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Unless there is some compelling need for this area of incompetency supported by stronger reasons than those given for the common-law rule,³⁴ it should be eliminated from the statute books. A reason presented by the court is to avoid "fraud and collusion."³⁵ This was one of the reasons noted for the common-law rule which has been discarded for all other cases except this and divorce proceedings, and there is no more danger of collusion here than in other cases. Actually there is less danger considering the delicacy of the testimony, which no one is prone to divulge even if true, ". . . and the interest of the state in the marriage relation, which may justify extreme measures to prevent collusion in divorce litigation is no excuse for a rule of incompetency in criminal conversation actions."³⁶ In fact one jurisdiction, in a case of criminal conversation presented at a time when the wife was generally incompetent as a witness for or against her husband, has held that a wife should be allowed to testify *for* the husband in this action on grounds of public policy.³⁷ At a time when speedy and accurate administration of justice has become the watchword, this change is in order.

R. W. BRADLEY, JR.

Federal Jurisdiction—State Statutes Enlarging Federal Equity Jurisdiction—The Doctrine of Equitable Remedial Rights

Solely on a basis of diversity of citizenship a simple contract creditor entered a federal court in Wisconsin and asked for a receiver. By principles of old English Chancery as applied by the federal courts the plaintiff would not have been entitled to such relief until it had exhausted its remedies at law. On the other hand, under the Wisconsin "Uniform Fraudulent Conveyance Act" the plaintiff was entitled to the relief.¹ *Held*: Defendant's motion to dismiss denied.²

Under a similar set of facts in *Pusey & Jones v. Hanssen*³ the United States Supreme Court reversed an order appointing a receiver

³⁴ *Powell v. Strickland*, 163 N. C. 393, 400, 79 S. E. 872, 875 (1913) (" . . . whether it was upon the ground of interest alone, when the testimony is in favor of the spouse, or marital bias, or public policy when it is against, or whether it was because they were considered as two souls in a single body. . .").

³⁵ See note 31 *supra*.

³⁶ STANSBURY, NORTH CAROLINA EVIDENCE §58 n. 42 (1946).

³⁷ *Coy v. Humphries*, 142 Mo. App. 92, —, 125 S. W. 877, 879 (1910) ("All power should be given to society to punish those moral ulcers on the body politic which corrupt its vitals and demoralize its members; and unless society shall apply sufficient remedies to repress the erotic mania displayed in this case [defendant enticed a wife into adultery] its most cherished and priceless institutions—home and the family—will be destroyed. The admission of testimony of the wife for the plaintiff was not error.")

¹ WIS. STAT. (Brossard, 1943) §242.10.

² *Houseware Sales Corp. v. Quaker Stretcher Co.*, 70 F. Supp. 747 (E. D. Wis. 1947).

³ 261 U. S. 491 (1923). See Comment, 33 YALE L. J. 193 (1923).

for want of equity jurisdiction.⁴ The opinion in that case restated the doctrine of equitable remedial rights, to wit, that a remedial right to proceed in a federal court sitting in equity can be neither enlarged⁵ nor narrowed⁶ by state law.⁷

In the instant case, Judge Duffy, with remarkable candor, faced the issue of whether the doctrine of equitable remedial rights in the *Pusey* case is still the law after *Erie R. R. v. Tompkins*.⁸ Although he recognized that the opinion in *Guaranty Trust Co. v. York*⁹ did not expressly overrule *Pusey & Jones v. Hanssen*, Judge Duffy concluded: The "attitude of the Supreme Court" appears to be "that as far as possible in shaping relief federal courts should conform to the laws of the State where suit is brought in a diversity of citizenship case."¹⁰

Soon after the formulation¹¹ of the doctrine of equitable remedial rights the Supreme Court created a mode of circumventing that doctrine where desirable to reach a particular result. The Court laid down the rule that although the states may neither enlarge nor narrow equitable remedial rights in federal courts, the states may confer equitable substantive rights which will be administered in the federal courts.¹² A

