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FROM SWIFT vs. TYSON TO ERIE R. R. vs. TOMKINS
NINETY-SIX WEEKS OF SUPREME COURT HISTORY

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THE battle which centered around the thirty-fourth section of the Federal Judiciary Act[1] had its official beginning in the Supreme Court of the United States with the announcement of the decision in the case of Swift vs. Tyson, 16 Peters 865.

For ninety-six years commentators and judges alike bemoaned at great length the decision and its effects. For ninety-six years the decision withstood the onslaught, and never during all of that time was its authority even slightly weakened. Then on April 25, 1938, in a surprise decision[2] which was sweeping in effect, the Court completely annihilated Swift vs. Tyson and all of the hundreds of decisions which had been supported by it. The opinion by Mr. Justice Brandeis applied the doctrine which had previously been urged by Mr. Justice Field and Mr. Justice Brandeis in dissenting opinions. A second ground for the decision was the research of a "competent scholar," the thesis of which was that the legislative history of Section Thirty-four of the Federal Judiciary Act proved conclusively that the rule of Swift vs. Tyson was at variance with the intent of Congress. The case which announced the change was that of Erie R. R. Co. vs. Tomkins, 58 Sup. Ct. 817, 82 Law Edition 787 (April, 1938).

In Swift vs. Tyson, action was brought on a bill of exchange by the holder against the acceptor. A defense of fraud of the drawer was raised. The issue was whether the holder who had taken the bill as payment for an antecedent debt was free from the defense of fraud as a bona fide purchaser for value. There was no statute in New York, and the decisions were in conflict. Justice Story assumed that under New York decisions the holder was not a purchaser for value. The learned Justice then proceeded to disregard this rule. His decision was that the United States courts were free to decide questions of general commercial law according to their judgment of what the common law rules were. He ruled that

[1]Fed. Jud. Act of 1789, 1 Statute at Large 73, 92, Chap. 20, 28 U. S. C. A., Section 725.

[2]The question had not been raised by the parties.

"laws" in Section 34 of the Judiciary Act of 1789[3] did not include "within the scope of its meaning the decisions of the local tribunal," but included only statute laws and "local usages." Uniformity was the reason of policy assigned for the decision.

There was a dissenting opinion by Mr. Justice Catron. He complained as follows: "I never heard this question spoken of as belonging to the case until the principal opinion was presented last evening; and therefore I am not prepared to give any opinion even was it called for by the record."[4]

Vigorous dissent from the rule of Swift vs. Tyson first appeared in 1845 in Lane vs. Vick.[5] The question was whether federal courts were bound by the decision of the highest court of the state on the construction of a will. The majority of the court said no, in accordance with Swift vs. Tyson. The dissenting opinion was written by Mr. Justice McKinley, and concurred in by Mr. Chief Justice Taney.

Language used was in part as follows:

"And when Congress defined the powers of the courts of the U. S., they directed that the laws of the several states should be regarded as the rules of decision in suits at common law in cases where they apply. And upon these principles, with few, if any, exceptions, has this court acted from the commencement of the government down to the present term of this court. That they should continue so to act is of great importance to the peace and harmony of the United States. If the state judicial tribunals establish a rule, governing titles to real estate, whether it arise under statute deed or will, and this court establishes a different rule, which of these two rules shall prevail? They do not operate like two equal powers in Physics, one neutralizing the other; but they produce a contest for success, a struggle for victory; and in such a contest it may easily be foreseen which will prevail."

The learned justice continues to the effect that the contest should be averted by conforming to the rules of property established by a state and thus he registers his objection to extension of the doctrine of Swift vs. Tyson to devises of real estate.

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[3]Which section 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."

[4]Robert Jackson points out (in an article in 24 A. L. A. Journal) that it is curious that in both Swift v. Tyson and Erie R. R. v. Tompkins, the dissenting opinions raise the same objection, namely, that the question was not raised by the case.

[5]3 Howard 475, 11 L. Ed. 687.

General law was held to include obligations under contracts entered into and to be performed within a state in the case of Rowan vs. Runnels, 5 How. 134, 139, 12 L. Ed. 85, 87.

There the Supreme Court's interpretation of a provision of the Mississippi State Constitution conflicted with that of the highest tribunal of that state. Mr. Justice Daniel, dissenting, at page 87 of 12 L. Ed., contended that the construction of a state constitution by the state court should be received and followed by the Supreme Court. He stated that the decision of the court ran contra to that proposition. He concluded as follows: "Such a rule of interpretation involves in my view a contradiction which I am wholly unwilling to adopt."

