F. Supp. 712 (D. Del. 1943); see Maxwell v. Enterprise Wall Paper Mfg. Co., 131 F. (2d) 400, 402 (C. C. A. 3d, 1942); Homewood v. Standard Power & Light Corp., 55 F. Supp. 100, 102 (D. Del. 1944); Smith v. Aeolian Co., 53 F. Supp. 636, 638 (D. Conn. 1943).

95. Kelleam v. Maryland Casualty Co., 312 U. S. 377 (1941).

96. Purcell v. Summers, 145 F. (2d) 979 (C. C. A. 4th, 1944); Black and Yates v. Mahogany Ass'n, 129 F. (2d) 227 (C. C. A. 3d, 1942), *cert. denied*, 317 U. S. 672 (1942); SEC v. Fiscal Fund, 48 F. Supp. 712 (D. Del. 1943); Dunn v. Wilson & Co., 51 F. Supp. 655 (D. Del. 1943); Griffith v. Bank of New York, 147 F. (2d) 899 (C. C. A. 2d, 1945), *cert. denied*, 325 U. S. 874 (1945) (suit to enjoin enforcement of state court judgment); see Sun Oil Co. v. Burford, 130 F. (2d) 10, 18 (C. C. A. 5th, 1942), *rev'd*, 319 U. S. 315 (1943). However, an injunction has been often held "substantive" for *Erie* purposes. Elastic Stop Nut Corp. v. Greer, 62 F. Supp. 363 (N. D. Ill. 1945); National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 140 F. (2d) 618 (C. C. A. 1st, 1944); Zachs v. Aronson, 49 F. Supp. 696 (D. Conn. 1943); see Ross v. Service Lines, 31 F. Supp. 871 (E. D. Ill. 1940) (equitable defense of fraud).

97. Rambo v. United States, 145 F. (2d) 670, 671 (C. C. A. 5th, 1944), *cert. denied*, 325 U. S. 858 (1945).

98. Perrott v. U. S. Banking Corp., 53 F. Supp. 953 (D. Del. 1944).

99. Herzbergs, Inc. v. Ocean Acc. & Guar. Corp., 42 F. Supp. 52 (D. Nebr. 1941), *aff'd*, 132 F. (2d) 438 (C. C. A. 8th, 1943).

the rights to specific performance,[100] indemnity and contribution,[101] establishment or enforcement of a lien,[102] subrogation,[103] quiet title,[104] redemption of mortgage,[105] liquidation of corporation,[106] creditor's bill,[107] establishment of a trust,[108] accounting,[109] bill to set aside a judgment,[110] cancellation of insurance contract,[111] construction of a will [112] and foreclosure of lien [113] have been governed by state law. It is to be hoped that the trend towards limitation of the equitable remedial rights rationale and the strict application of the *Erie* policy evinced in the *York* case will lead eventually to complete elimination of the doctrine.

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100. Wells Fargo Bank & Union Tr. Co. v. Titus, 41 F. Supp. 171 (S. D. Tex. 1941), *rev'd on other grounds*, 134 F. (2d) 223 (C. C. A. 5th, 1943). Pitcairn v. Rumsey, 32 F. Supp. 146 (W. D. Mich. 1940); Moreschi v. Mosteller, 28 F. Supp. 613 (W. D. Pa. 1939).

101. Bohn v. American Export Lines, 42 F. Supp. 228 (S. D. N. Y. 1941); Gray v. Hartford Acc. & Indem. Co., 31 F. Supp. 299 (W. D. La. 1940); Kravas v. Great Atl. & Pac. Tea Co., 28 F. Supp. 66 (W. D. Pa. 1939).

102. United States v. Certain Lands in Highlands, N. Y., 49 F. Supp. 962 (S. D. N. Y. 1943). But see First Camden Nat. Bank & Trust Co. v. Aetna Cas. & Sur. Co., 132 F. (2d) 114, 118 (C. C. A. 3d, 1942), *cert. denied*, 319 U. S. 749 (1942).

103. Maryland Casualty Co. v. City of Pittsburg, 51 F. Supp. 459 (W. D. Pa. 1943).

104. McAndrews v. Belknap, 141 F. (2d) 111 (C. C. A. 6th, 1944), *cert. denied*, 323 U. S. 721 (1944). But see Harlan v. Sparks, 125 F. (2d) 502, 506 (C. C. A. 10th, 1942).

105. Smith v. Schlein, 144 F. (2d) 257 (App. D. C. 1944).

106. SEC v. Fiscal Fund, 48 F. Supp. 712 (D. Del. 1943); Wall & Beaver St. Corp. v. Munson Line, 58 F. Supp. 101 (D. Md. 1943); Goldman v. Postal Telegraph, 52 F. Supp. 763 (D. Del. 1943). *Contra:* Smith v. Aeolian Co., 53 F. Supp. 636 (D. Conn. 1943).

107. Keene v. Hale-Halsell Co., 118 F. (2d) 332 (C. C. A. 5th, 1941).

108. Robinson v. Linfield College, 136 F. (2d) 805 (C. C. A. 9th, 1943), *cert. denied*, 320 U. S. 795 (1943); Bruun v. Hanson, 103 F. (2d) 685 (C. C. A. 9th, 1939), *cert. denied*, 308 U. S. 571 (1939); Palmer v. Palmer, 31 F. Supp. 861 (D. Conn. 1940).

109. Commercial Nat. Bank v. Parsons, 144 F. (2d) 231 (C. C. A. 5th, 1944), *cert. denied*, 323 U. S. 796 (1945); Schwartz v. Artcraft Silk Hosiery Mills, 110 F. (2d) 465 (C. C. A. 2d, 1940). *Contra:* Root v. York Corp., 56 F. Supp. 288 (D. Del. 1944); *cf.* Maxwell v. Enterprise Wall Paper Mfg. Co., 131 F. (2d) 400, 402 (C. C. A. 3d, 1942).

110. Fakouri v. Cadais, 147 F. (2d) 667 (C. C. A. 5th, 1945); Park v. Park, 37 F. Supp. 185 (N. D. Ga. 1941); *rev'd on other grounds*, 123 F. (2d) 370 (C. C. A. 5th, 1941).

111. Park v. Park, cited *supra* note 110; Mutual Ben. Health & Acc. Ass'n v. Teal, 34 F. Supp. 714 (E. D. S. C. 1940) *semble.*

112. Howell v. Deady, 48 F. Supp. 104 (D. Ore. 1939).

113. Meyer v. City of Eufaula, 132 F. (2d) 648 (C. C. A. 10th, 1942). But see First Trust & Sav. Bank v. Iowa-Wis. Bridge Co., 98 F. (2d) 416, 420 (C. C. A. 8th, 1938), *cert. denied*, 305 U. S. 650 (1938).