⁴ Jurisdiction is not used in the strict sense of power to hear and determine but rather in the sense of propriety or appropriateness according to established principles of equity; see *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377 (1941); *Di Giovanni v. Camden Ins. Ass'n*, 296 U. S. 64 (1935); *Gordon v. Washington*, 295 U. S. 30 (1935); *Burnrite Coal Briquette Co. v. Riggs*, 274 U. S. 208 (1926); *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77 (1923); *In re Metropolitan Railway Receivership*, 208 U. S. 90 (1908). *But see* *Atlas Ins. Co. v. Southern Inc.*, 306 U. S. 563, 568 (1939); *Cates v. Allen*, 149 U. S. 451 (1893); *In re Sawyer*, 124 U. S. 200 (1887).

⁵ *Kelleam v. Maryland Casualty Co.*, 312 U. S. 377 (1941); *Pusey & Jones v. Hanssen*, 261 U. S. 491 (1923); *accord*, *Henrietta Mills v. Rutherford County*, 281 U. S. 121 (1930); *see* *See & Depew v. Fisheries Products Co.*, 9 F. 2d 235 (C. C. A. 2d 1925) (a case involving N. C. GEN. STAT. (1943) §§55-147).

⁶ *Guffey v. Smith*, 237 U. S. 101 (1914); *Mississippi Mills v. Cohn*, 150 U. S. 202 (1893); *accord*, *David Lupton's Sons v. Automobile Club*, 225 U. S. 489 (1911) (action at law); *Mason v. U. S.*, 260 U. S. 545 (1922).

⁷ *See* *Cowley v. Northern Pacific R. R.*, 159 U. S. 569 (1895); *Gormley v. Clark*, 134 U. S. 338 (1890); *Kohler v. McClellan*, 156 F. 2d 908 (C. C. A. 5th 1946); *Orth v. Transit Inv. Corp.*, 132 F. 2d 938 (C. C. A. 3d 1942); *Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co.*, 64 F. 2d 817 (C. C. A. 4th 1933); *Securities and Exchange Comm'n v. Fiscal Fund*, 48 F. Supp. 712 (D. Dela. 1943). *See also* Note, *The Equitable Remedial Rights Doctrine*, 55 YALE L. J. 401 (1946).

⁸ 304 U. S. 64 (1938).

⁹ 326 U. S. 99 (1945).

¹⁰ *Houseware Sales Corp. v. Quaker Stretcher Co.*, 70 F. Supp. 747, 750 (E. D. Wis. 1947); *accord*, *Feldman v. Pennroad Corp.*, 155 F. 2d 773 (C. C. A. 3d 1946), *cert. denied*, 67 Sup. Ct. 621 (1947); *Bruun v. Hanson*, 103 F. 2d 685 (C. C. A. 9th 1939). *Contra*: *Pittsburgh Equitable Meter v. Loeber & Co.*, 160 F. 2d 721 (C. C. A. 7th 1947) (same circuit as instant case); *see* *Kohler v. McClellan*, 156 F. 2d 908 (C. C. A. 5th 1946).

¹¹ *Robinson v. Campbell*, 3 Wheat. 212 (U. S. 1818); *Boyle v. Zacharie*, 6 Pet. 647, 658 (U. S. 1832); *Payne v. Hook*, 7 Wall. 425, 430 (U. S. 1868).

¹² *Matthews v. Rodgers*, 284 U. S. 521 (1932); *Guardian Savings & Trust Co. v. Road Improvement District*, 267 U. S. 1 (1925); *Lawson v. U. S. Mining Co.*, 207 U. S. 1 (1907); *Bardon v. Land & River Imp. Co.*, 157 U. S. 327 (1895);

nice distinction is required to determine when a state law merely confers equitable remedial rights and when it confers equitable substantive rights.

