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The purpose of this paper will be to point out some of the fields of law wherein the courts may still apply a federal common law since the case of *Erie Railroad Co. v. Tompkins* [1] was decided in 1938. This paper will not purport to deal with the other types of law applicable in the federal courts but will confine itself to the narrow issue of when federal common law will be applied.

It is impossible to begin any consideration of what is left of the federal common law without discussing the *Erie* case, in which case Mr. Justice Brandeis uttered his famous dictum that "there is no federal general common law".[2] That Justice Brandeis intended this statement to be read in the light of his whole opinion is clear not only from an examination of the entire pronouncement, but also from his own opinion in another case [3] decided the same day. In this latter case he stated, "For whether the water of an interstate stream must be apportioned between the two states is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive".[4] From this statement, it becomes immediately apparent that there will be at least some room for the application of the federal common law to the exclusion of the common law as determined by the state courts.

For a while after the decision in the *Erie* case, there was much uncertainty as to the fields in which federal common law could operate. The decisions of the United States Supreme Court since 1938 have not removed all doubts upon this question; however, there does seem to have unfolded a fairly consistent pattern for the application of federal common law in specific types of cases. These cases, as we will see, are not "exceptions" to the *Erie* case, but rather are outside the scope of that case.[5]

error.

In the *Erie* case, where the court was dealing with a state created right,[6] it was said, "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. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[7] Thus, the court in effect said that state law, whether statutory or state de-

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* Written while a student at the University of Denver College of Law.

[1] 304 U. S. 64 (1938).

[2] *Id.* at 78.

[3] Hinderlider v. LaPlatta River and Cherry Creek Ditch Co., 304 U. S. 92 (1938).

[4] *Id.* at 110.

[5] See note, 59 *Harvard Law Review* 966 (1946), which seemingly calls into this

[6] Tompkins brought an action against the Erie Railroad for personal injuries caused by the alleged negligence of the defendant in the state of Pennsylvania.

[7] Erie Railroad v. Tompkins, *supra* at 78.

cisional law, must be applied in the federal courts whenever a *state created right* is involved, whatever may be the basis of jurisdiction. This left room for the application of federal law, whether statutory or federal common law, by the federal courts wherever a *federally created right* is involved, whatever may be the basis of jurisdiction.

In other words, whether the federal court is bound to apply the law as interpreted by the courts of a state under authority of the *Erie* case will depend, not upon the basis of jurisdiction—diversity or federal question—but rather upon the nature of the right involved, i.e., state created or federally created.[8] This construction is, of course, in keeping with the reason behind the *Erie* decision (the need for uniformity of decision between the federal and state courts) in that the uniformity is not limited to cases of diversity only.

What are these federally created rights which are outside the scope of the *Erie* case and to which the federal common law may be applied? These rights arise in cases which can be generally classified into three categories: first, where the United States is a party to the action as a result of contract or otherwise; second, where the right is within the sweep of a federal statute; and third, where Congress has "occupied the field" wherein the right arises. Each of these categories will be discussed separately.

Federally Created Rights Where the United States is a Party

It should be noted here that if it is correct to say that the *Erie* doctrine is limited to cases where federal jurisdiction is based on diversity of citizenship (as is often, and it is believed fallaciously, assumed), then this line of cases can be explained on that ground alone because jurisdiction here rests on the fact that the United States is a party. However, it seems better to say that this line of cases involves federally created rights and thus falls outside the application of the *Erie* rule.

A typical case falling into this group is *Clearfield Trust Co. v. United States*.[9] In that case there was involved a check drawn upon the Treasurer of the United States payable to one Barner for WPA services rendered by him. This check was dated April 28, 1936, and although placed in the mail addressed to Barner, it was intercepted by some unknown person who forged the payee's name and cashed it at the store of the J. C. Penney Co. in Clearfield, Pennsylvania, which paid value in good faith. The J. C. Penney Co. endorsed the check to the Clearfield Trust Co., which collected it from the United States through the Federal Reserve Bank of Philadelphia. Shortly after this, Barner notified his WPA foreman that he had not received the check. It was not until January 12, 1937, however, that notice was given to the Clearfield Trust Co. of the alleged forgery, and not until August 31, 1937

[8] See Snepp, "The Law Applied in the Federal Courts," 13 *Law and Contemporary Problems* 165, 168-169 (1948), as to the fallacy of limiting the Erie doctrine to diversity cases.

