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OIL AND GAS

THE RULE OF *SWIFT v. TYSON* IN MINERAL LAW

By extending a claim which was "staked out" nearly a century ago in Mr. Justice Story's decision in *Swift v. Tyson*,¹ federal courts are indicating, in some instances, a tendency to decide cases involving real property interests independently of the law of the state in which those interests have *situs*.² If it be accepted that law is a prophecy of what the courts will do in fact,³ it is yet imperative that a relatively high degree of certainty be maintained in the field of real property law.⁴ A regrettable situation arises when federal courts exercise judgment independently of state decisions in real property cases, thus creating two rules of property law within the same jurisdiction.⁵

To avoid an anticipated conflict between state and federal courts, the judiciary act of 1789 wisely paved a highway of respect in these words:

"And be it further enacted, That 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."⁶

Fifty-three years later Mr. Justice Story understood the statute to have a meaning expressed in these words:

¹ 16 Pet. (U. S.) 3, 10 L. Ed. 865 (1842). The court held that a pre-existing debt constituted value, in a negotiable instrument transaction, for purposes of making one a holder in due course, contrary to New York state decisions at that time.

² *Mid-Continent Petroleum Corporation v. Sauder et al.*, 67 F. (2d) 9 (C. C. A. 10th, 1933), Note (1934) 40 W. VA. L. Q. 175, *certiorari* granted 54 S. Ct. 438, 78 L. Ed. 454 (January 22, 1934). The District Court of the United States for the District of Kansas was reversed by the Circuit Court of Appeals of the Tenth Circuit in this case. See *Denker v. Mid-Continent Petroleum Corporation*, 56 F. (2d) 725 (C. C. A. 10th, 1932) and *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 30 S. Ct. 140 (1910).

³ Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 461.

⁴ Sharp and Brennan, *The Application of the Doctrine of Swift v. Tyson since 1900* (1929) 4 IND. L. J. 367, 377, where it is said: "Such a conflict would be especially undesirable in the field of real property, where predictability has always been the desideratum."

⁵ For example compare *Kuhn v. Fairmont Coal Co.*, *supra* n. 2, with *Griffin v. Coal Co.*, 59 W. Va. 48, 53 S. E. 24 (1905).

⁶ Act of September 24, 1789, c. 20, § 34, 1 STAT. 92, found in 28 U. S. C. A. 97, § 725 (1926).

“And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.”⁷

The learned judge supposed the statute above applied to

“... rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.”⁸

In accord with this interpretation and exposition the general rule is thus stated:

“Rules of real property settled by course of state decisions are followed by federal courts.”⁹

Real or apparent exceptions to this generalization, which provide avenues through which federal courts exercise independent judgment, may be summarized under three situations:

1. Where the property rights involved in the litigation accrued prior to the state decisions;¹⁰
2. Where the state decisions on the point in issue are not in harmony;¹¹ and
3. Where equitable relief is sought.¹²

Limiting this study to the application of the rule of *Swift v. Tyson* in mineral law, a starting point is the generalization

⁷ *Swift v. Tyson*, *supra* n. 1, at page 19. For a modern statement of the rule see *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 249, 37 S. Ct. 524 (1917). For some criticisms of Story, J., in the *Swift v. Tyson* opinion, see *infra* page 263 and notes there cited.

⁸ *Swift v. Tyson*, *supra* n. 1, at page 18.

⁹ 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 41.

¹⁰ See cases cited in n. 2. Also see *Helm v. Zarecor*, 213 Fed. 648 (M. D. Tenn., 1913). But see *Sutherland v. Selling*, 16 F. (2d) 865 (C. C. A. 9th, 1926). *Kuhn v. Fairmont Coal Co.*, *supra* n. 2.

¹¹ As to this general exception see *Risty v. Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 46 S. Ct. 236 (1926); *Dernberger v. B. & O. R. Co.*, 243 Fed. 21, 155 C. C. A. 551 (1917).

