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## Federal Courts and Diversity of Citizenship Jurisdiction

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## NOTES AND COMMENT

### FEDERAL COURTS AND DIVERSITY OF CITIZENSHIP JURISDICTION.

The power of federal courts in matters arising on the ground of diversity of citizenship has been the subject of intensive legal controversy for too many years. Arising as an academic problem<sup>1</sup> in the heated days of the Constitutional Convention it has become, through the doctrine set forth in *Swift v. Tyson*<sup>2</sup> and later evolutionary additions and ramifications, a serious challenge to the logic of our constitutional law.

The source of the controversy is the much-discussed Section 34 of the Federal Judiciary Act of 1789,<sup>3</sup> which provides: "that the *laws* of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." (Italics ours.)

On the face of it, the section<sup>4</sup> seems easily understandable, and in the early days of its stormy existence, appears to have been interpreted with facility by the courts. Certainly during Chief Justice Marshall's time, the United States Supreme Court seems tacitly to have assumed that the federal courts in the exercise of their jurisdiction based on diversity of citizenship, were bound by the decisions of the highest courts of the state in which the action arose, provided there were such decisions in point, whether they rested on a local statute or on the general principles of common law.<sup>5</sup>

This seems to have been the comparatively simple state of the law on the subject until *Swift v. Tyson*,<sup>6</sup> which offered a new interpretation of Section 34.<sup>7</sup> Briefly stated, the problem presented to Mr. Justice Story and his colleagues was whether or not the Supreme

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<sup>1</sup> Friendly, *The Historic Basis of Diversity Jurisdiction* (1928) 41 HARV. L. REV. 483. This article contains the statement that the provision for federal jurisdiction was regarded as of trifling importance by the fathers of the Constitution.

<sup>2</sup> 16 Pet. 1 (U. S. 1842).

<sup>3</sup> 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1926).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Brown v. Van Braam*, 3 Dall. 344 (R. I. 1797); *Sums v. Irvine*, 3 Dall. 425 (U. S. 1799); *Tilfair v. Stead*, 2 Cranch 407 (Ga. 1804); *Lewis v. Harwood*, 6 Cranch 82 (La. 1810); *Elmendorf v. Taylor*, 10 Wheat. 152 (Ky. 1825); *Hamilton Bank v. Dudley*, 2 Pet. 492 (Ohio 1829); *Green v. Neal*, 6 Pet. 291 (Tenn. 1832); *Smith v. Clapp*, 15 Pet. 125 (Ala. 1841).

In *Jackson v. Chew*, 12 Wheat. 153 (U. S. 1827) the court said, "This court adopts the state decisions because they settle the law applicable to the case, and the reasons assigned for this course apply as well to the rules of construction growing out of the common law as the statute law of the state \* \* \*"

<sup>6</sup> 16 Pet. 1 (U. S. 1842).

<sup>7</sup> 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1926).

Court of the United States should follow the New York doctrine that a pre-existing debt is not value in a case arising on diversity of citizenship jurisdiction.<sup>8</sup> The court, in a monumental decision written by Mr. Justice Story, decided that the Supreme Court was not bound to apply the common law of the state in such a case, but was free to exercise an independent judgment as to what the common law of New York *should be*, in questions of general jurisprudence. The point was made that Section 34<sup>9</sup> furnished a rule obligatory on the court to follow state tribunals. In attempting to explode this doctrine the court said:

"In order to maintain the argument it is essential, therefore, to hold that the '*laws*' in this Section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, *only evidence of what the laws are, and are not of themselves laws*. They are often re-examined, reversed and qualified by the courts themselves whenever they are found to be either defective or ill-founded or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established customs having the force of laws \* \* \*.

"The true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate \* \* \*. It has never been supposed by us that the section did apply, or was intended to apply to questions of a more general nature \* \* \* as, for example, to the construction of ordinary contracts or other written instruments and especially to questions of general commercial law \* \* \*." (Italics ours.)<sup>10</sup>

In effect the decision, by its interpretation of Section 34,<sup>11</sup> limited its application to positive statutes of the state and to real estate, holding that the provisions of Section 34<sup>12</sup> could not extend to questions of a more general nature, not dependent on local statutes or usages. For cases of the latter type, such as the construction of ordinary contracts, the federal court was guided by its own rulings and not those of the state courts.<sup>13</sup>

<sup>8</sup> The New York law in this connection was not changed until 1897 by N. I. L. § 51.