From the deceptive and ambiguous meanings of the term, equitable remedial rights, confusion has abounded. However, some idea of its meaning is prerequisite to distinguishing equitable remedial rights from equitable substantive rights. The term has not had the exclusive meaning of referring to types of relief, *e.g.*, specific performance, appointment of receiver, injunction. If that were its sole meaning, the distinction of equitable remedial rights from equitable substantive rights would be relatively clear. Sometimes the term, equitable remedial rights, has been used in the sense of the procedure in courts of chancery.¹³ If that were the extent of its meaning, the distinction would be the same as the general distinction between "substance" and "procedure" which is necessary in all civil actions of federal diversity jurisdiction.¹⁴ However, in most cases the term, equitable remedial rights, denoted the elements of a suit required to justify giving the desired equitable relief. For example, in *Pusey & Jones v. Hanssen* the statute, which was construed as merely conferring an equitable remedial right, abolished the principle of old English Chancery which made an execution returned unsatisfied an element prerequisite to the appointment of a receiver. In this respect "equitable remedial rights" has been used synonymously with "principles of equity" or "rules of decision." Indeed some opinions have thus phrased the doctrine of equitable remedial rights: "Remedies afforded . . . in Federal [equity] courts are not determined by local laws or rules of decisions, but by general principles, rules and usages of equity having uniform operation in [Federal] courts wherever sitting."¹⁵

The purported distinction between equitable remedial rights in the sense of principles of equity and equitable substantive rights has been at best wholly unpredictable.¹⁶ However, where a state statute concerned the title of real property, the Court has consistently construed such

Gormley v. Clark, 134 U. S. 338 (1890) (The Court said that in diversity of citizenship cases it would administer the equitable relief which state legislation accords.); *Holland v. Challen*, 110 U. S. 15 (1883) (enlargements of rights will be administered, "though in the form of remedial proceedings"); *Case of Broderick's Will*, 21 Wall. 503 (U. S. 1874); *Clark v. Smith*, 13 Pet. 194 (U. S. 1839).

¹³ *Robinson v. Campbell*, 3 Wheat. 212 (U. S. 1818).

¹⁴ *Clark, Procedural Aspects of the New State Independence*, 8 GEO. WASH. L. REV. 1230 (1940); *Tunks, Categorization and Federalism "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939).

¹⁵ *Guffey v. Smith*, 237 U. S. 101, 114 (1914); *see also Livingston v. Story*, 9 Pet. 632 (U. S. 1835); *Boyle v. Zacharie*, 6 Pet. 648, 658 (U. S. 1832); *United States v. Howland*, 4 Wheat. 115 (U. S. 1819).

¹⁶ For a suggested test, *see Comment*, 33 YALE L. J. 193, 195 (1923) "A statute which allows a suit in equity to accomplish a result which could be attained by an action at law gives a remedial right. . . . A statute which allows a suit in equity to accomplish a result which, except for the statute, could not be attained either at law or equity . . . gives an equitable substantive remedial right."

statutes to create equitable substantive rights because reasons of policy demanded uniformity within the state¹⁷—a marked parallel to the exception to the *Swift v. Tyson*¹⁸ rule.

The doctrine of equitable remedial rights emanated from a fear of the hostile attitude of some states to courts of chancery and a desire for national uniformity in equity¹⁹ analogous to the *Swift v. Tyson* doctrine at law. The doctrine served a valuable function when the federal equity courts were in their infancy, but it belongs to the climate of jurisprudential opinion of *Swift v. Tyson*.