¹² *Guffey v. Smith*, 237 U. S. 101, 35 S. Ct. 526 (1915). At page 114 the court said: “By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting.” That mutuality in specific performance cases is considered procedural, rather than substantive, and that in such cases the federal courts

that mineral rights are rights in property,¹³ or are so closely related thereto in all cases as to be subject to the same rules.¹⁴ Cases involving mining rights or interests,¹⁵ the contracts, options, or other writings relating thereto,¹⁶ and the liabilities thereunder,¹⁷ all of which subject matter may be considered as having a stationary *situs* within the state,¹⁸ uniformly hold that federal courts are bound by state decisions establishing a rule of property, or whether or not it is strictly a rule of property,¹⁹ on the point in issue. The apparent and well-known exception to this generalization is *Kuhn v. Fairmont Coal Company*,²⁰ which seeks justification on the ground that the rights therein involved accrued prior to state decisions on the point and, hence, the federal court was privileged to exercise independent judgment.²¹

An increasingly large group of cases involving oil and gas leases²² presents a complicated situation upon which it is difficult to formulate a generalization. States differ as to the property

act independently of state decisions are noted in *Union Bag Corporation v. Bischoff*, 255 Fed. 187 (D. C. N. Y., 1918). See also as to equity rules in federal courts *Robinson v. Campbell*, 3 Wheat. (U. S.) 212, 4 L. Ed. 372 (1818); *Williams v. Provident Life & Trust Co.*, 242 Fed. 417, 155 C. C. A. 193 (1917).

¹³ *Simonton, Has a Landowner Any Property in Oil and Gas in Place?* (1921) 27 W. VA. L. Q. 279, 298; *Shaffer v. Marks et al.*, 241 Fed. 139, 142 (E. D. Okla., 1917); *Foster v. Elk Fork Oil & Gas Co.*, 90 Fed. 178, 153 C. C. A. 560 (1898).

¹⁴ *Marquette Cement Mining Co. v. Oglesby Coal Co.*, 253 Fed. 107 (D. C. N. D. Ill., E. D., 1918).

¹⁵ *Scranton Coal Co. v. Graff Furnace Co.*, 289 Fed. 305 (C. C. A. 3d, 1923).

¹⁶ *Fretts v. Shriver*, 181 Fed. 279 (N. D. W. Va., 1910); *Marquette Cement Mining Co. v. Oglesby Coal Co.*, *supra* n. 14; *East Central Eureka Mining Co. v. Central Eureka Mining Co.*, 204 U. S. 266, 27 S. Ct. 258 (1907); *Scranton Coal Co. v. Graff Furnace Co.*, *supra* n. 15; *Foster v. Elk Fork Oil and Gas Co.*, *supra* n. 13; *Nelson v. Republic Iron and Steel Co.*, 240 Fed. 285, 153 C. C. A. 211 (1917).

¹⁷ *Guzzi v. Delaware, etc., Co.*, 266 Fed. 513 (C. C. A. 3d, 1920). See also *Kuhn v. Fairmont Coal Co.*, *supra* n. 2.

¹⁸ See *Simonton*, *supra* n. 13, at 284 and 290.

¹⁹ *Marquette Cement Mining Co. v. Oglesby Coal Co.*, *supra* n. 14.

²⁰ *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 360, *supra* n. 2, where the court says: "So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued."

²¹ The state decision is *Griffin v. Coal Co.*, *supra* n. 5.

