Relationships Between Federal and Local Courts After Court Reorganization

by Sherman L. Cohn*

In preparing for this talk, I was concerned with how elemental to be until I received a phone call from a former student who is now a law clerk to one of the eminent judges on the local district court. He told me that he had the judge's permission to call concerning a problem then before the court. It was a civil matter involving thirty-five thousand dollars, and the judge was insisting that, since it was under fifty thousand, all of the jurisdiction was in Superior Court.

The law clerk was trying to explain to the judge that in diversity and federal question cases, the District Court has concurrent jurisdiction if there be between ten and fifty thousand dollars in controversy, and apparently in desperation he called upon me. I went over to the Courthouse. And sure enough, we then talked about the very elements of what citizenship means under the diversity clause and examined 28 United States Code Sections 1331 and 1332 and explored the elements of *Erie Railroad*.[1]

The Judge gratuitously advised me that he had gone to law school before *Erie Railroad* and therefore had not even heard of its principles. Now I realize that only a very small minority of our local judges and of our local bar fit this category, but I will proceed on the premise that it is of value to go over the elements as a reminder from some years ago.

I would like to start with a recent decision, which I assure

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[1] *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

you was not talked about in law school. In April of this year, the D.C. Court of Appeals in *Palmore* v. *United States*[2] was faced with the question as to whether the relationships between federal courts and state courts to which Professor Dennis J. Tuckler earlier referred, are to be applied to the District of Columbia. One of the questions that must be asked is: "What are the Superior Court and the D. C. Court of Appeals?"

The District of Columbia Court Reorganization Act says that these courts are Article I courts. The argument was made in *Palmore* that, if the Superior Court is an Article I court, it can have no felony jurisdiction because felony jurisdiction is an exercise of judicial power whereas misdemeanor jurisdiction is historically an exercise of administrative jurisdiction. And Article III, Section 2 says, "the judicial power of the United States shall be vested in" Article III courts. I suspect that to the D.C. Court of Appeals the argument that they might be an Article III court might be sort of tempting, as it would give the judges of that court life tenure. I wondered in my own mind whether there was not a conflict of interest in their trying to decide that issue.

But the Court came down on the negative side of the issue. It held that it is not an Article III court, as tempting as that might have been, but that it is an Article I court. They also ruled that, under Article I, Section 8, Clause 17, the District of Columbia Clause of the Constitution, Congress could apportion judicial power, including felony power to Article I or Article III courts as it deems best.

So the highest court in the District has held that the local courts are Article I courts and that they are capable of receiving felony jurisdiction. That case is now before the United States Supreme Court, an appeal having been taken and probable jurisdiction noted. So some time this Spring we should have a Supreme Court decision to settle this question. Yet here lies still another question: how do you seek Supreme Court review from a decision such as *Palmore*? Is the Court Reorganization Act a statute of the United States for the purpose of appeal? If so, you may appeal only where you have

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[2] *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972), review granted 41 U.S.L.W. 3165, probable jurisdiction postponed to hearing of the case on the merits 41 L.W. 3183 (Oct. 10, 1972).

relied on a federal statute and it was declared unconstitutional —otherwise you would go up by certiorari. Or is it equivalent of the state statute, so you go up by appeal when the statute is upheld against a Constitutional challenge and otherwise by certiorari? In *Palmore* counsel argued that the proper route was appeal, but not being certain, and being a good lawyer, he asked in the alternative that his papers be considered a petition for a writ of certiorari.

Should the Supreme Court duck the Article III issue, we would then have at least the possibility of the next problem, assuming that *Palmore's* counsel then goes to the District Court for federal habeas corpus on his Article I—Article III argument. Here we have the potential of a conflict in every sense of the word between the Superior Court and the D.C. Court of Appeals on the one hand and the District Court and the U.S. Court of Appeals on the other.