The Court in Pease vs. Peck, 18 Howard 595, 599, 15 L. Ed. 518, 520 (1855), conceded that it should adopt the state court's construction of a state statute, but refused to change its decision in accordance with a subsequent state decision and thus to "surrender our clear convictions and unbiased judgment to the authority of the new state decision."

Mr. Justice Campbell in a dissenting opinion retorted as follows, page 521 of 15 Law Edition:

> "The question is so entirely of a domestic character, and belongs so particularly to the constituted authorities of the state to determine, that I cannot bring myself to oppose their conclusion on the subject."

Mr. Justice Miller dissented from the application of the doctrine of Swift vs. Tyson in two instances. First in the case of Gelpcke vs. Dubuque, 1 Wall. 175, 17 L. Ed. 520 (1863), wherein the Court held that it was not bound to follow a late decision of the Iowa Supreme Court which overruled prior decisions. The Court applied the earlier decisions. The dissenting opinion reads in part as follows:

> "I think I have sustained by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything theretofore decided by it on this subject. That advance is in the direction of a usurpation of the right, which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes. This invasion is made in a case where there is no pretense that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States."

A similar protest by Mr. Justice Miller was made to the decision of the court in the case of Rutz vs. Muscatine, 8 Wall. 575, 585, 19 L. Ed. 490, 494. This opinion was concurred in by Mr. Chief Justice Taney.

The dissenting opinions of Mr. Justice Field and Mr. Justice Holmes were much more vigorous.

In the case of Baltimore & Ohio R. R. Co. vs. Baugh, 149 U. S. 368, 390, 37 L. Ed. 772, 782, 13 Sup. Ct. 914, the Court applied the doctrine to a case of liability for a tort committed within the state upon persons resident therein. The Court further declared that the thirty-fourh section of the judiciary act applied only to positive state statutes and their construction.

Justice Field dissented on the ground that the doctrine was an unconstitutional federal invasion of the state in that the federal court in applying the doctrine was in fact governing within the state matters which belonged to the state, and thus there was a usurpation of power.[6] The intensity of the justice's emotions on the subject can be seen from reading some of his words (page 401 of 149 U. S.):

"I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views."

Again, at page 403:

"I cannot permit myself to believe that any such conclusion, when more fully examined, 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'."

The first of Mr. Justice Holmes' dissents on the point is found in the case of Kuhn vs. Fairmont Coal Co., 215 U. S. 349, 370, 54 L. Ed. 228, 238, 30 Sup. Ct. 140. There the opinion of the Court extended to a situation involving title to real property. It was because of this feature of the case that Mr. Justice Holmes objected.

His opinion reads in part as follows:

"This is a question of title to real estate. * * *

"I admit that plenty of language can be found in the earlier deci-

[6]One of the supporting props used by the Supreme Court in the Erie R. R. case, supra, is the concept of the "unconstitutionality of the course pursued" as thus expounded by Mr. Justice Field.

sions to support the present decision. That is not surprising in view of the uncertainty and vacillation of the theory upon which Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, and the later extensions of its doctrine, have proceeded. * * *

"If, as I believe, my reasoning is correct, it justifies our stopping when we come to a kind of case that, by nature and necessity, is peculiarly local, and one as to which the latest intimations, and, indeed, decisions, of this court are wholly in accord with what I think to be sound law."

It would seem that the objection of Justice Holmes was to the extension of the doctrine.

Mr. Justice Holmes went further in the Taxicab case.[7] There a Kentucky corporation incorporated in Tennessee and made a contract in Tennessee with a railroad which was also a Kentucky corporation, providing for exclusive patronage. Such a contract was not valid in Kentucky. Nevertheless, the Federal Court recognized it as valid and issued an injunction prohibiting a rival Kentucky corporation from competing. The Supreme Court upheld this decision.

The dissenting opinion of Mr. Justice Holmes was to the effect that the Court had acted unconstitutionally.

"But the question is important and in my opinion has been accepted upon a subtle fallacy that never has been analyzed. If I am right, the fallacy has resulted in an unconstitutional assumption of powers by the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[8]

Actually, according to Justice Holmes, there is no such "august corpus." The common law exists within a state by virtue of the authority of that state, "and if that be so, the voice adopted by the state as its own[9] should utter the last word."

