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## Federal Courts – Foreign Aid Appropriations Act – Survival of Federal Common Law

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than principal.<sup>25</sup> A share dividend does not constitute income to the stockholder.<sup>26</sup> Unauthorized share dividends are treated as cash dividends.<sup>27</sup>

The court in the *Folsinski*<sup>28</sup> case cites *In re Joy's Estate*,<sup>29</sup> in which the Michigan court adopted the Massachusetts rule, holding that share dividends are applied to principal and are not income.<sup>30</sup> The Florida court in *In re Vail's Estate*<sup>31</sup> adopted the theory of *Williams v. Western Union Telegraph Co.*,<sup>32</sup> in which Justice Cardozo stated, "A stock dividend does not distribute property but simply dilutes the shares as they existed before."<sup>33</sup> Florida, in adhering to this view, rendered the decision on what would be an application of the Massachusetts rule.

The Massachusetts rule, as applied by the courts of Michigan and Florida in the instant cases, represents the adoption of a rule of convenience that will not impose the burden on the trustee of a complex disbursement system of dividends received. The courts have hereby given the trustee a plain principle to guide him.

Alan H. Dombrowsky

## FEDERAL COURTS—FOREIGN AID APPROPRIATIONS ACT—SURVIVAL OF FEDERAL COMMON LAW

Performance of a contract to purchase manufactured printing presses destined for export to Russia was refused by vendee on the ground that an export license could not be obtained. Vendor subsequently sold the goods to the United States at a profit, and vendee brought suit to recover the down-payment on the contract price. On appeal from a district court decision for defendant-vendor,<sup>1</sup> *held*, reversed. The plaintiff-vendee was entitled to restitution of the down-payment beyond and above any injury suffered by defendant, where an export license had been refused by the United States, on the ground that national public policy as promulgated by Congress in the Foreign Aid Appropriations Act<sup>2</sup> required such a rule. *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103 (2d Cir. 1953).

25. *Bass v. Commissioner of Internal Revenue*, 129 F.2d 300 (1st Cir. 1942); *Strassburger v. Commissioner of Internal Revenue*, 124 F.2d 315 (2d Cir. 1941); *Helm's Bakeries v. Commissioner of Internal Revenue*, 46 B.T.A. 308 (1942).

26. *Helvering v. Griffiths*, 318 U.S. 371 (1943); *Eisner v. Mancomber*, 252 U.S. 189 (1920); *Towne v. Eisner*, 245 U.S. 418 (1918).

27. *Vogt Mach. Co. v. United States*, 39 F.2d 986 (Ct. Cl. 1930).

28. 60 N.W.2d 302 (Mich. 1953).

29. 247 Mich. 418, 225 N.W. 878 (1929).

30. *Minot v. Paine*, 99 Mass. 101 (1868).

31. 67 So.2d 665 (Fla. 1953).

32. 93 N.Y. 162 (1883).

33. *Williams v. Western Union Tel. Co.*, 93 N.Y. 162, 189 (1883).

1. 108 F. Supp. 170 (S.D. N.Y. 1952).

2. 62 STAT. 1054 (1949).

In 1937 the case of *Erie Railroad v. Tompkins*<sup>3</sup> purportedly ended the concept of a "federal common law" which had developed from *Swift v. Tyson*.<sup>4</sup> This theory was soon limited, and thereafter a body of such law has developed as a result of federal courts deciding cases in accordance with federal rather than state law.<sup>5</sup> A growing series of decisions have advanced federal common law or "policy" as controlling in situations where state law would seem applicable under the *Erie* rule,<sup>6</sup> were it not for some connection with fields regulated by the federal government. These decisions have used as their basis the concept that where the right to sue the United States arises under a federal statute, state law is inapplicable,<sup>7</sup> and its corollary that federal courts need not follow state law where federal statutes "otherwise require or provide."<sup>8</sup> In the realm of interstate communications<sup>9</sup> and in relation to the National Banking system,<sup>10</sup> the Federal Deposit Insurance Corporation,<sup>11</sup> and checks issued by the government subject to a national law,<sup>12</sup> a federal "public policy" has been deemed to control decisions.

