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Erle A. Kightlinger
Member, Indianapolis Bar

SWIFT v. TYSON OVERRULED

By ERLE A. KIGHTLINGER*

The mine run case involving simple questions of tort or contract law may provide the vehicle for the expression of far reaching judicial doctrine. Just such cases were *Swift v. Tyson*,[1] and *Erie Railroad v. Tomkins*.[2] The question presented in *Swift v. Tyson* was whether the plaintiff who had taken the negotiable instrument sued upon in satisfaction of a pre-existing debt was a bona fide holder free of the defenses which would have been available as between the original contracting parties. The action had been brought in the Federal Court in New York upon the ground of diversity of citizenship. Since the tendency of the New York decisions "deviated widely from the norm of judicial decision" Justice Story embarked upon his narrow construction of the 34th Section of the Judiciary Act of 1789[3] and held that the word "laws" therein only comprehended statutes and did not extend to the decisions of the state tribunals. Thus Swift recovered, the New York law holding that a pre-existing debt was not sufficient consideration to constitute the plaintiff a bona fide holder was disregarded, the prevailing doctrine but not universal rule that a pre-existing debt was such a valuable consideration as to convey title to the instrument "to a bona fide holder against all antecedent parties to a negotiable note" was followed, and the doctrine that as to matters of general jurisprudence, not touched upon by the statutes of the states, the Federal Courts were free to

* Of the Indianapolis Bar.

1 16 Pet. (41 U. S.) 1 (1842).

2 Erie R. Co. v. Tompkins (U. S. 1938), 58 S. Ct. 817.

3 "The laws of the several States, except where the Constitution, treaties, or statutes of the United States 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." (28 U. S. C. A., Sec. 725.)

establish their own rules was sent upon its way to be severely criticised but followed for nearly one hundred years.

In *Erie Railroad v. Tompkins,* the plaintiff was a Pennsylvania citizen who sued the Erie, a New York corporation, in Federal Court for an injury which he claimed occurred when he was struck by something which looked like a door projecting from one of the moving cars as he walked at night along a path of the Railroad's right of way. The Erie contended that the law of Pennsylvania, the locus delicti, did not impose liability upon the railroad for negligence to trespassers. The plaintiff denied that such was the Pennsylvania law and in the alternative contended that since there was no statute of Pennsylvania on the subject the railroad's duty and liability was to be determined in the federal courts as a matter of general law. The trial court agreed with the plaintiff's contention and followed what it considered to be the generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if struck by a projection from the train.

Justice Brandeis speaking for the majority of the Court did not confine the decision to reinterpretation of the 34th Section of the Judiciary Act.[4] Justice Reed, concurring in part, counseled this position but the majority view found in the case an issue of constitutionality.

Justice Story had said in *Swift v. Tyson,*[5]

"In order to maintain the argument, it is essential, therefore, to hold, that the word '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

[4] The fact that the interpretation of the 34th Section of the Judiciary Act had been consistently followed by the Courts and the legislation reenacted after such construction became fixed justified the Court to seek other grounds for its opinion.

[5] 16 Pet. (41 U. S.) 1 at 17-18.

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 local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court has uniformly supposed, that the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the 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, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

Justice Brandeis concludes that the view as expressed was erroneous and relies largely upon the research of Mr. Charles Warren.[6] In his work Mr. Warren shows that as originally drafted the section in question was as follows:

"And be it further enacted, That the statute law of the several states in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, except where the constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in the trials at common law in the courts of the United States in cases where they apply;"

That the draftsman changed the phraseology of the section by striking out "statute law" and inserting in their place the word "laws" and then struck out the words:

"in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise;"

[6] Warren's—"New Light on the History of the Federal Judiciary Act of 1789" (1923), 37 Harv. L. Rev. 49.

with the result that the same thought was expressed in more concise form.[7]

But the real significance of the majority opinion is expressed by Justice Brandeis:

"The Federal Courts assumed in the broad field of 'general law' the power to declare rules of decision which Congress was confessedly without power to enact as statutes". . . .

"But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." . . .

"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 general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."[8]

It is clear that Justice Story had proceeded upon the assumption that Congress had the power to declare the substantive rules applicable in litigation in Federal Courts even though they were not authorized by some other express or implied grant of power in the Federal Constitution. The reasonable implication from the Erie Railroad case is the denial of that power whether the law is expressed by the Congress or the courts and further it is clear that such power is one reserved to the states. It is strongly suggested that the decision has a definite bearing upon the subject of the powers of the federal government and those of the states.[9]

Justice Story expressed the prevailing theory of jurisprudence of the day that judicial decisions were not law in themselves but were merely evidence of law. The fallacy of this position is ably discussed by Justice Holmes.

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[7] It was argued before Justice Story that if anything broader than statutes was intended by the word "laws" the draftsman would have used the phrase "system of laws."

[8] Erie R. Co. v. Tompkins, 58 Sup. Ct. 817, 819, 822.

[9] 36 Mich. L. Rev. 1312.

"Books written about any branch of the common law treat it as a unit, cite cases from this court, from the circuit courts of appeal, from the state courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else."[10]

The only real justification for the doctrine of *Swift v. Tyson* is clearly untenable under modern theories of jurisprudence. The abuses which arose from the doctrine[11] and its failure to achieve uniformity in the law contributed to the view of the Court in the Erie Railroad case.[12] But its real significance to the writer is the limitation upon Congress and the Federal Courts which is expressed and the possible future employment by the Court of the language of Justice Brandeis wherein he states that the interpretation persisted in by the Supreme Court constituted an unconstitutional exercise of power by that Court.

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[10] Holmes, J., dissenting in Black and White Taxi Cab & Transfer Co. v. Brown and Yellow Taxi Cab and Transfer Co., 276 U. S. 518 at 533, 48 S. Ct. 404, 57 A. L. R. 426.

[11] See Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U. S. 518.

[12] Erie R. Co. v. Tompkins, 58 S. Ct. 817 (821). It was suggested that the prestige of the Supreme Court of the United States would encourage state courts to follow its decisions upon matters of general law and thus uniformity would be achieved. But obviously this has not been the case.

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