[9] 318 U. S. 363 (1943).

was it notified that the United States was asking reimbursement upon the check. Suit was brought by the United States against the Clearfield Trust Co. on November 16, 1939, and the J. C. Penney Co. subsequently intervened. The federal district court applied Pennsylvania law and held for the trust company. The circuit court reversed, and the Supreme Court affirmed in favor of the United States. The court held that the *Erie* case was inapplicable not because this was a non-diversity case, but because "the rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law . . . *The authority to issue the check had its origin in the Constitution and the statutes of the United States* [10] and was in no way dependent on the laws of Pennsylvania or of any other state . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources . . . In absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards."[11]

Another case of this type is *United States v. Standard Oil Co. of California.*[12] In this case a soldier of the United States was injured by a motor truck through the negligence of the driver. The expenses of his hospitalization were borne by the United States, and he continued to receive his army pay during the period of his disability. The United States brought suit in a federal district court against the owner and driver of the truck as tortfeasors to recover the amounts expended for hospitalization and the soldier's pay during the period of disability. The court held (as in the *Clearfield* case) that the *Erie* case was inapplicable and that federal law governed because "not only is the government-soldier relationship distinctively and exclusively *a creation of federal law* [13] but we know of no good reason why the Government's right to be indemnified in these circumstances, or lack of such right, should vary in accordance with the rulings of the several states, simply because the soldier marches or, today perhaps as often, flies across state lines".[14] In other words, the right was federally created, and the federal common law applied even though Congress had not acted affirmatively concerning the specific question.

A third case that falls within this group is *Board of Commissioners v. United States.*[15] This was an action brought by the United States in behalf of one of its Indian wards for taxes unlawfully paid. A treaty between the United States and the Pottawatomie Indians in 1861 had provided that lands held by the United States in trust for the Pottawatomie Indians were exempt from taxation. The lands in question were so held in trust, but the Secretary of the Interior had cancelled the Indian ward's trust patent in 1918 and issued a fee simple patent. As a result, Jackson County, Kansas began to

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[10] Italics are added.
[11] Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943).
[12] 332 U. S. 301 (1947).
[13] Italics are added.
[14] United States v. Standard Oil of Calif., 332 U. S. 301, 310 (1947).
[15] 308 U. S. 343 (1939).

subject the lands to its regular property taxes. Later Congress authorized the cancellation of such fee simple patents, and the United States commenced this action to recover for its Indian ward the taxes paid to Jackson County. The county urged that the *Erie* case bound the court to follow the Kansas law. Mr. Justice Frankfurter, speaking for the Court, said, "*Since the origin of the right* [16] to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties, or statutes of the United States and does not owe its authority to the lawmaking agencies of Kansas." [17] Again the Court chose to distinguish the *Erie* doctrine on the basis that a federally created right was involved rather than upon the mere fact that this was not a diversity case.

From the language of the Court in the above mentioned cases, it becomes evident that the Court has not chosen to rest its decisions on the somewhat narrow ground that the basis of jurisdiction in the federal court was not diversity of citizenship. The Court looks, rather, to the origin of the right which is sought to be enforced.

Where Rights Are Within The Sweep of a Federal Statute

There has never been any question as to whether state or federal law would be applied when the right involved was a direct and express creation of a federal statute. The more difficult problems arise where federal statutes fail to define certain rights which are, nevertheless, implied in the policy of the statutes. This type of situation is illustrated in the early post-*Erie* case of *Deitrick v. Greaney* [18] wherein an action was brought by a receiver of a national banking association to compel payment of a promissory note. The Court refused to accept a defense on the note raised by the defendant which was based on local law. The Court brushed aside the *Erie* argument by stating and thus deciding: "But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted". [19]

In the case of *D'Oench, Duhme and Co. v. FDIC,* [20] the facts involved a suit by the FDIC on a note given to a bank by the defendant. The defendant had a secret agreement with the bank that the note would not be enforced. The defenses on the note were lack of consideration because of the agreement and that the FDIC was not a holder in due course. The majority decided the case in favor of the FDIC on the basis of federal law, relying on the analogy of *Deitrick v. Greaney*. Mr. Justice Jackson, concurring, said, "I do not understand Justice Bandeis' statement in *Erie R. Co. v. Tompkins,* 304 U. S. 64 at 78, that 'There is no federal general common law', to

[16] Italics are added.
[17] Board of Commissioners v. U. S., 308 U. S. 343, 349 (1939).
[18] 309 U. S. 190 (1940).
[19] *Id.* at 200.
[20] 315 U. S. 447 (1942).

deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions."[21] He then said:

> "Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the Federal Constitution and statutes and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present."[22]

It should be noticed that in these cases the federal statute does not specifically cover the matter in question. Neverthless, the court has treated the rights as being federally created because the cases arise under laws of the United States. As Mr. Justice Jackson said, concurring in the *D'Oench* case, "Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit, or the liability of the maker thereof".[23] That is the reason the cases have been classified as falling "within the sweep" of the federal statute rather than directly under the statute.

Federally Created Rights Where Congress Has Occupied the Field

Into the third category will fall those rights which might well have been found to be state created rights had it not been for the fact that by the enactment of a more or less comprehensive statute within the field, Congress has given expression to its desire to bring about uniformity in a particular branch of the law and to bring particular matters within the purview of federal, rather than state, influence. Examples of this third category will likely be found most frequently in the field of regulation of interstate commerce as Congress exerts its influence into new fields of activity.