Commentators have contributed much on both sides of the question. There has been considerable criticism since the

[7]Black and White Taxicab & Transfer Co., Petitioner, v. Brown and Yellow Taxicab & Transfer Co., 276 U. S. 518, 532, 72 L. Ed. 681, 686, 48 Sup. Ct. 404, 57 A. L. R. 426.

[8]Justice Holmes then points out that the fallacy of the doctrine is that it assumes that there is a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute; that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law."

[9]Whether it be of its Legislature or of its Supreme Court.

decision in the Taxicab case.[10] This can be explained on the ground that that case clearly demonstrated possible abuses of the doctrine of Swift vs. Tyson. It was clearly shown that corporation litigants could use federal courts for the express purpose of avoiding a state decision which was unfavorable. Much also has been written in defense of the doctrine.[11]

John Chipman Gray[12] contended that the decision in the case of Swift vs. Tyson was explainable in terms of the personality of Mr. Justice Story. Gray felt that Mr. Justice Story was influenced by his restless vanity, his fondness of "glittering generalities," his reputation for "great learning" and by the fact that "he was occupied at the time in writing a book on bills of exchange." That Mr. Justice Story also was influenced by the desire for uniformity in the law of bills and notes was unquestioned. This is demonstrated by the following language from Swift vs. Tyson:

> "The law respecting negotiable instruments may be truly declared in the language of Cicero, * * * not the law of a single country only, but of the commercial world. *Non erit lex Romae, alia Athenis, alia nunc, alia posthac, set et apud omnes gentes, et omni tempore, una eademque lex obtenebit.*"

This concept has of course been carried out in the Uniform Negotiable Instruments Law.

The greatest single contribution made on the subject was that of Charles Warren in his article, New Light on the

[10]See Shelton, Concurrent Jurisdiction—Its Necessity and its Dangers (1928), 15 Va. L. Rev. 137; Frankfurter, Distribution of Judicial Power Between Federal and State Courts (1928), 13 Corn. L. 2, 499, 524-30; Johnson, State Law and the Federal Courts (1929), 17 Ky. L. J. 355; 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. 225; Dawson, Conflict of Decisions Between State and Federal Courts in Kentucky, and the Remedy (1931), 20 Ky. L. J. 1; Campbell, Is Swift v. Tyson an Argument for or Against Abolishing Diversity of Citizenship Jurisdiction (1932), 18 A. B. A. J. 809; Ball, Revision of Federal Diversity Jurisdiction (1933), 28 Ill. L. Rev. 356, 362-64; Fordham, Swift v. Tyson and the Construction of State Statutes (1935), 41 W. Va. L. 2, 131.

[11]Eliot, The Common Law of the Federal Courts (1902), 36 Am. L. Rev. 498, 523-25; A. B. Parker, The Common Law Jurisdiction of the United States Courts (1907), 17 Yale L. J. 1; Schofield, Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts (1910), 4 Ill. L. Rev. 533; Brown, The Jurisdiction of Federal Courts Based on Diversity of Citizenship (1929), 78 U. of Pa. L. Review 179, 189, 191; J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It (1932), 18 A. B. A. J. 433, 438; Yntema, The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States (1933), 19 A. B. A. J. 71, 74, 75.

[12]Gray, Nature and Sources of the Law (2nd ed.), page 223.

History of the Federal Judiciary Act of 1789 (1923), 37 Harvard Law Review, 49, 51-52, 81-88, 108.[13]

Warren's research consisted of a study of the legislative history of Section 34 of the Judiciary Act. His findings established that there was very definitely an issue in Congress as to whether "laws" should mean statute laws merely, or should include general law. In an original bill the word "statute" was struck out, leaving the word "laws." This would indicate that it was the intention of Congress to require the Federal courts to follow all state laws including judicial decisions, except where the constitution or statutes of the United States shall otherwise provide. Therefore, if Warren was right, the interpretation of Section 34 by the Supreme Court in Swift vs. Tyson was not in accord with the intention of Congress.