Swift v. Tyson was overruled in 1938. The policy of *Erie R. R. v. Tompkins*²⁰ was immediately extended to suits in equity.²¹ In *Guaranty Trust Co. v. York*, Mr. Justice Frankfurter said: "To make an exception to *Erie R. R. Co. v. Tompkins* on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision."²²

Nevertheless, the decisions of the Supreme Court since 1938 do not inevitably command agreement with Judge Duffy's conclusion in the instant case that the doctrine of equitable remedial rights in the *Pusey* case is no longer the law in diversity jurisdiction cases.²³ In *Kelleam v. Maryland Casualty Co.*²⁴ the Supreme Court squarely upheld the doctrine of equitable remedial rights in a diversity jurisdiction case. However, the force of this decision is weakened to some extent because: (1) the Court did not mention *Erie R. R. v. Tompkins*, and (2) the decision could have been made purely on a basis of affording comity to the Oklahoma probate court.²⁵

¹⁷ *Lawson v. U. S. Mining Co.*, 207 U. S. 1 (1907); *Bardon v. Land & River Imp. Co.*, 157 U. S. 327 (1895); *Reynolds v. Crawfordville Bank*, 112 U. S. 405 (1884); *Holland v. Challen*, 110 U. S. 15 (1883); *Clark v. Smith*, 13 Pet. 194 (U. S. 1839) (federal courts will "give effect to state legislation and policy"). *But cf.* *Whitehead v. Shattuck*, 138 U. S. 146 (1891).

¹⁸ 16 Pet. 1, 18 (U. S. 1842). Under the *Swift v. Tyson* rule, "when such rules of property concerning real property have been declared by lines of decisions in the state courts, then federal courts will consider themselves bound by these decisions." DOBIE ON FEDERAL PROCEDURE §143 (1928).

¹⁹ *Robinson v. Campbell*, 3 Wheat. 212 (U. S. 1818); *Guffey v. Smith*, 237 U. S. 101 (1914); *Mississippi Mills v. Cohn*, 150 U. S. 202 (1893); *Payne v. Hook*, 7 Wall, 425 (U. S. 1868); *Livingston v. Story*, 9 Pet. 632 (U. S. 1835); *Boyle v. Zacharie*, 6 Pet. 648, 658 (U. S. 1832); *United States v. Howland*, 4 Wheat. 115 (U. S. 1819); *Black & Yates, Inc. v. Mahogany Ass'n, Inc.*, 129 F. 2d 227 (C. C. A. 3d 1942), *cert. denied*, 317 U. S. 672 (1942). See von Moschizker, *Equity Jurisdiction in the Federal Courts*, 75 U. OF PA. L. REV. 287 (1927).

²⁰ 304 U. S. 64 (1938).

²¹ *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202 (1938).

²² 326 U. S. 99, 111 (1945).

²³ *E.g.*, *Atlas Ins. Co. v. Southern Inc.*, 306 U. S. 563, 568 (1939); *Sprague v. Ticonic National Bank*, 307 U. S. 161, 164 (1939) (this was not a case of federal diversity jurisdiction, but its dictum approving the doctrine of equitable remedial rights has been transplanted by lower courts into cases of diversity jurisdiction); decisions in lower federal courts, collected in Comment, 55 YALE L. J. 401, n. 10 (1946).

²⁴ 312 U. S. 377 (1941); criticised, 1 MOORE'S FEDERAL PRACTICE 114 (Supp. 1946).

²⁵ Note, 50 YALE L. J. 1094 (1941).

The Supreme Court had an opportunity to abolish the doctrine of equitable remedial rights in *Guaranty Trust Co. v. York*,²⁶ because the court of appeals had expressly stated: "[*Erie R. R. v. Tompkins*] did not in any way alter the wholly distinct doctrine, relating to equitable 'remedial rights.'"²⁷ However, the Supreme Court did two apparently inconsistent things. First, it reversed the lower court's decision and laid down the standard that state law will control in cases of federal diversity jurisdiction whenever it significantly affects the outcome of the litigation. Then, secondly, the Court proceeded to utter some dictum apparently approving the doctrine of equitable remedial rights. The most noteworthy and unfortunate dictum was: "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."²⁸

In the instant case, if these *obiter* remarks are ignored and if the standard set forth in the *Guaranty Trust* case is applied, it is obvious that the outcome of the suit will be significantly affected by following the Wisconsin statute, which makes an execution returned unsatisfied unnecessary to the appointment of a receiver, instead of following the contrary principle of old English Chancery.²⁹