It is very tempting to say that the Superior Court and the D.C. Court of Appeals are the equivalent of state courts. This is very tempting because at least there is a body of law out there. Although it is amorphous in spots, there is something to refer to, something to build on. Unfortunately, Congress did not say that the local courts are the equivalent of state courts. Congress did not say that the Superior Court shall be considered a state court for all purposes. Instead, Congress went through the various statutes and here and there said it is a state court for this or that purpose, *e.g.*, appeal to the Supreme Court shall be taken as if it were a state court. There are many gaps and even where Congress did speak there are many construction problems.

One might easily, if you analyze the D.C. Court Reorganization Act, speak of it as the Attorneys' Relief Act of 1970 because it will provide many a fee for many years working out these problems of construction.

So, what I would like to do today is to talk about the principles applicable to the relationships of state courts with federal courts, and to apply those principles where I can to the District, or at least to raise the question as to their application to the District.

Professor Dennis J. Tuckler raised the abstention problem, which is a very real problem on the federal level, much less

here in the District. There are some twists among the states that do not apply in the District. For example, one of the prime factors in the abstention doctrine rationale is that of state sovereignty. Obviously, this factor does not apply in the District because, cut it as you will, the District of Columbia does not present a state sovereignty situation. So the policy considerations are not quite identical; perhaps the results ought to differ as well.

The Last Word on Federal Law

Another problem is raised by a 1970 decision of the Seventn Circuit in *United States ex rel. Lawrence* v. *Woods.*[3] That case raised the question as to whether the federal court is the last word on questions of federal law, binding on state courts as well as on lower federal courts in the geographic area served by the federal court that ruled on the matter of federal law. *Lawrence* arose in an Illinois county court as a misdemeanor action against one of the alleged participants in the 1968 Chicago riot, the charge being based upon violation of a Chicago police ordinance. Mr. Lawrence challenged the ordinance as being contrary to the Federal Constitution. While that case was on appeal to the Illinois appellate court, the Northern District of Illinois, the federal court in Chicago, in another case held the ordinance to be unconstitutional. The argument was then made in the Illinois state court in *Lawrence* that it was bound by the decision of the District Court. It was argued that, when a lower federal court decides a point of federal constitutional law, the state courts in that geographic area are bound. Strong emphasis was placed upon the virtues of uniformity: that it would be unfortunate if the identical ordinance was constitutional in one court and unconstitutional in the court across the street.

The Supreme Court of Illinois disregarded those arguments. A habeas corpus action was then brought in the Northern District of Illinois, which then went up to the Seventh Circuit. The Seventh Circuit ruled that under our constitutional system there are two parallel sets of courts—state and federal; the final arbiter as to the federal constitutional law is the United States Supreme Court; the final arbiter is *not* the U.S. District Court or the Court of Appeals. And therefore the Illinois state Courts are not required to follow rulings of law of the federal court,

[3] *United States ex rel. Lawrence* v. *Woods,* 432 F.2d 1072 (7th Cir. 1970), *cert. denied* 402 U.S. 983 (1971).

even of the Court of Appeals, and even on matters of federal constitutional law.

That is not a uniform holding, however. There are decisions from Supreme Courts of states to the effect that they are bound by holdings of the federal courts of appeal in their jurisdiction. The Seventh Circuit has now drawn a conflict.

The difficulty that one can get in is seen by comparing two other recent cases: the *Babbitz case,*[4] before a three judge district court in Wisconsin and the *Ryan* case[5] which comes out of Pennsylvania, both concerned attempts to have declared unconstitutional state abortion statutes.

In *Babbitz* the federal court declared the Wisconsin statute unconstitutional but at first did not enjoin its enforcement, relying upon 28 U.S.C. 2283 for the proposition that the federal court may not enjoin the enforcement of a state statute. The Wisconsin attorney general thereupon announced that he would continue to enforce the Wisconsin statute no matter what the three-judge federal court had declared. The three-judge federal court then issued a second opinion enjoining the enforcement of the state statute in the effectuation of its judgment, which is one of the exceptions under 2283.