<sup>9</sup> 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1926).

<sup>10</sup> 16 Pet. 1 (U. S. 1842) at 17.

<sup>11</sup> 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1926).

<sup>12</sup> *Ibid.*

<sup>13</sup> East Alabama R. R. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869 (1885); Bucher v. Cheshire R. R., 125 U. S. 337, 8 Sup. Ct. 920 (1887); Gormley v.

The practical effect of the *Swift v. Tyson*<sup>14</sup> decision was to create with a single thrust a common law of the United States, the existence of which had repeatedly been denied prior to that time, which often differed from that of the state.<sup>15</sup>

The New York courts adhered to their earlier common law doctrine in regard to pre-existing debt even after *Swift v. Tyson*.<sup>16</sup> Many state courts, too, followed the New York ruling rather than the federal doctrine.<sup>17</sup> A further example of the divergent views is shown by *Lockwood v. R. Co.*,<sup>18</sup> which came from a federal court in New York and in which the Supreme Court refused to follow the New York cases relative to contracts by a common carrier against liability for his own negligence. New York courts again persisted in following their own prior rulings.<sup>19</sup>

In spite of these differences the doctrine has been followed and enlarged in an almost unbroken line of opinions in the federal courts.<sup>20</sup> It has developed beyond the actual question involved in

Clark, 134 U. S. 338, 10 Sup. Ct. 554 (1889); *B. & O. R. R. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914 (1892); *Folsom v. Ninety-Six*, 159 U. S. 611, 16 Sup. Ct. 174 (1895); *Barber v. Pittsburgh, etc. R. R.*, 166 U. S. 83, 17 Sup. Ct. 488 (1896); *Stanley County v. Color*, 190 U. S. 439, 23 Sup. Ct. 567 (1902); *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399 (1903); *Comm'rs & Co. v. Bancroft*, 203 U. S. 112, 21 Sup. Ct. 21 (1906).

<sup>14</sup> 16 Pet. 1 (U. S. 1842).

<sup>15</sup> TUCKER'S BLACKSTONE (1803) 422-433; *Wheaton v. Peters*, 8 Pet. 591 (U. S. 1834).

<sup>16</sup> *Stalkes v. McDonald*, 6 Hill 93 (N. Y. 1843); *McBride v. Farmer's Bank of Salem*, 26 N. Y. 450 (1863); *Cary v. White*, 52 N. Y. 138 (1873).

<sup>17</sup> In the following cases state courts followed the New York rather than the federal doctrine:

Arkansas: *Bertrand v. Backman*, 13 Ark. 150 (1852).

Connecticut: *Webster & Co. v. Howe Mach. Co.*, 54 Conn. 394, 8 Atl. 482 (1887).

Maine: *Bramhall v. Becket*, 31 Me. 205 (1850).

Minnesota: *Becker v. Sandersky City Bank*, 1 Minn. 311 (1854).

Missouri: *Goodman v. Simonds*, 19 Mo. 106 (1853).

Ohio: *Roxborough v. Messick et al.*, 6 Ohio St. 448 (1856).

Wisconsin: *Cook v. Helms & Vandercook*, 5 Wis. 107 (1856).

<sup>18</sup> 17 Wall. 357 (U. S. 1873).

<sup>19</sup> *Groves v. Slaughter*, 15 Pet. 449 (U. S. 1841); *Gelpcke v. City of Dubuque*, 1 Wall. 175 (U. S. 1864); *Breiner v. N. Y. etc. R. R.*, 124 N. Y. 59, 26 N. E. 324 (1891); *Johnston v. Fargo*, 184 N. Y. 279, 77 N. E. 388 (1906).