The reasoning in favor of following the Wisconsin statute would be even stronger if a simple contract creditor had instituted his suit for a receiver in a Wisconsin state court and a non-resident defendant had removed the suit to a federal court. Under such circumstances, could the over-all policy of *Erie R. R. v. Tompkins* condone the defendant's invoking the doctrine of equitable remedial rights to nullify the plaintiff's right to a receiver under the Wisconsin statute?³⁰

After the instant case was decided, the Supreme Court in *Angel v. Bullington*³¹ reached a result³² whereby the federal court in a diversity jurisdiction case was bound by a North Carolina statute³³ withdrawing from the North Carolina courts jurisdiction to grant deficiency judgments. *Inter alia*, the court said: "Cases like *David Lupton's Sons v.*

²⁶ 326 U. S. 99 (1945).

²⁷ *York v. Guaranty Trust Co.*, 143 F. 2d 503, 522 (C. C. A. 2d 1944).

²⁸ *Guaranty Trust Co. v. York*, 326 U. S. 99, 106 (1945).

²⁹ In *Davis v. Gray*, 16 Wall. 203, 221 (U. S. 1872) Mr. Justice Swayne said: "A party by going into a National Court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality." In *Pusey & Jones v. Haussen* the Court said the foregoing "oft-quoted statement . . . must be taken with the qualification [of the doctrine of equitable remedial rights]." Today, is this qualification valid?

³⁰ *Cowley v. Northern Pacific R. R.*, 159 U. S. 569 (1895). Although this case was decided long before the *Erie* case the court said: "It does not lie in his [defendant's] mouth to claim such [federal] court has no jurisdiction."

³¹ — U. S. —, 67 Sup. Ct. 657, 91 L. Ed. (Adv. Ops.) 557 (1947).

³² See Farinholt, *Angel v. Bullington: Twilight of Diversity Jurisdiction*, 26 N. C. L. REV. 29 (1947); Note, 26 N. C. L. REV. 60 (1947).

³³ N. C. GEN. STAT. (1943) §45-36.

*Automobile Club*³⁴ are obsolete."³⁵ The *Lupton* case had often been cited for the proposition that state laws cannot enlarge or restrict federal jurisdiction. The *Lupton* case is distinguished from the instant case because it was an action at law and also the statute in that case attempted to restrict federal jurisdiction rather than to enlarge it.

The distinction between statutes which are construed to restrict federal equity jurisdiction and statutes which are urged to enlarge federal equity jurisdiction may be decisive.³⁶ The importance of the distinction would be quite logical, if the Supreme Court should interpret federal equity jurisdiction in the sense of power to hear and determine rather than in the sense of propriety.³⁷ Under such an interpretation, the Court could consider it within its discretion to withhold a portion of its federal equity power in order to give effect to a state statute restricting equity jurisdiction. At the same time, the Court could consider it beyond its power to follow a state statute attempting to enlarge the reservoir of federal equity jurisdiction which Congress has conferred.³⁸

Consequently, whether the language of the majority opinion in *Angel v. Bullington*, "cases like the *Lupton* case are obsolete," was intended to include suits of an equitable nature such as the instant case where the state law attempts to enlarge equitable remedial rights is not certain. The dissent seemed to think it did, because the dissent, citing *Pusey & Jones v. Hanssen* and other cases espousing the doctrine of equitable remedial rights, said: "The majority departs from controlling precedents that state enactments on jurisdiction, remedies and procedures do not affect the jurisdiction, remedies and procedures of federal courts."³⁹ It is hoped that the dissent's interpretation of the majority's opinion is correct and that the obsolete doctrine of equitable remedial rights has been abolished. However, it must be borne in mind that, although the Supreme Court reversed the lower court's decision in the *Guaranty Trust* case, it has never specifically overruled the statement

³⁴ 225 U. S. 489 (1911).