²² *Guffey v. Smith*, *supra* n. 12; *Lindlay v. Raydure*, 239 Fed. 928 (D. C. Ky., 1917); *Downey v. Gooch*, 240 Fed. 527 (D. C. Okla., 1914); *Shaffer v. Marks et al.*, *supra* n. 13; *Washburn v. Gillespie*, 261 Fed. 41 (C. C. A. 8th, 1920), *certiorari* denied in 252 U. S. 587, 40 S. Ct. 396 (1920); *Lyon v. Union Gas and Oil Co.*, 281 Fed. 674 (C. C. A. 6th, 1922); *Thurlow v. Waite-Phillips Co.*, 22 Fed. (2d) 781 (C. C. A. 10th, 1927).

interest which the landowner has in the oil and gas beneath his land,²³ as to the stationary or fugitive consideration to be given to oil and gas, and as to the interest which the lessee in an oil and gas lease possesses.²⁴ To generalize, however, as in the mining cases, federal courts are bound by rules of decisions established by state courts relative to oil and gas interests.²⁵

In the recent case of *Mid-Continent Petroleum Corporation v. Sauder et al.*,²⁶ the plaintiff, a Kansas landowner,²⁷ sued to cancel a part of an oil and gas lease held, after mesne assignments, by the defendant, a foreign corporation.²⁸ The plaintiff alleged the breach of an implied covenant to develop diligently the lease. The defendant answered that, in view of geological information to the effect that oil and gas could not be produced in paying quantities on the undeveloped part of the leased land, he had acted as an ordinary prudent operator and had breached no covenant. The lease was entered into June 6, 1916. In *McCarney v. Freel*,²⁹ decided June 12, 1926, the Kansas Supreme Court held, in a situation very similar to the present case, that the lease should be cancelled. Contrary to this state court decision, which in theory followed former Kansas decisions, the Circuit Court of Appeals of the Tenth Circuit held, September 14, 1933, that the lease be not cancelled, saying

“Since *McCarney v. Freel*, *supra*, was decided long after the date this lease was entered into, while persuasive, it is not binding on us.”³⁰

The result of this decision is, from the point of view of this study, that merely on grounds of diversity of citizenship which gave jurisdiction to the federal court this foreign corporation acquired and retained a greater interest in the oil and gas than a resident corporation could have acquired.³¹ Unless the holding in the *Sauder* case is reversed by the United States Supreme Court, to which it has been taken by writ of *certiorari*, two rules applicable to oil and gas leases will seek an existence within the

²³ See Simonton, *supra* n. 13, at 298 *et seq.*

²⁴ Simonton, *The Nature of the Interest of the Grantee under an Oil and Gas Lease* (1918) 25 W. VA. L. Q. 295, 322.

²⁵ See cases cited in n. 22.

²⁶ *Mid-Continent Petroleum Corporation v. Sauder et al.*, *supra* n. 2.

²⁷ Philip Sauder, the landowner, died in the course of the proceedings and the case was continued by heirs at law.

²⁸ *Mid-Continent Petroleum Corporation* is chartered in Delaware.

²⁹ *McCarney v. Freel*, 121 Kan. 189, 246 Pac. 500 (1926).

³⁰ *Mid-Continent Petroleum Corporation v. Sauder et al.*, *supra* n. 2 at 12.

³¹ *Id.* at 16, words of Circuit Judge McDermott, dissenting.

jurisdiction of Kansas and court decisions will hinge on diversity of citizenship in many cases.

Is the result sound? The customary arguments have been set forth, *supra*.³² To view the arguments that rights accrued prior to, and that there is a lack of harmony in, state decisions, it is well to quote from *Kuhn v. Fairmont Coal Company*,³³ a case which has been criticized in no uncertain terms.³⁴ The court there said:

“But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt.”³⁵

The early Kansas decisions,³⁶ the decision of *McCarney v. Freel*,³⁷ and the principles of justice in the *Sauder* case³⁸ apparently created no doubt in the minds of a majority of the court.³⁹ As to the contention that the relief sought is equitable and, hence, federal courts may exercise independent judgment, it is agreed that the suit to cancel a lease is on the equity side of the court and that federal courts “determine for themselves the general principles and usages of equity,”⁴⁰ yet it is submitted that the indulgence in the “general principles and usages” of equity should not license a federal court to decide a substantive legal property right⁴¹ contrary to state decisions.