See also *Cotton v. Brien*, 6 Rob. 115 (La. 1843) and *Forepaugh v. R. R. Co.*, 128 Pa. 217, 18 Atl. 503 (1889). In the latter case the court applied the law of another state and followed the decisions of the state courts, expressly refusing to follow the contrary decisions of the federal courts as to the law of that state.

Judge Holt enumerated twenty-five differences between state and federal courts fifty years ago. HOLT, CONCURRENT JURISDICTION OF FEDERAL AND STATE COURTS (1888) 162 *et seq.*

<sup>20</sup> *Triumph Electric Co. v. Patterson*, 211 Fed. 244 (C. C. A. 8th, 1914); *Colorado Yule Marble Co. v. Collins*, 230 Fed. 78 (C. C. A. 8th, 1915); *Aktieselskabet Horn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 250 Fed. 935 (C. C. A. 2d, 1918), *aff'd*, 252 U. S. 313, 40 Sup. Ct. 332 (1920); *Parramore v. Denver & R. G. W. R. R.*, 5 F. (2d) 912 (C. C. A. 8th, 1925), *cert. denied*, 269 U. S. 560, 40 Sup. Ct. 20 (1925). For lists of the earlier cases supporting the doctrine see 28 U. S. C. A. § 725, n. 6.

*Swift v. Tyson*<sup>21</sup> and it has been settled that federal courts may exercise their independent judgment in questions relating to contracts,<sup>22</sup> commercial paper,<sup>23</sup> insurance policies,<sup>24</sup> liability for injury to a servant,<sup>25</sup> for negligence of servants,<sup>26</sup> liability of carrier of passengers,<sup>27</sup> or goods,<sup>28</sup> or livestock,<sup>29</sup> the rights and duties of telegraph companies,<sup>30</sup> the construction and validity of a bond,<sup>31</sup> the validity of a release,<sup>32</sup> and estoppel.<sup>33</sup> These and other additions have been held included in the vague term "general law".

The doctrine is further beclouded by continuous assertions of federal courts to the effect that they will give weight to state decisions although they are not bound to follow them in order to avoid conflict as far as possible and in case of doubt they *may*, for the sake of harmony, lean towards the views of the state courts.<sup>34</sup> Insofar as statutory law is concerned, federal courts regard themselves as bound to

<sup>21</sup> 16 Pet. 1 (U. S. 1842).

<sup>22</sup> U. S. Savings, etc. Co. v. Harris, 113 Fed. 27 (E. D. Ky., 1902); Casserleigh v. Wood, 119 Fed. 308 (C. C. A. 9th, 1902); Ottumwa v. City Water Sup. Co., 119 Fed. 315 (C. C. A. 8th, 1902); Gilbert v. American Surety Co., 121 Fed. 499 (C. C. A. 7th, 1902), *cert. denied*, 190 U. S. 560, 23 Sup. Ct. 855 (1902).

<sup>23</sup> Diggert v. Vermont L. & T. Co., 94 Fed. 913 (C. C. A. 9th, 1899); Northern Nat. Bank v. Hoopes, 98 Fed. 935 (E. D. Pa. 1900); Citizens Savings Bank v. Newburyport, 169 Fed. 766 (C. C. A. 7th, 1902), *cert. denied*, 215 U. S. 598, 30 Sup. Ct. 399 (1909).

<sup>24</sup> Carpenter v. Providence Washington Ins. Co., 16 Pet. 495 (U. S. 1842); Washburn etc. Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 21 Sup. Ct. 1 (1900); Spinks v. Mutual Reserve Fund Life Assn., 137 Fed. 169 (E. D. Ky., 1905); Mutual Life Ins. Co. v. Lane, 151 Fed. 276 (E. D. Ga., 1907), *aff'd*, 157 Fed. 1002 (1907), *cert. denied*, 208 U. S. 617, 28 Sup. Ct. 561 (1908).

<sup>25</sup> Baltimore v. Baugh, 149 U. S. 368, 13 Sup. Ct. 871 (1893); Gardener v. Michigan Cent. R. R., 150 U. S. 349, 14 Sup. Ct. 140 (1893); Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345 (1896).