In *Ryan,* the Eastern District of Pennsylvania three-judge federal court decided that it would abstain from deciding the constitutionality of the Pennsylvania statute, but would retain jurisdiction of the case, pending a reasonable time for the Pennsylvania courts to decide the issue, clearly implying that, if the Pennsylvania courts would not move soon enough "we will move." In *Ryan* the Pennsylvania federal court was also concerned wtih uniformity—but uniformity within all of Pennsylvania. The only defendant before the federal court was the District Attorney from Philadelphia. The court was concerned that should it rule the statute unconstitutional in the case pending before it, the statute would remain constitutional elsewhere in the state. The statute could then be challenged again in another case, perhaps before the Pennsylvania Supreme Court, and be held constitutional. And perhaps such a ruling would be affirmed by the United States Supreme Court. A decision

[4] *Babbitz v. McCann,* 310 F. Supp. 293 (E.D. Wisc.) appeal dismissed, 400 U.S. 1 (1970).

[5] *Ryan* v. *Specter,* 321 F. Supp. 1109, 332 F. Supp. 26 (E.D. Pa. 1971).

in the current case to the contrary would stand in a limbo, binding only the parties to the case. The court therefore decided that abstention for a time was the better course of action.

In the Wisconsin case the court also said it was concerned about uniformity within the state, but it was also very much concerned that it had before it a type of case in which the federal court was charged with jurisdiction which it could not refuse to exercise even under the abstention doctrine. The court held that it had the duty to decide the constitutionality of the statute before it and once rendering that decision it had the duty to enforce it.

So here in concrete form is a real problem in potential jurisdictional disputes. Congress has recognized the potential in that conflict and has enacted what is now 28 U.S.C. 2283, limiting a federal court's power to enjoin a state court. Does 2283 apply to the District of Columbia? The Court Reorganization Act does not speak to this point. And 2283 by its own terms clearly limits the power of the federal courts to enjoin state court proceedings and no more. If 2283 does not apply to the District, there is no statutory limitation that I am aware of. I add that caveat because by no means do I profess to know all of the implications of the Court Reorganization Act, and I defy anyone to say otherwise with any certainty. While I believe there to be no statute limiting the District Court of the District from enjoining the Superior Court, there is a rule of comity and of good sense and the broad abstention doctrine that was referred to earlier, which provide handles for the federal court to shape a workable relationship with the local courts of the District.

Choice of Law

Another large area of conflict between federal courts and state courts concerns the choice of law—the so-called *Erie Railroad* problem. I would like to spend several minutes tracing this doctrine because now for the first time it is important in the District.

But before we turn to *Erie Railroad* it is essential to look at the District of Columbia Court of Appeals' decision in *M.A.P.* v. *Ryan.*[6] In that case the Court declared that it was bound on a *stare decisis* basis to decisions of the United States

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[6] *M.A.P.* v. *Ryan*, 285 A.2d 310 (D.C. App. 1971).

Court of Appeals rendered prior to the effective date of the Court Reorganization Act, February 1, 1971. But such decisions, like decisions of the District of Columbia Court of Appeals itself, were not immutable: *stare decisis* does not mean and never did mean that a rule of law once rendered may never change; rather it remains in effect until the same court that rendered it determines there be good and sufficient reason to alter it. Prior to February 1, 1971, the District of Columbia Court of Appeals was subordinate to the United States Court of Appeals and of course was bound by the latter's decisions no matter its own views on the law. Now, however, the District of Columbia Court of Appeals is the highest court of the District on matters of local law and has declared itself free, except as *stare decisis* binds, of pre-February 1, 1971, rulings of the United States Court of Appeals. And decisions of the United States court on matters of local law subsequent to that date, while entitled to great respect do not have even *stare decisis* force.

This, I submit, is as it should be. Without such a rule, the local law would become stultified as of February 1, 1971. Yet law must change in its application as reality changes, or what was once a judge-made rule of justice becomes an outmoded shackle of injustice.