³² See brief for appellant in the Circuit Court of Appeals of the Tenth Circuit, at 34.

³³ *Kuhn v. Fairmont Coal Co.*, *supra* n. 2.

³⁴ Meigs, *Decisions of the Federal Court on Questions of State Law*, (1911) 45 *Am. L. Rev.* 47.

³⁵ *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 360, *supra* n. 2. For meanings of comity see *Hilton v. Guyot*, 159 U. S. 113, 163, 16 S. Ct. 139 (1895), per Gray, J., and a dissenting expression by Fuller, C. J., in 159 U. S. at 233. See also *Prentiss v. Atlantic Coastline Co.*, 211 U. S. 210, 232, 29 S. Ct. 67 (1908), per Holmes, J., and Fuller, C. J., in 211 U. S. at page 237.

³⁶ *Webb v. Croft*, 120 Kan. 654, 244 Pac. 1033 (1926); *Howerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47 (1910); *Alford v. Dennis*, 102 Kan. 403, 170 Pac. 1005 (1918); *Day v. Kansas City Pipe Line Co.*, 87 Kan. 617, 125 Pac. 43 (1912).

³⁷ *McCarney v. Freel*, *supra* n. 29.

³⁸ *Mid-Continent Petroleum Corporation v. Sauder et al.*, *supra* n. 2.

³⁹ The *Sauder* case was tried before Phillips and McDermott, Circuit Judges, and Kennedy, District Judge, with McDermott, J., strongly dissenting. As to the federal court attitude on doubt in such cases, see *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 35 S. Ct. 173 (1915) and *Burgess v. Seligman*, 107 U. S. 20, 33, 2 S. Ct. 10 (1883).

⁴⁰ *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 S. Ct. 75 (1893); *Clark v. Andrew*, 11 F. (2d) 958, 960 (C. C. A. 5th, 1926).

⁴¹ As to oil and gas being property in Kansas see *Moore v. Griffin*, 72 Kan. 164, 83 Pac. 395 (1905) and *Robinson v. Smalley*, 102 Kan. 842, 171 Pac.

In view of the facts that research⁴² is revealing that Mr. Justice Story probably misconstrued the intent and meaning of the framers of the judiciary act,⁴³ that some able jurists have attacked the doctrine of *Swift v. Tyson*⁴⁴ in no uncertain terms,⁴⁵ and that some federal courts yet tend to extend the doctrine,⁴⁶ the proposition presented is: What remedy or remedies for the situation may be found? Three remedies have been suggested:⁴⁷ (1) State statutes may be passed controlling many questions of "commercial law and general jurisprudence;" (2) The United States Supreme Court may overrule *Swift v. Tyson*; and (3) Congress may amend and clarify the judiciary act.⁴⁸ The first suggestion is hardly desirable.⁴⁹ The second suggestion has able support.⁵⁰ At least one attempt has been made to have Congress amend and clarify the act in these terms:

"Decisions of the highest court of a state shall govern the courts of the United States in the ascertainment of the common law and general jurisprudence of such state."⁵¹

1155 (1918). Simonton, *supra* n. 13, at 291; 1 TIFFANY, REAL PROPERTY, (2nd ed. 1920) 873; Summers, *Property in Oil and Gas* (1920) 29 YALE L. J. 17.

⁴² Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49.

⁴³ Act of September 24, 1789, *supra* n. 6.

⁴⁴ *Swift v. Tyson*, *supra* n. 1.

⁴⁵ Green, *The Law of Precedent, Prophecy, and Principle: State Decisions in Federal Courts* (1924) 19 ILL. L. REV. 217. Black and White Taxicab Co. v. Black and Yellow Taxicab Co., 276 U. S. 518, 533, 48 S. Ct. 914 (1928), wherein Mr. Justice Holmes denounced the doctrine in a dissent concurred in by Mr. Justice Brandeis and Mr. Justice Stone. See also Mr. Justice Holmes's dissent in *Kuhn v. Fairmont Coal Co.*, *supra* n. 2, concurred in by Mr. Justice White and Mr. Justice McKenna.