<sup>26</sup> Salmons v. Norfolk etc. R. R., 162 Fed. 722 (S. D. W. Va., 1908), *aff'd*, 169 Fed. 1022 (C. C. A. 4th, 1908); Farrar v. St. Louis R. R., 149 Mo. 188, 130 S. W. 373 (1910).

<sup>27</sup> Lake Shore etc. R. R. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261 (1892); Baltimore etc. R. R. v. Thornton, 188 Fed. 868 (C. C. A. 4th, 1911).

<sup>28</sup> Myrick v. Mich. Cent. R. R., 107 U. S. 102, 1 Sup. Ct. 425 (1882).

<sup>29</sup> Tripp v. Mich. Cent. R. R., 238 Fed. 449 (C. C. A. 6th, 1917).

<sup>30</sup> Western Union Tel. Co. v. Sklar, 126 Fed. 295 (C. C. A. 6th, 1903); Western Union Tel. Co. v. Burns, 179 Fed. 92 (C. C. A. 8th, 1910).

<sup>31</sup> Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 Fed. 507 (W. D. Mo., 1906).

<sup>32</sup> Fowler v. Pennsylvania R. R., 229 Fed. 373 (C. C. A. 2d, 1916).

<sup>33</sup> Newburn v. Barnesville Nat. Bank, 234 Fed. 209 (C. C. A. 6th, 1916).

<sup>34</sup> *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842); Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10 (1882); Bucher v. Cheshire R. R., 125 U. S. 555, 8 Sup. Ct. 974 (1887); Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 10 (1890); Baltimore v. Baugh, 149 U. S. 368, 13 Sup. Ct. 871 (1893); Tampa Water Works Co. v. Tampa, 199 U. S. 241, 26 Sup. Ct. 23 (1905); Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140 (1910); Paterlin v. Memorial Hospital Assn., 229 Fed. 838 (W. D. Pa. 1915), *rev'd on other grounds*, 232 Fed. 359 (C. C. A. 3d, 1916).

follow the decisions of the highest court of the state, construing the state statutes.<sup>35</sup>

Through the years in which the doctrine has been steadily developing a series of strong dissents have appeared—dissents against the rule introduced by *Swift v. Tyson*<sup>36</sup> and dissents against the construction of Section 34.<sup>37</sup> In most cases the basic criticism contained in these dissents is the fact that *Swift v. Tyson*<sup>38</sup> runs counter to the fundamental principle that the substantive rights of litigants should not be varied by the accidental circumstance that the action is instituted in one forum rather than in another.

The strong dissenting voices found renewed strength as the increasing difficulties with the doctrine became apparent. Aside from the fact that many states stubbornly adhered to their rules even after contrary adjudication by federal courts,<sup>39</sup> and the fact that more and more types of actions were gradually included in the vague term "general law", which covered a multitude of cases,<sup>40</sup> there remained the unalterable truth that what had originally been meant as a constitutional safeguard to prevent discrimination against non-residents was becoming the means through which such discrimination was effected in favor of non-citizens. It is not seriously disputed that the sole object for which jurisdiction between citizens of different states is vested in the federal courts is to secure to all the administration of justice on the same principles upon which it is administered between citizens of the same state.<sup>41</sup> The net result of this doctrine was that the non-resident was given a decided advantage over the citizen of the state, for the former could, by bringing an action in the federal court, disregard the common law of the state in matters of general law, while the citizens of a state had no such happy selection to make, but were limited to the courts of the state for redress. It is clear, therefore, that "equal protection of the laws" guaranteed by the Fourteenth

<sup>35</sup> *Jones v. Prairie Oil and Gas Co.*, 273 U. S. 195, 47 Sup. Ct. 338 (1926); *People of Sioux City, Neb. v. National Surety Co.*, 276 U. S. 238, 48 Sup. Ct. 239 (1928).