It is significant to note that in cases where there have appeared conflicts between a "national public policy" and state law, it has been held that national policy will prevail.<sup>13</sup> A notable advancement in the development of a federal common law has been applied in the cases where jurisdiction has been assumed by the federal court on the basis of diversity of citizenship alone. Federal common law has been determinative of result where the court, having assumed jurisdiction on a diversity basis rather than that of a federal question in the case, decided that the subject matter involved was really governed by federal policy, enunciated in such statutes as the Sherman Anti-Trust Act.<sup>14</sup> The court in the instant

3. 304 U.S. 64 (1937).

4. 16 Pet. 1 (U.S. 1842).

5. *Hinderlider v. La Plata Co.*, 304 U.S. 92, *rehearing denied*, 305 U.S. 668 (1938).

6. 304 U.S. 64, 78 (1937) ". . . except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied is the law of the state."

7. *Byron Jackson Co. v. United States*, 35 F. Supp. 655 (S.D. Cal. 1940).

8. REV. STAT. § 721 (1875), 28 U.S.C. § 725 (1934).

9. *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940) (interstate telegraph message containing libel held governed by federal law).

10. *Deitrick v. Greaney*, 308 U.S. 190 (1940) (in interests of uniform regulation federal courts would determine rules implementing federal statutes).

11. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (policy to protect FDIC expressed in the act was strong enough to require that liability on a note be determined without concern for state law).

12. *Clearfield Trust Co. v. United States*, 119 U.S. 363 (1943) (federal courts would fashion law according to their own standards applicable to checks issued under federal law).

13. *Mitchell v. Flintkote Co.*, 185 F.2d 1008 (2d Cir. 1950), *cert. denied*, 341 U.S. 931 (1951) (recovery denied on contingent commission agreement to obtain government contracts on ground that federal policy against such agreements overrides state contract law).

14. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 1943 (1942) (Sherman Anti-Trust Act, 26 STAT. 209 (1890) held to control subject matter of patent license contract, and case was decided according to federal law); *accord*, *Moore v. Illinois Central R.R.*, 312 U.S. 360 (1941).

case also assumed jurisdiction on the diversity basis, but proceeded to decide the case as if the question had been a federal one from the beginning.

The instant decision presents a set of facts which would call for restitution of plaintiff's down-payment under both *Restatement of Contracts* § 357<sup>15</sup> and current New York law.<sup>16</sup> However, at the time the contract was formed, New York law denied recovery to a defaulting vendee in the absence of complete frustration of purpose.<sup>17</sup> The court in the instant case, recognizing the trend in the law in favor of granting restitution to a defaulting vendee within the proper limitations,<sup>18</sup> interpreted the Foreign Aid Appropriations Act of 1949 as providing a theory of contract law which in this type of situation entitles plaintiff to restitution. The purpose of the applicable section of the act is to save producers or exporters from loss where contracts were made for exporting goods, and the exports became impossible.<sup>19</sup> The particular words only relate to the Administrator's duty to transfer the goods designed for export to a non-participating country, which cannot under the act receive them, to a participating country which can. The court construes this section of the act as setting forth a manifestation of "national policy" which overrides New York contract law, reasoning that since it would be inequitable for relief to be extended to a producer under the act and still allow him to retain the vendee's down-payment, the plaintiff should have restitution of his down-payment where defendant has sold the goods to another without loss.

It is submitted that the result achieved in the instant case is a just and equitable one and, in theory, perhaps is supportable as an extension of the federal common law by statutory interpretation. In view of the language of the Foreign Aid Appropriations Act,<sup>20</sup> however, it seems difficult to discern a clear-cut "national policy" reflecting a theory of contract law. An act of judicial legislation seems manifest.

Donald H. Norman

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15. RESTATEMENT, CONTRACTS § 357 (1932) (provides for restitution in favor of a plaintiff who is himself in default).

16. N.Y. PERS. PROP. LAW § 145-a (1952).

17. *Pirman v. Kurtz*, 267 App. Div. 258, 45 N.Y.S.2d 508 (3d Dep't. 1943).

18. 62 STAT. 1054 (1949).

19. *Id.* at 1059. "The Administrator shall provide for the procurement of such commodity to transfer to a participating country in accordance with the requirements of such country, at not less than the contract price of such commodity to the producer or exporter, as the case may be."

20. *Ibid.*