In *O'Brien v. Western Union Telegraph Company*,[24] a defamatory message concerning the plaintiff was transmitted by the defendant from a point in Massachusetts to a point in Michigan. In the libel suit in the Massachusetts federal court there was a jury verdict for the defendant. Plaintiff excepted to the refusal of the trial court to rule as a matter of law that the transmission was not privileged. Neither Massachusetts nor Michigan courts had decided whether a telegraph company had such a privilege, but the Communications Act of 1934 had provided: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in services . . ." [25] The court

[21] *Id.* at 469.
[22] *Id.* at 471
[23] *Id.* at 472.
[24] 113 F(2d) 539 (1940).
[25] 37 U. S. C. sec. 202(a).

held that neither the Michigan nor Massachusetts law would be binding, since the telegram was an interstate message and the telegraph company an interstate carrier subject to the federal act. The court said:

> "*Congress having occupied the field*[26] by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules. . . . Notwithstanding *Erie Railroad Co. v. Tompkins* there still exist certain fields—and this is one—where legal relations are governed by a 'federal common law', a body of decisional law developed by the federal courts untrammeled by state court decisions."[27]

The latest case of this group is *Francis v. Southern Pacific Co.*[28] Here the suit was brought by guardians of minor children to recover damages from the railroad for the death of the father, who was killed while riding on a train of the defendant. Jurisdiction was founded on diversity. The deceased had been riding on a free pass which provided by its terms that the user assumed all risk of injury to person or property whether by negligence or otherwise, and the user absolved the issuing company from liability therefor. Under the applicable local law (Utah), recovery is permitted against a railroad when its negligence was responsible for a passenger's death, whether the passenger rides on a free pass containing at attempted waiver of liability for negligence or pays his fare in money. The Hepburn Act,[29] however, one of the various statutes regulating interstate commerce, deals with "free passes" on interstate carriers. As early as 1904, even before the Hepburn Act, the Supreme Court had held that a provision in a free pass similar to the one in the instant case absolved the railroad from liability caused by ordinary negligence.[30] The Hepburn Act was passed in 1906 and limited the cases in which free passes could be issued, and after that act the course of decisions remained consistent with the *Adams case*.[31] In 1940 the statutes dealing with railroads were revamped and the free pass provisions were modified only to permit free transportation to additional classes of persons—no changes were made in the established judicial interpretation. In view of this history, the court determined that the issuance of free passes and the judicial determination of their legal effect was a federal matter to the exclusion of the state law and *Erie* had no application. In other words, the Court felt that the provision for passes in the act, with its sanction in penalties, was a "regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary".[32] The Court felt that Congress, through the act,

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[26] Italics are added.
[27] 113 F(2d) 539, 541 (1940).
[28] 333 U. S. 445 (1948).
[29] 49 U. S. C. Sec. 1 (1940).
[30] Northern Pacific R. Co. v. Adams, 192 U. S. 440 (1904).
[31] *Ibid.*
[32] 333 U. S. 445, 449 (1948).

had decreed this to be a federal problem which should be governed by federal, rather than state, law. This case thus goes far in saying that such a right is federally created, but it is a good example of the expansion of the "federal fields" doctrine by the ever stretching idea of what constitutes a federally created right.

The cases which have been referred to in the course of this paper are by no means the only cases that have been decided since *Erie v. Tompkins* wherein the court still felt free to apply federal common law. However, they are sufficient to illustrate the realization on the part of the Supreme Court that some degree of uniformity in the application of national law is necessary for a workable federal system. That is not to say that diversity of laws should not be permitted between states on matters which are clearly within the scope of state regulation. But on matters which are, under our Constitution, placed under the control of the national government, national uniformity is necessary. Decisional or common law is everywhere relied on in legal systems founded upon Anglo-American law, and federal common law is a constantly expanding body of law in our judicial system today.

The Book Trader's Corner

O'Rourke and Kempf of Montrose are anxious to trade their duplicate volumes of Colorado reports. They have extra copies of volumes 68 to 72, and 75 to 90, and are in need of Court of Appeals volumes 11, 21 and 22 and Colorado reports 95 to 104.

Anyone wishing to sell a full set of Board of Tax Appeal reports should contact the secretary, 319 Chamber of Commerce Bldg., Denver.

Marion Porter, who still maintains his membership in the Colorado Bar Association although he is practicing in Billings, Mont., is interested in outfitting a whole new library with Pacific reporters, Pacific 2nd, C.J., C.J.S., or Am. Jur., Montana reports, ALRs, Hillyer or Bancroft on Pleading and Practice, and California jurisprudence books.

Midwestern Association Names New Officers

At its annual meeting on September 24, the Midwestern Colorado Bar Association elected Charles S. Thomas of Paonia, president, Jack Hughes of Montrose, vice president, and W. G. Waldeck of Montrose, secretary-treasurer. Two members of the Denver bar, Judge Joseph J. Walsh and former Supreme Court Justice R. Hickman Walker, were guest speakers for the meeting held this year at Paonia.

New Otero-Crowley Officers

Officers of the Otero-Crowley Bar Association for the current year are: Cover Mendenhall of Rocky Ford, president; George L. Strain of La Junta, vice-president; and Robert A. Trainor of Ordway, secretary-treasurer.