Erie R. R. Co. vs. Tomkins, 58 Sup. Ct. 817, 82 L. Ed. Advance Sheets 787, supra, was a personal injury case. Its facts are not now important. The trial court in accordance with the then rule ignored the law of Pennsylvania on the subject. The law of Pennsylvania would have precluded recovery. The railroad company "contended that application of the Pennsylvania rule was required, among other things, by Section 34 of the Federal Judiciary Act of September 24, 1789, Chapter 20, 28 U. S. C. A., Sec. 725, * * *"

Justice Brandeis wasted no words in stating the issue (82 L. Ed. 787):

[13]This work is recognized by Mr. Justice Brandeis in the Tomkins case, supra: "Doubt was repeatedly expressed as to the correctness of the construction given Section 34 (citing Pepper, The Border Land of Federal and State Decisions (1889), 57; Gray, The Nature and Sources of Law (1909 ed.), Sections 533-34; Trickett, Non-Federal Law Administered in Federal Courts (1906), 40 Am. L. Rev. 819, 821-824), and as to the soundness of the rule which it introduced (citing Street, Is There a General Commercial Law of the United States (1873), 21 Am. L. Reg. 473; Hornblower, Conflict Between State and Federal Decisions (1880), 14 Am. L. Rev. 211; Meigs, Decisions of the Federal Courts on Questions of State Law (1882), 8 So. L. Rev. (N. S.) 452, (1911), 45 Am. L. Rev. 47; Heiskell, Conflict Between Federal and State Decisions (1882), 16 Am. L. Rev. 743; Rand, Swift v. Tyson versus Gelpcke v. Dubuque (1895), 8 Harvard L. Rev. 328, 341-43; Meils, Should Federal Courts Ignore State Laws (1900), 34 Am. L. Rev. 51; Carpenter, Court Decisions and the Common Law (1917), 17 Columbia L. Rev. 593, 602-03.) But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written."

"The question for decision is whether the oft-challenged doctrine of Swift v. Tyson shall now be disapproved."

The Court first declares that the statutory construction in Swift vs. Tyson was erroneous.

The opinion points out that experience in applying the doctrine has "revealed its defects, political and social; that it failed to bring about uniformity, in fact uncertainty was increased. Further, that it brought about discrimination in favor of those who could use the federal courts. "Thus the doctrine rendered impossible equal protection of the law." "Swift vs. Tyson introduced grave discriminations by citizens against non-citizens."

General law was given a broad province. In fact, it was extended to all kinds of matters, both national and local.

As a further reason for the decision, Justice Brandeis states that "The unconstitutionality of the course pursued has now been made clear and compels us to do so."[14]

The course is unconstitutional because there is no "federal general common law." Congress has no power to declare substantive rules of common law applicable in a state. Nor can the courts do so. The common law exists only by virtue of the sovereignty of the state within which it is declared. The common law does not consist of a "transcendental body of law outside of any particular state, but obligatory within it unless and until changed by statute."

"Thus the doctrine of Swift vs. Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' 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."

The chief criticism urged by Mr. Justice Butler in his dissenting opinion (concurred in by Mr. Justice McRaynolds) is that the constitutional question was not "suggested or argued below or here." He points out that the court has

[14] "To abandon a doctrine so widely applied throughout nearly a century."

"often emphasized its reluctance to consider constitutional questions." According to Justice Butler, the case could have been decided on another ground.

In a concurring opinion Mr. Justice Reed registered his disapproval of the act of the court in adopting the constitutional ground. Justice Reed felt that the decision could have been made on the issue of statutory construction. "It seems preferable to overturn an established construction of an act of Congress, rather than in the circumstances of this case, to interpret the Constitution."

The effects of the Tompkins case will be far-reaching. The most important result of the decision will be a greatly decreased docket in the federal courts. Also, the decision will give rise to new problems. Some of these are set out in a very recent article.[15] The authors suggest the following:

"(1) A line must be drawn between substance and procedure. As to the latter the national courts are now governed by their own rules. (2) What will happen to the repudiation cases such as Gelpckes v. Dubuque? (3) What will determine which state's substantive law will be applied by the national courts? (4) Will the march of conformity to state law be completed in equity?"[16]

To this writer the most interesting aspect of the subject is the extraordinary phenomenon that it presents from the standpoint of the judicial process. An extremely controversial decision is attacked on all sides by judge and writer alike. Despite these continuous assaults it becomes increasingly strong, vital and extensive. At last, with one tremendous sweep, it is wiped out completely. Moreover, we find the hopeful prophecy of Mr. Justice Field[17] come to pass. It has, in the end, "died among its worshippers."

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[15]The collapse of "General Law in The Federal Courts, Charles T. McCormick and Elvin Hall Hewins, 33 Ill. L. Rev. 126.

[16]This question has been answered by the subsequent Supreme Court case of Ruhlin v. New York Life Insurance Co., 82 Law Edition Advance Sheets 823.

[17]B. & O. R. R. v. Baugh, 149 U. S. 369, 403.