Thus, the District of Columbia Court of Appeals will go off in its own direction on local law matters. And we may very well find—and ought to find—developing a diversion between the common law of the District and what is going on elsewhere in the country. We will find in time that there will be a difference between District of Columbia common law and federal common law. Clearly, despite what one may read out of *Erie Railroad,* there is a federal common law not generally applicable in a local situation. The Supreme Court at the end of the last term decided another of a series of cases in this regard. This case, *Illinois* v. *Milwaukee,*[7] concerned pollution. The Supreme Court told the lower courts to decide pollution questions as matters of federal common law and to create a federal common law of nuisance. This is but one example of federal common law.

So it is very possible, and indeed likely, that the federal common law of this Circuit and the District of Columbia

[7] *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972).

common law are going to diverge. In that situation the federal court, sitting in diversity, has a problem, a problem that requires the application of the *Erie Railroad* doctrine.

That doctrine, it bears emphasis, applies only when the federal court sits in diversity. I emphasize that point because there are other jurisdictional bases of federal courts, such as the federal question jurisdiction, or cases in which the United States is a plaintiff or defendant. In those cases, the *Erie Railroad* doctrine does not apply.

The general proposition of the *Erie Railroad* doctrine is clear—it's only the implementation that is not. The doctrine holds that in a diversity case the federal court applies the "substantive" law—the quotes are used advisedly—of the state in which it is sitting. But the District of Columbia is not a state. Therefore it may be argued that *Erie Railroad* has no application. And if you go to Brandeis' decision in *Erie,* you will find that it is underpinned very strongly by constitutional arguments based upon the need to intermesh our federal and state systems into a proper working relationship, recognizing that each has some, but limited, sovereignty. Those constitutional arguments, I think, rather clearly have no application to the District of Columbia. Here we have no state sovereignty to worry about, for this is solely a federal jurisdiction.

But the policy arguments that are made in *Erie*—the argument that the law should not differ depending on which side of John Marshall Place you bring your case—are not as easily dismissed. The common law or even the local statutory interpretation ought to be the same no matter which court you are in, so that an outsider, someone who lives in Montgomery County, Maryland, and brings a suit, should not be able to select the law to be applied depending upon the court he chooses to go into.

Thus, although the constitutional underpinnings of the *Erie* doctrine do not apply to the District, there is a strong argument that its policy considerations are as applicable to the District as to the states. One can buttress that argument with support from the decisions holding that federal courts in the territories, such as the District Court for Guam or the Ninth Circuit, when deciding a local matter should apply territorial law on matters of local law.

So much for the application of *Erie*. Now for the contents of the doctrine. Those of you who have completed law school recently know that the contents of the doctrine is very difficult, if not impossible, to state as a litmus test that will clearly apply to every situation. *Erie Railroad* drew a dichotomy of substantive law as against procedural law: state law to be applied to matters of substance and federal law to matters of procedure. That case involved a question of negligence law in a licensee-trespasser situation. Thus, the issue clearly went to the actual right involved and the substantive-procedural test worked.

Statute of Limitations

Guaranty Trust,[8] which came along in 1945, posed the problem in a different situation. That case concerned the application of a statute of limitations; and, as we all know, the statute of limitations is usually procedural. Therefore, the argument was made, federal courts should apply a federal limitations period because *Erie* says procedural equals federal law and we all know statutes of limitations are procedural. The Supreme Court cautioned, however, that labels are treacherous. Procedural for the purpose of conflict of laws, which is where statutes of limitations are usually labeled as procedural, is not procedural for the purpose of *Erie Railroad.* The Court thereupon laid down the test of outcome determinative: Is the choice of rule going to determine the outcome of the case? If so, you apply state law so that the outcome should be the same in federal court as it would be across the street in the state court.