³⁵ *Angel v. Bullington*, — U. S. —, 67 Sup. Ct. 657, 662, 91 L. Ed. (Adv. Ops.) 557 (1947).

³⁶ The history of the doctrine of equitable remedial rights shows that the Supreme Court has been more favorably disposed to enforce statutory enlargements than statutory limitations because of a fear that the state might usurp federal equity, *Robinson v. Campbell*, 3 Wheat. 212 (U. S. 1818); 1 POMEROY, EQUITY JURISPRUDENCE §292 (5th ed. Symons 1941). Today, "there is strong sentiment in favor of entirely omitting cases based on diverse citizenship," MONTGOMERY'S MANUAL OF FEDERAL JURISDICTION AND PROCEDURE §4 (4th ed. 1942). Federal diversity jurisdiction may be judicially minimized by always affording the same result in the federal court as would have been obtained in the state court by following the state law.

³⁷ See note 4 *supra*.

³⁸ 1 STAT. 78 (1789), 28 U. S. C. §41(1) (1927). See *Atlas Ins. Co. v. Southern Inc.*, 306 U. S. 563, 568 (1939).

³⁹ 67 Sup. Ct. 657, 91 L. Ed. (Adv. Ops.) 557 (1947). But see *Pittsburgh Equitable Meter Co. v. Loeber & Co.*, 160 F. 2d 721 (C. C. A. 7th 1947) (decided after the *Bullington* case and in the same circuit as the instant case).

in the lower court's opinion: "[*Erie R. R. v. Tompkins*] did not in any way alter the wholly distinct doctrine relating to equitable remedial rights. . . . There is no doubt that today, as before *Erie R. R. Co. v. Tompkins*, a federal court sitting in a given state will, for instance, refuse to appoint a receiver at the suit of an unsecured creditor although the statute of that state authorizes such an action."⁴⁰

In any event, even if the doctrine of equitable remedial rights has been abolished, the litigant in a federal diversity jurisdiction case must still resolve the general dilemma of "substance" and "procedure."

HENRY E. COLTON.

Habeas Corpus—A Method of Federal Review of State Decisions?

There has been an increasing number of applications for writs of habeas corpus in the federal courts to review the administration of justice by the state courts. Such applications present a complex problem to the federal judge. He is torn between the traditional reluctance of the federal courts to interfere with the states' administration of justice and the urgent desire to assure an accused of a fair trial.

In *Stonebreaker v. Smyth*,¹ recently decided by the Fourth Circuit Court of Appeals, the problem was aptly illustrated. The appellant, Stonebreaker, was serving a sentence of fifty years in the Virginia State Penitentiary, imposed by a Virginia court in 1931 upon pleas of guilty to three indictments charging armed robbery. In 1943, Stonebreaker had presented his petition for writ of habeas corpus to the trial court, alleging that he had been denied due process of law guaranteed by the Fourteenth Amendment of the Federal Constitution, in that, at the time he was sentenced he was a minor twenty years of age, ignorant and uninformed as to his right to counsel, and incapable of representing himself, and that he had pleaded guilty because of a confession that had been unfairly obtained from him. After full hearing on the merits, the trial court discharged the writ and dismissed the petition; and a writ of error was denied by the Supreme Court of Appeals of Virginia. Then, in 1944, an application for writ of certiorari to the United States Supreme Court was denied.²

After more than two years, the petitioner filed his petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, relying on the identical grounds urged in the state court in 1943. The district court, relying on *White v. Ragen*,³ dismissed the petition without an examination into the substance of the allegations,

⁴⁰ *York v. Guaranty Trust Co.*, 143 F. 2d 503, 522 (C. C. A. 2d 1944).

¹ 163 F. 2d 498 (C. C. A. 4th 1947).

² *Stonebreaker v. Smyth*, 323 U. S. 754 (1944).

³ 324 U. S. 760 (1944).