<sup>36</sup> Dissent from the application or extension of the *Swift* doctrine was expressed as early as 1845 in *Lane v. Vick*, 3 How. 464 (U. S. 1845). Later dissents appeared in *Rowan v. Runnels*, 5 How. 134 (U. S. 1846); *Pease v. Peck*, 18 How. 595 (U. S. 1853); *Gelpcke v. City of Dubuque*, 1 Wall. 175 (U. S. 1863). The most vigorous attacks on the doctrine were expressed in later years by Mr. Justice Field in *Baltimore and Ohio R. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 871 (1893); and by Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140 (1909) and *Black and White etc. Co. v. Brown and Yellow etc. Co.*, 276 U. S. 518, 48 Sup. Ct. 404 (1928).

<sup>37</sup> Street, *Is There a General Commercial Law of the United States* (1873) 21 AM. L. REV. 473; Hornblower, *Conflict Between State and Federal Decisions* (1880) 14 AM. L. REV. 743; Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 HARV. L. REV. 328; Carpenter, *Court Decisions and the Common Law* (1917) 17 COL. L. REV. 593.

<sup>38</sup> 16 Pet. 1 (U. S. 1842).

<sup>39</sup> See note 16, *supra*.

<sup>40</sup> See notes 21 to 32 *incl.*, *supra*.

<sup>41</sup> *Polk's Lessee v. Wendell*, 5 Wheat. 293 (U. S. 1820).

Amendment<sup>42</sup> was merely a constitutional phrase with no basis in fact as far as this doctrine was concerned.

Corporations are, of course, one of the major groups which are permitted the use of federal courts on the ground of diversity of citizenship.<sup>43</sup> The theory on which this is sustained is based on the "conclusive presumption" that the members of the corporation are citizens of the state in which it is incorporated.<sup>44</sup> Many writers decry this reasoning and regard the use of federal courts by corporations as deplorable.<sup>45</sup> The fact that corporations have been the chief beneficiaries of diversity of citizenship jurisdiction served only to make the abuses of the doctrine more apparent in connection with corporations.

The entire matter received widespread attention after the decision in *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*,<sup>46</sup> brought to sharp realization the increasing difficulties with the doctrine. In that case the Louisville Railroad owned a station in Bowling Green, Kentucky, and sought to give the Brown and Yellow corporation the exclusive privilege of soliciting the taxicab trade at that station. Both parties were interested in preventing competition. Knowing that an agreement such as the one contemplated would be void at common law in Kentucky, the state of its incorporation, the Brown and Yellow corporation was reincorporated under the law of Tennessee and proceeded to fulfill its contract with the railroad. When the Black and White corporation sought to interfere with the exclusive privilege the Brown and Yellow corporation (now a Tennessee corporation) brought a suit in the Federal Court for Western Kentucky to enjoin competition by the Black and White corporation. The United States Supreme Court affirmed the decree granting the injunction.

Clearly, a situation where a corporate party could, by the mere process of reincorporating, legalize a contract which was illegal in the state in which it was entered into and where it was to have been executed was intolerable. The case received widespread publicity in legal periodicals and criticism of the *Swift v. Tyson*<sup>47</sup> doctrine reached a new high.<sup>48</sup>

Armed further with the researches of Professor Charles Warren,<sup>49</sup>

<sup>42</sup> U. S. CONST. Amend. XIV.

<sup>43</sup> FLETCHER, CYCLOPEDIA OF CORPORATIONS (Perm. ed., 1931) c. 51, subd. 7.

<sup>44</sup> *Bank of U. S. v. Deveaux*, 5 Cranch 61 (U. S. 1809); *Marshall v. B. & O. R. R.*, 16 How. 314 (U. S. 1853). See PRASHKER, PRIVATE CORPORATIONS (1937) 20, for a discussion of the later cases on this subject.

<sup>45</sup> Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 39 HARV. L. REV. 49; Frankfurter, *Judicial Power of the Federal and State Courts* (1928) 13 CORN. L. Q. 499.

<sup>46</sup> 276 U. S. 518, 48 Sup. Ct. 404 (1928).

<sup>47</sup> 16 Pet. 1 (U. S. 1842).

<sup>48</sup> Case commented on in (1928) 38 YALE L. J. 88; (1928) 2 So. CALIF. L. REV. 80; (1929) 7 TEX. L. REV. 283; (1929) 7 N. C. L. REV. 48.