⁴⁶ See cases cited in n. 2.

⁴⁷ Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 VA. L. REV. 225.

⁴⁸ *Id.* at 241.

⁴⁹ As to the doctrine on state statutes see Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423.

⁵⁰ See citations in n. 45. *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 403, 13 S. Ct. 914 (1893) includes these words of Mr. Justice Field: "I cannot permit myself to believe that any such conclusion, when more fully examined (the doctrine of *Swift v. Tyson*), will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will, in the end, 'die among its worshippers'."

⁵¹ Senate resolution No. 4333, 69th Congress, first session (1928), presented by Senator Thomas J. Walsh, of Montana. U. S. Daily, May 4, 1928, at 585, reveals the resolution was referred to the Senate committee on judiciary and it apparently died therein.

Above all it seems preposterous to have two rules of decisions on real property law, and, hence, on mineral law, within a single jurisdiction.⁶²

—STANLEY E. DADISMAN.

MINES AND MINERALS — FRAUDULENT DRAINAGE BY OIL AND GAS LESSEE — ESTIMATE OF DAMAGES. — The complainant sought, *inter alia*, damages for fraudulent drainage in an oil and gas lease of West Virginia land. The lower federal court denied recovery. Complainant sought review by the circuit court of appeals. *Held*: Complainant's evidence, due to its meagreness and insufficiency failed to sustain any cause of action. Affirmed. *Updegraff v. United Fuel Gas Company*.¹

⁶² See annotation as to federal courts following state court decisions as to rules of property, 40 L. R. A. (N.S.) 380, 391 (1912). For a West Virginia case see *Liberty Central Trust Co. v. Greenbrier College for Women*, 50 F. (2d) 424 (S. D. W. Va., 1931), affirmed in a memorandum decision in 283 U. S. 800, 51 S. Ct. 493 (1931). It seems fair to cite Schofield, *Uniformity of Judge-Made Law in State and Federal Courts* (1910) 4 ILL. L. REV. 533, where the writer defends the decision of Mr. Justice Story in *Swift v. Tyson* as "solid, unshaken, and untouched."

A lengthy justification of the rule of *Swift v. Tyson* has been attempted by Parker, Circ. J., in *Hewlett v. Schadel*, 68 F. (2d) 502, 504 (C. C. A. 4th, 1934), of which the following is representative:

"And the occasional conflict which occurs between the decisions of the state and federal courts is by no means the serious matter that some persons imagine. If the federal court follows the rule of the common law, as it must, its decision is in accord with the system which, as has been said, is the common heritage of the people in all of the states and with which they are presumably familiar. Men are presumed to know the law; and they actually do know pretty well those rules of the common law which affect their lives and business. They are not presumed to know what judges have said about the law; and decisions departing from the common-law rules are known to but few persons outside the class of professional lawyers. Adherence to the rules of the common law is not only essential, therefore, to the doing of justice where citizens of different state are involved, but it also results in decisions more nearly in accord with the ideas and conditions of life of the people whose local courts may have departed temporarily from common-law principles."

Judge Parker's view is that the federal rule "will preserve a uniform body of law upon which those who do business in other states can depend, and which will inevitably have a unifying influence on the decisions of the state courts themselves." Such a view assumes the desirability of uniformity throughout the United States, irrespective of divergent local conditions. Even in the classical period of Roman law, its principles varied from province to province. Similarly, where existent in the present-day British Commonwealth of Nations, the common law adapts itself to its habitation and environment. Cf. *Trainor Co. v. Aetna Casualty & Surety Co.*, — U. S. —, 54 S. Ct. 1 (1933), and *Burne Mtg. Co., Inc. v. Fried*, 67 F. (2d) 352 (1933).

¹ 67 F. (2d) 431 (C. C. A. 6th, 1933).