Then we come to *Hanna* v. *Plumer,*[9] which is the last decision of the Supreme Court, coming in 1965. In *Hanna* the Court was faced with a situation which was clearly outcome determinative. The service of process was ineffectual under state law, but it was permitted under the federal rules. The argument was made, and I think very logically, that if you apply state law "I win"; if you apply federal law "I might lose"; what could be more determinative of the outcome than that?

The Supreme Court rejected that argument and—going back to the forum-shopping rationale of *Erie*—said that, where we are concerned with the right or the remedy, we should look to the substantive state law. However, if it be a question of the mechanics of the law suit, then we should apply federal law.

[8] *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945).
[9] *Hanna v. Plumer,* 380 U.S. 460 (1965).

Method of service was held to be a matter of mechanics rather than of right or remedy, despite the fact that the outcome would be determined by the choice of law. This dichotomy between right-remedy and mechanics is a simplification of the current status of the *Erie* rule, but I think a workable one.

The Court also said something else most interesting—that a Federal Rule of Procedure to be valid must be procedural, otherwise under the Enabling Statute it would be invalid. And here we have a Federal Rule that has been passed on by the Judicial Conference, after coming through the advisory committee and after comment of bench and bar. Moreover, it has been approved by the Supreme Court and it has laid before the Houses of Congress. After such thorough review, the Federal Rule is presumptively valid and thus presumptively procedural.

So we now have a litmus test of sorts: if it be in the Federal Rules, you apply that Rule, unless you can maintain the almost impossible burden of convincing the Supreme Court that when it promulgated the rule it exceeded its power.

Now, as I said, applying this doctrine to specific situations is not easy. There are certain specific matters which we can assume are now settled because the Supreme Court has already ruled on them. For example, matters of conflict of state laws are governed by the substantive law of the state. When a suit is commenced for the purpose of tolling the statute of limitations is a question of state law. The burden of proof is a matter of state law. That not all situations are yet settled can be seen by comparing the rule governing the burden of proof, which is settled, with the standard for the grant of directed verdict, which is not. There are two standards for the grant or denial of directed verdicts, although from the decisions of the U.S. Court of Appeals for this Circuit you wouldn't know it these days. The local D.C. Courts of Appeals has not yet had to face that issue.

But many states have faced that issue and have adopted one standard as against the other. The Fifth Circuit a few years ago had to decide whether in a diversity case the standard for directed verdict is akin to the burden of proof and as such to be considered substantive for *Erie* purposes or is a matter of federal judicial law as an off-shoot of the Seventh Amendment

jury trial right.[10] The Fifth Circuit held that federal law applied and the standard was contrary to that of the state, in that case, Mississippi. A petition for certiorari raising this issue was denied.

So this is the doctrine as I now see it. We still need time to work out the other intricacies of *Erie Railroad* itself. Moreover, in the District of Columbia, counsel will argue and judges will ultimately need to determine whether the absence of the constitutional implications of *Erie* may require different connotations in the District. It is very possible to conceive that in certain areas, the absence of the constitutional implications of *Erie* may require different results than in the states. So whatever is settled under *Erie* for the rest of the country will need to be reargued here. The arguments and solutions will occupy the next several years or decades, I am sure.

Finding State Law

Now, let us explore still another question: where do you find state law, once you decide that state law applies? Here of course, we would look to find the law of the District of Columbia.

In the states the task is relatively easy if one can find a state statute that is clear and needs no construction, having already been construed by the Supreme Court of the state. It is also relatively easy if one can find a rather firm decision of the Supreme Court of the State holding what its common law is on a point. Please note that, when we talk about state law, we are talking about the common law as well as the statutory law of the state. But that is where simplicity ends.

What happens if you have no decision by the highest court of the state? Can you then look, or must you then look, to the decisions of the lower state courts? For a while we seemed to have a rule that the federal court had to look to whatever state decisions there were in point, and if the sole decision was one of a lower state court, it had to be followed by the federal court. The effect of this rule can be seen in a Third Circuit case involving one Miss Field.[11] Miss Field sued under a New Jersey statute, which had been construed by two lower-court judges in New Jersey in such a way that her suit could not be brought.