<sup>49</sup> Professor Warren (*op. cit. supra* note 45) succeeded in unearthing the original draft of the Federal Judiciary Act of 1789 and from the changes made

whose brilliant investigations led him to many startling conclusions in connection with Section 34 and other sections of the Federal Judiciary Act of 1789,<sup>50</sup> an increasing number of legal writers took up the task of pointing out the glaring discrepancies and the basic lack of logic in the doctrine.<sup>51</sup>

Typical of the tenor of these articles is that of Professor Felix Frankfurter in which he declares:<sup>52</sup>

"Whenever that law is authoritatively declared by the state, either by legislation or by adjudication, state law ought to govern in state litigation, whether the forum of application is a state court or a federal court. *Swift v. Tyson* with all its offspring is mischievous in its consequences, baffling in its application, and, as Mr. Charles Warren recently proved, a perversion of the purposes of the framers of the First Judiciary Act \* \* \*. Deeper probably than any other rationalization of *Swift v. Tyson* is the temptation of judges to make law according to their own views when untrammelled by authority, but whether the roots of the doctrine be in rational theory or in obscure impulse it is now too strongly imbedded in our law for judicial self-correction. Legislation should remove this doctrine."

With full cognizance of the deeply-intrenched state of this principle the Supreme Court delivered a surprising opinion in April, 1938—and the *Swift v. Tyson*<sup>53</sup> doctrine was no more. In *Erie R. v.*

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in the original draft inferred that the drafters of Section 34 must have meant decisions as well as statutes to be included in the section. After stating the changes which were made in the section before its ultimate passage Professor Warren concludes that the insertion of the word "laws" in place of the more detailed enumeration of all forms of state law contained in the original draft was intended merely to be a more concise expression. He states at page 85:

"It now appears from an examination of the Senate Files, however, that if Judge Story and the court had had recourse to those files in preparing the decision in *Swift v. Tyson* it is highly probable that the decision would have been different and that the word 'laws' in § 34 would have been construed to include the common law of the state as well as statute law. This conclusion will probably be reached by anyone who examines the original slip of paper on which the amendment containing § 34 was written."

<sup>50</sup> 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1926).

<sup>51</sup> Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499; Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423; Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 VA. L. REV. 356; Fordham, *Swift v. Tyson and the Construction of State Statutes* (1935) 41 W. VA. L. Q. 131.

<sup>52</sup> Frankfurter, *Distribution of Judicial Power of United States and State Courts* (1928) 13 CORN. L. Q. 499, 528.

<sup>53</sup> 16 Pet. 1 (U. S. 1842).



*Tompkins*,<sup>54</sup> the plaintiff was injured by one of the defendant's freight trains while walking on the railroad's right of way in Pennsylvania. He claimed that the accident occurred through negligence in the operation of the train and that he was rightfully on the railroad's property as a licensee because of a commonly used footpath which ran alongside the tracks. Erie claimed, however, that he was a trespasser. Plaintiff, a citizen of Pennsylvania, brought an action for the personal injuries he sustained in the Federal Court for the Southern District of New York because the defendant railroad is incorporated in New York. Defendant urged that the decisions of Pennsylvania, where the injury took place, imposed no liability on it. Plaintiff claimed that the federal court was empowered to determine the law independently, without regard for the law of Pennsylvania. The verdict for the plaintiff was unanimously set aside by the Supreme Court.

Two justices, Mr. Justice Butler and Mr. Justice McReynolds, based their opinion on the Pennsylvania law but upheld the *Swift v. Tyson*<sup>55</sup> doctrine, decrying the action of the majority when, in their opinion, the case was inadequately argued on this point. Mr. Justice Reed's opinion, also concurring in result, sought to arrive at the same conclusion by a reconstruction of the Federal Judiciary Act of 1789<sup>56</sup> to avoid the rule. The majority held that the court was *bound* to apply the Pennsylvania decisions and that *Swift v. Tyson*<sup>57</sup> was thereby overruled.

