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# Wendell: RELATIONS BETWEEN THE FEDERAL AND STATE COURTS

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# RECENT BOOKS

This department undertakes to note or review briefly current books on law and materials closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publishers' literature, and the ordinary library sources.

# BRIEF REVIEWS

RELATIONS BETWEEN THE FEDERAL AND STATE COURTS. By *Mitchell Wendell.* Studies in History, Economics and Public Law, edited by the Faculty of Political Science of Columbia University, No. 555. New York: Columbia University Press. 1949. Pp. 298. $4.

Twelve years have elapsed since the Supreme Court of the United States, in two swift strokes, reversed the relationship of the federal and state judiciaries with respect to both substantive and procedural law. The new Federal Rules of Civil Procedure,[1] displacing and superseding the 56-year-old Conformity Act,[2] were submitted by Chief Justice Hughes to Attorney-General Cummings on December 20, 1937, and became law the following September 16, three months after adjournment of Congress on June 16, 1938. On April 25 of that same year, the Court's decision in *Erie Railroad Co. v. Tompkins*[3] struck down the 96-year-old doctrine of *Swift v. Tyson,*[4] whereunder federal courts were free to disregard state precedents and apply their own interpretation of state law. Thus, almost in a breath, procedural conformity gave way to procedural independence, and substantive independence to substantive conformity.

The torrent of legal writing which these two epoch-making changes in federal judicial policy set off is not yet fully abated,[5] but a reappraisal of the judicial phase of American federalism after a decade of the new order is now possible, and such is the purpose of this book.

Mr. Wendell begins with the establishment and rise to power of the federal judiciary, traces the development and current trends of the two most important bases of federal jurisdiction (federal question and diversity of citizenship) and concludes with certain recommendations for improvement of federal-state judicial relationships. He decides, and most lawyers will agree, that it would not be practical for a single judicial system, either federal or state, to do justice to the administration of two systems of law, and that as long as a federal government is maintained there will be a need for both federal and state courts. The chief problems that arise out of that duality have to do with access of litigants to federal courts and the distribution of judicial power between the two systems. Areas of possible conflict occur whenever under a given set of facts and law there is a choice of

[1] 308 U.S. 645 (1939), authorized by Act of June 19, 1934, 48 Stat. 1064, c. 651.
[2] 17 Stat. 197 (1872).
[3] 304 U.S. 64, 58 S.Ct. 817 (1938).
[4] 16 Pet. (41 U.S.) 1 (1842).
[5] In 1939 the section on federal courts of the *Index to Legal Periodicals* contained 53 references on these two subjects; in 1941, 41; and in 1949 about a dozen.

tribunals, or when the tribunal having jurisdiction has a choice of laws to apply. The author would narrow the former by limiting diversity jurisdiction to cases in which a showing of risk of local prejudice could be made. The latter has been largely resolved by the *Tompkins* case, although the difficulties of the federal courts in ascertaining what the state law is are graphically portrayed.

About half of the book is taken up with the *Tyson* and *Tompkins* cases and their background and implications. *Gelpcke v. Dubuque,*[6] a "high water mark" of federal judicial independence under *Swift v. Tyson,* is pictured against an interesting and illuminating background of the story of nineteenth-century railroad financing and the municipal bond litigation that arose out of it.

The most anomalous feature of present federal-state judicial relationships is the extreme to which the doctrine of federal supremacy has been pushed in the granting of concurrent jurisdiction to state courts to enforce acts of Congress, and it is surprising that the author makes no more of it than he does. Article VI of the Federal Constitution makes that Constitution and federal laws and treaties the supreme law of the land, and particularly specifies that "the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There is no reason to suppose that the writers of the Constitution had anything more in mind than, in Mr. Wendell's words, "a necessary safeguard against the undercutting of the central government" to "prevent state nullification of national policies." To a simple sharing of jurisdiction, as in naturalization cases, however, has been added the compulsory state jurisdiction of the Federal Employers' Liability Act,[7] with removals forbidden, and an apparent acquiescence by the Supreme Court in the proposition that in such an instance state courts may not decline jurisdiction for an otherwise valid reason such as forum non conveniens.[8] For a hundred years states have declined to enforce "penal" laws of the United States, but in a 1946 case the Supreme Court denounced that stand, and asserted that it "flies in the face of the fact that the States of the Union constitute a nation."[9] The federal courts have recently gone so far as not only to tell the state courts what cases to try but how to handle them.[10]

[6] 1 Wall. (68 U.S.) 175 (1864).

[7] 36 Stat. 291, §6, 45 U.S.C.A. (1910) §§51-60.

[8] Leet v. Union Pacific R. Co., 25 Cal. (2d) 605 at 612-613, 155 P. (2d) 42 (1944) cert. den. 325 U.S. 866, 65 S.Ct. 1403 (1945). A contrary view was stated by Mr. Justice Holmes in Douglas v. N.Y., N.H. and H.R. Co., 279 U.S. 377 at 387, 49 S.Ct. 355 (1928): "As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned." This has been overlooked or ignored in much subsequent litigation; it is not even cited in Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810 (1947).

[9] Testa v. Katt, 330 U.S. 386 at 389, 67 S.Ct. 810 (1947).

[10] In Brown v. Western Railway of Alabama, 338 U.S. 294, 70 S.Ct. 105 (1949), the Georgia court had sustained a demurrer to a complaint filed under the Federal Employers' Liability Act, in reliance upon a long-standing Georgia rule of practice that pleadings are to be construed most unfavorably to the pleader. The Supreme Court (Black, J.) did not like the rule and its application, and reversed with a holding that a valid cause of action was stated. Justices Frankfurter and Jackson dissented, on grounds that the decision did violence to the existing system of judicial federalism.

Mr. Wendell accepts this situation as settled and goes on to discuss some questions of policy that arise out of it, such as the financial burden on the state judicial systems, but decides that whatever danger there may be lies in the future rather than the present. It has already gone so far, however, that unless the Supreme Court sometime takes the trouble to make a specific examination of the problem and chalk out some frontiers beyond which federal domination of the state judiciaries may not be pressed, drastic changes in our conception of federal and state sovereignty will have to be made.

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