[10] *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869 (5th Cir.), *cert. denied* 389 U.S. 930 (1967).

[11] *Fidelity Union Trust Co.* v. *Field*, 108 F.2d 521 (3rd Cir. 1939), *reversed* 311 U.S. 169 (1940).

The Third Circuit reading the New Jersey statute disagreed with that construction but held that it was bound by the lower-court holdings and Miss Field could not recover. The New Jersey Supreme Court later in another case went the other way and rejected the construction given by the lower state courts and followed reluctantly by the Third Circuit. So we are left with a situation in which Miss Fields because she lucklessly went into federal court at the wrong time, ended up losing when she should have won.

Today, however, the Supreme Court rule seems to be that the federal district judge sits as if he were a state judge and he looks to all sources of state law. If he finds only lower court state decisions, he uses that as data, which would be rather important data, but he is not bound by it. He is to consider all of the data on what the law of the state is. He may even go to the extreme of disregarding an old decision of the state Supreme Court, when he finds that, although it still stands, it has been chipped away by time and perhaps dicta here and there. Sitting as a state court, the federal judge could consider that case to be no longer the state law and he could disregard it in the proper circumstances.

Of course here in the District we have the added problem that the old law is that of the U.S. Court of Appeals. Thus, there is now the possibility of a federal district judge deciding that he need not follow a U.S. Court of Appeals decision of five years ago because it ruled on a point of the common law of the District which the D.C. Court of Appeals has strongly indicated it is going to alter. And, therefore, the district judge, anticipating what a Superior Court judge would do in these circumstances, may rule against the decision of the U.S. Court of Appeals.

Whether the U.S. Court of Appeals will agree or not I do not know, but that is a perfectly logical result under the *Erie Railroad* doctrine and one compelled by it in its present formulation.

I earlier noted that, when one considers statutory law, the task in the states is relatively easy—state statutes. But what are the state statutes in the District of Columbia, ignoring for the moment whatever force there may be in an ordinance of the city council? The statutes of the District are passed by Con-

gress. As such they are also laws of the United States, statutes of the United States, are they not? But who speaks as the final word on their construction and application? The D.C. Court Reorganization Act does not answer that question. The reorganization Act, it is true, says that such statutes are not to be considered laws of the United States for the purposes of 28 U.S.C. 1331 federal-question jurisdiction. But, please note, only for that purpose All the rest is left open. Are these statutes to be considered as state statutes to be finally construed by the D.C. Court of Appeals? Or, as any other statutes of the United States, to be construed by the federal courts? I suggest that here is an area where the courts will need to work out a reasonable solution.

There are also questions that will arise in federal court on which there is no state law of any kind. Placing the question in the local context there are matters on which neither the U.S. Courts of Appeals (before February 1, 1971) nor the D.C. Courts of Appeals have spoken. Here the federal district judge must act like the state judge and create that District of Columbia state law. He later may not be followed by the D.C. Courts of Appeals, but when faced with the problem he has no way of ducking, except perhaps by utilizing a device of abstaining for a time while the parties sought a declaratory judgment from the Superior Court. This of course is done by the federal courts in the states—but only as to construction of statutes, regulations, or ordinances. But in the District there is a factor not present among the states. It has been ruled that the local courts of the District, like the federal courts, cannot render advisory opinions. So, it may be argued that such an action cannot be brought in Superior Court, for it is then not really a case or controversy. This is another interesting problem that some day will need to be decided.

Still another interesting implication comes from the fact that the final word on the District of Columbia law always has been, and theoretically still is, the U.S. Supreme Court. The U.S. Supreme Court for years lay down principles of common law for the District of Columbia. Of course the Court was doing it for the rest of the country too before *Erie Railroad.* But those principles have been binding in the District even after *Erie.*

Now the D.C. Court of Appeals is the final word on the local law of the District. As such the D.C. Court of Appeals may

create the local common law. And it may also change the common law, not only where it was set down by the U.S. Court of Appeals, but also where it was set down by the Supreme Court of the United States. Logically that would have to follow.