In a clear and masterful opinion, Mr. Justice Brandeis set forth the history of the *Swift v. Tyson*<sup>58</sup> doctrine and the misconception on which it was based, the untoward effects of the doctrine and the many criticisms which have been levelled at it. After declaring that federal divergency from state decisions for the benefit of foreign citizens denies "equal protection of the laws"<sup>59</sup> the court delivered this trenchant statement on the changed doctrine:

"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. *There is no federal common law.* Congress has no power to declare substantive rules of common law applicable to a state, whether they be local in nature or 'general', be they commercial law or part of the law of Torts. And no clause in the Constitution purports to confer such a power on the federal courts \* \* \*.

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<sup>54</sup> 304 U. S. 64, 58 Sup. Ct. 817 (1938).

<sup>55</sup> 16 Pet. 1 (U. S. 1842).

<sup>56</sup> 1 STAT. 92 (1789), 28 U. S. C. A. § 725 (1926).

<sup>57</sup> 16 Pet. 1 (U. S. 1842).

<sup>58</sup> *Ibid.*

<sup>59</sup> U. S. CONST. Amend. XIV.

Thus the doctrine of *Swift v. Tyson* is as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct'.<sup>60</sup> In disapproving that doctrine we do not hold unconstitutional Section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.' (Italics ours.)<sup>61</sup>

It is this writer's opinion that the alternative opinions written by Mr. Justice Butler and Mr. Justice Reed only lend greater value to the squarely-faced issue presented by the majority. Mr. Justice Brandeis and his associates have refused to allow the continuation of the rule, regardless of how firmly imbedded in our law it has become, because they regard it as based on an unconstitutional construction of Section 34.<sup>62</sup> In arriving at this conclusion the court has borrowed in part, at least, from the famous dissents and has stated the change in the law in accord with the great weight of scholarly legal opinion.<sup>63</sup>

It must not be supposed, however, that the case is immune from criticism. The language of the opinion is broad enough to include even those cases where the federal courts have original jurisdiction and other situations of which no mention is made in the decision. For instance, federal courts have maintained from the earliest date of their functioning right down to the present that the principles of equity jurisprudence which they apply need not be the rules of the several states.<sup>64</sup> If we are to take the *Erie* decision literally when it declares "the law to be applied in *any* case is the law of the state"<sup>65</sup> (italics

<sup>60</sup> Dissent of Holmes, J., in *Black & White etc. Co. v. Brown & Yellow etc. Co.*, 276 U. S. 518, 48 Sup. Ct. 404 (1928) at 532-533.

<sup>61</sup> 304 U. S. 64, 58 Sup. Ct. 817, 822 (1938).

In a case decided after the preparation of this article (*Schopp v. Muller Dairies, Inc.*, decided Oct. 20, 1938, reported in N. Y. L. J. of Oct. 27, 1938, p. 1, col. 3) the Federal Court for the Eastern District of New York ruled squarely on the *Erie* holding. The jurisdiction of the court was based on diversity of citizenship. Plaintiff brought the action for personal injuries sustained by reason of the alleged negligence of the defendant. The burden of proving freedom from contributory negligence rests on the plaintiff in New York, whereas in the federal courts the defendant is required to prove such negligence. The court held that under *Erie Ry. v. Tompkins*, federal courts were required to follow the New York rule in this connection and declared that the burden of proof was on the plaintiff, declaring that contributory negligence was a matter of substantive law rather than procedure.

<sup>62</sup> 1 STAT. 92 (1789), 26 U. S. C. A. § 725 (1926).

<sup>63</sup> See notes 35, 36, *supra*.

<sup>64</sup> *Robinson v. Campbell*, 3 Wheat. 108 (U. S. 1818); *Pusey & Jones v. Hanssen*, 261 U. S. 491, 43 Sup. Ct. 454 (1922); *Matthews v. Rodgers*, 284 U. S. 521, 52 Sup. Ct. 517 (1921); *Gordon v. Washington*, 295 U. S. 30, 55 Sup. Ct. 584 (1935).