This begs the question whether you could go to the U.S. Supreme Court on a matter of local law. After all you can still go from the D.C. Court of Appeals to the U.S. Supreme Court under 28 U.S.C. 1257, and that statute says you may appeal where there had been an attack made on a statute of the United States. Query: does that provision apply where the attack is made on a "statute of the United States" locally applicable in the District of Columbia? By the language of 1257, the answer is yes. The D.C. Court Reorganization Act does not speak to this point. The intent of Congress if one could ever find the intent of Congress on this type of point (and I think that is really chasing rainbows) probably would be that Congress wanted to keep local matters local, but who is really to say with any certainty, short of the Supreme Court?

The Lawyers' Relief Act of 1970

There is another provision of 28 U.S.C. 1257 of some interest here. 1257 says that the Supreme Court may decide matters involving "*laws* of the United States," arising even from a state court. Is a common law of the District of Columbia a law of the United States? Note that the same statute uses "statute of the United States" in one provision and "laws of the United States" in another. And one could very easily argue that obviously there must be two different meanings—whether the Congress knew that or not. And once you conclude that "laws of the United States" has a different meaning than "statutes of the United States," you are dealing with common law. Now, what is the District of Columbia? It isn't a state. It is a federal area. Thus, logic tells us that the common law of the District must be "laws of the United States." But could that be the intent of Congress? You see what I mean by calling the D.C. Court Reorganization Act the Lawyers' Relief Act of 70.

I would like to come around circle now to the federal common law point, because there is federal common law, and it is of growing importance. Soon after *Erie Railroad*, you had the case of *Clearfield Trust* v. *United States*,[12] which was a contract action in which the United States was a party. The

[12] *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943).

Supreme Court said "of course there is a federal common law in non-diversity situations."

This has been a growing area. Professor Tuckler referred to the 42 U.S.C. 1983 Civil Rights cases as examples. Still another and very much growing area of federal common law is the so-called *Borak* [13] line of cases where the Supreme Court has recognized private implied remedies. Under this doctrine suits can be brought privately where remedies are implied out of federal statutes and regulations. There is a whole new area of federal common law growing in those cases. Under the *Lincoln-Mills* decision,[14] all labor contracts are governed by federal common law. And now, as I noted earlier, there is the pollution case of last spring, which again speaks of a federal common law.

So in the District we will have two common laws—federal and state. And the federal judge, the district judge, is going to have to decide which one to apply. I suggest he will have some real fun when he is faced with a case that has one count under D.C. common law and a second count under federal common law.

That rounds up what I have here. I'll say one more point though involving *stare decisis*, and this has to do with a personal story, if you'll permit me. . . .

In arguing a case before the Tenth Circuit several years ago, I was relying very heavily upon a Tenth Circuit decision. Indeed, that was the only decision I had going my way; everything else went the other way. The distinguished judge of that court made it quite clear that he was very unhappy that counsel, particularly Government counsel, would pull cases far out of their original intendment. After he calmed down, he asked me if I were sure of my statement of the case. I replied that that being my key case I had reread it that morning and what I stated reflected accurately both my memory and my notes. He then asked: "Who decided that case?" I replied: "Both my notes and my memory tell me that you did, your Honor." "I couldn't have!" he answered. He stopped everything and sent out for the decision. When it arrived, he read it, and after two or three minutes he turned back to see who had written it. His comment stands as a vivid reminder to me: he said "I'll be damned. I did say that, but I couldn't have meant it."

[13] *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

[14] *Lincoln Mills* v. *Textile Workers Union of America, CIO*, 230 F.2d 1 (5th Cir.), *reversed* 353 U.S. 448 (1957).