<sup>65</sup> 304 U. S. 64, 58 Sup. Ct. 817 (1938).

ours) it would seem that equity suits would also be included within the scope of this ruling. A careful analysis of the language of the decision, however, reveals that such a result could not have been anticipated by the court. The court, throughout its entire opinion, makes continued references to the lack of differentiation between state law initiated by decision and state law declared by statute. The troublesome statement "there is no federal common law"<sup>66</sup> refers directly to the statutory and common law distinction contained in the previous sentence. We are not impelled to say on the authority of these phrases, as one writer has, that "the decision by its sweeping language \* \* \* unsettles the entire structure on which the federal judicial system is based",<sup>67</sup> because, as we view it, the clear result to be anticipated is that the decision will be limited to cases arising on concurrent jurisdiction and will not be extended to those cases in which the federal courts have original jurisdiction (*e.g.* bankruptcy matters, etc.) nor will it be held to include federal suits in equity.

The implications of this monumental decision are many and far-reaching. It is impossible at so early a date to state with any assurance the permanent results it will bring. Certainly it can be said that it throws the entire theory of our constitutional law towards a decentralized movement, and away from the nationalistic basis of *Swift v. Tyson*.<sup>68</sup>

The obvious result of the case is that decisions of federal courts on questions of general law are no longer authoritative. The litigants and the federal courts must now look for and apply the entire body of substantive law governing the identical action.<sup>69</sup> In a case decided one week after the *Erie* case,<sup>70</sup> which also arose on diversity of citizenship jurisdiction, *certiorari* had been granted (prior to the *Erie*<sup>71</sup> decision) because a Circuit Court of Appeals had reached a result in conflict with another circuit court on the same matter. The purpose of the Supreme Court's jurisdiction to grant *certiorari* is to promote uniformity in issues of state law and *certiorari* was, therefore, granted in this case. Under the *Erie* decision,<sup>72</sup> however, it cannot be anticipated that all the circuits will be in accord and conflict among the circuits would no longer be a reason for granting *certiorari*. The court said that had the *Erie*<sup>73</sup> decision been announced earlier, *certiorari* might not have been granted in the *Ruhlin* case.<sup>74</sup>

<sup>66</sup> *Ibid.*

<sup>67</sup> Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 26 A. B. A. J. 421.

<sup>68</sup> 16 Pet. 1 (U. S. 1842).

<sup>69</sup> Address by George W. Wickersham, Esq., at the Commencement exercises of St. John's University School of Law, June 8, 1938.

<sup>70</sup> 304 U. S. 64, 58 Sup. Ct. 817 (1938).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> 304 U. S. 202, 58 Sup. Ct. 860 (1938).

It would seem, therefore, that the *Erie Ry. v. Tompkins*<sup>75</sup> case will result in a divergence of views in the federal courts, a situation which could not have arisen with the earlier doctrine. In its place, however, there is the long-awaited advantage of consistency within the realm of the particular state, and a single set of laws for the state, with no possibility of altering the legal result by a diversity of citizenship plea.

The broad principle on which the *Swift* doctrine<sup>76</sup> was based may yet be attained. The principal reason for the *Swift* doctrine<sup>77</sup> was repeatedly stated to be that it would lead to uniformity among the states when they all adopted the federal views. This result was clearly not accomplished by a continuation of the doctrine. It would seem, therefore, that other forces must be used to gain that desired end, particularly the exchange of learning and the constant agitation of bar associations throughout the country for the cause of uniformity through action of state legislatures.

EDYTHE R. DUCKER.

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#### CIRCULATION AS AN ESSENTIAL ELEMENT OF A FREE PRESS.

In order to comprehend completely the scope of the question under consideration here, it is essential to examine at some length the significance of the phrase "freedom of the press", as the framers of the First Amendment understood it.

##### I.

The constitutional guaranty of a free press is found, not in the Constitution of the United States itself, but in the First Amendment which reads:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The generally recognized common law definition of the term "freedom of the press" is that stated by Blackstone:<sup>1</sup> "The liberty

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<sup>75</sup> 304 U. S. 64, 58 Sup. Ct. 817 (1938).

<sup>76</sup> 16 Pet. 1 (U. S. 1842).

<sup>77</sup> *Ibid.*

<sup>1</sup> 4 BL. COMM. 151, 152. For state constitutions that have been influenced by Blackstone's definition in wording their free press provisions see Index