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SWIFT v. TYSON — WHAT REMAINS ?

WHAT IS (STATE) LAW?

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In *Erie Railroad Company v. Tompkins*[1] the "general law" doctrine established in *Swift v. Tyson*[2] was repudiated. In view of this it may be well to reëxamine *Swift v. Tyson* to see what the problem which confronted the federal court was and whether or not its solution depended upon Story's broad generalizations. Although Story's sweeping pronouncements are shown to be unsound, it may be that the Court was confronted with a problem of some difficulty which will be found recurring in many of the cases arising under the diversity of citizenship jurisdiction which were decided by relying upon the repudiated doctrine. If so, some thought should be given to this problem in order that the district courts may know how to proceed in like cases without the "general law" doctrine.[3]

SWIFT V. TYSON

In *Swift v. Tyson*[4] the question was whether an antecedent debt was value for the transfer of a negotiable instrument so as to make the transferee of the drawer-payee a holder in due course free from the defense of fraud which the acceptor had against the drawer-payee. The transferee, apparently a citizen of Maine, sued the acceptor, a citizen of New York, in the Circuit Court of the United States for the Southern District of New York. It was doubtful what the law of New York was on the question and the court divided on it. The question whether the defendant was entitled to the same defense as he would have had against the drawer-payee was taken to the United States Supreme Court on a certificate of division. Justice Story said that defendants argued: that Section 34 of the Judiciary Act of 1789[5] required the application of state law; that the applicable law was the law of New York whose law governed because the contract was made there when the defendant accepted the draft; and, that by that law a pre-existing debt did not con-

[1]58 Sup. Ct. 817 (Apr. 25, 1938). Articles on this case which have so far appeared are Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 33 ILL. L. REV. 126; Schmidt, *Substantive Law Applied by Federal Courts—Effect of Erie R. Co. v. Tompkins* (1938) 16 TEX. L. REV. 512; Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 24 A. B. A. J. 421; Jackson, *The Rise and Fall of Swift v. Tyson* (1938) 24 A. B. A. J. 609; Powell, *The Constitutional Convention and Swift v. Tyson* (1938) 24 A. B. A. J. 862.

[2]16 Pet. 1 (U. S. 1842).

[3]Sharp and Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900* (1929) 4 IND. L. J. 367, shows the large number of lower federal court decisions in which the doctrine of *Swift v. Tyson* has been applied.

[4]*Supra* note 2.

[5]1 Stat. 73, 92 (1789); 28 U. S. C. A. § 725 (1927).

stitute value. Story proceeded to examine the law of New York, found that the New York Court of Errors had never been called upon to decide the question and that the Supreme Court of New York had decided it both ways, three decisions holding that an antecedent debt was not value, being preceded by one and followed by two holding the contrary.[6] In the three decisions first mentioned, the Supreme Court had misinterpreted a Court of Errors decision.[7] Justice Story said, " . . . it admits of serious doubt, whether any doctrine upon this question can at present be treated as finally established" (in New York).[8]

Instead of doing what the New York Court of Errors would have done—that is, examining the question anew, considering what the rule ought to be in New York, and, in this connection, considering the general objective of the "law merchant", the practice of business men, the persuasive force of authority elsewhere, etc. etc.—Story said that, admitting the law of New York to be that a pre-existing debt did not constitute value, the federal court was not obliged to apply it but could decide the question for itself.[9] The whole statement of this doctrine is contained in a single paragraph of the opinion a page and a half in length,[10] much of which is unquestionably sound as a description of the judicial process in deciding a case when the decisions of the courts of the state whose law is applicable are conflicting. Section 34 of the Judiciary Act of 1789 is as follows:

> "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."[11]

Story said that the word "laws" in this section did not apply to the decisions of state courts on questions of a "general nature, especially to questions of general commercial law". He said that the term laws was to be understood as meaning "statutes", "the construction thereof adopted by the local tribunals", "long established local customs having the force of laws", and "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". His reasons for this interpretation were (1) the idea that there was an all pervading common law, the principles of which were

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[6]16 Pet. 1, 16-17 (U. S. 1842).
[7]Bay v. Coddington, 5 Johns. Ch. 54, 9 Am. Dec. 268 (1821), *aff'd*, 20 Johns. 637, 11 Am. Dec. 342 (1822).
[8]16 Pet. 1, 17 (U. S. 1842).
[9]Professor Thayer pointed out that this statement was dictum. Thayer, *The Case of Gelpcke v. Dubuque* (1891) 4 HARV. L. REV. 311, 314.
[10]16 Pet. 1, 18-19 (U. S. 1842).
[11]1 Stat. 73, 92, (1789); 28 U. S. C. A. § 725 (1927).

independent of the decisions of the courts of any particular sovereignty,[12] and (2) the theory that decisions are not laws but only evidence of them. He said: "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 not of themselves laws. They are often reëxamined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."[13]

Erie Railroad Company v. Tompkins

While walking along a footpath beside the Erie Railroad Company's track in Pennsylvania, Tompkins was struck by something projecting from one of the cars of a passing freight train. Tompkins, a citizen of Pennsylvania, sued the Erie, a New York Corporation, in the Federal District Court for the Southern District of New York. The parties differed about what the law of Pennsylvania was. The Erie claimed that by the law of Pennsylvania its only duty toward persons using longitudinal footpaths on the right of way was to refrain from willful or wanton injury, relying on a case decided by the Supreme Court of Pennsylvania. Tompkins insisted that defendant was liable for injuries resulting from ordinary negligence; that is, it had a duty to exercise due care. He relied upon many other Pennsylvania decisions. He also claimed that the question was one of "general law" which the federal court could determine for itself independent of the Pennsylvania decisions. The trial judge refused to rule that the applicable law precluded recovery and the jury's verdict was for the plaintiff.

The Circuit Court of Appeals affirmed the judgment for the plaintiff on the ground that it was unnecessary to consider what the law of Pennsylvania was because the question was one of the general law by which the railroad's duty was to exercise due care. The Supreme Court, two justices dissenting, held that it was error to refuse to apply Pennsylvania law and that it was the court's duty to decide what the state law was. It reversed the decision and remanded the case to the Court of Appeals for further proceedings. It held that the term "laws" in the thirty-fourth section of the Judiciary Act of 1789 meant all the law of a state, unwritten or common law as well as statutes, repudiating the "general law" doctrine established in *Swift v. Tyson*. The principal reason for the change[14] was the research of Charles Warren who discovered the original draft of the section which was as follows:

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[12]"The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world." 16 Pet. 1, 19 (U. S. 1842).

[13]16 Pet. 1, 18 (U. S. 1842). See Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 Va. L. Rev. 225, 231.

[14]58 Sup. Ct. 817, 819 (1938).

> "And be it further enacted, that the ~~statute law~~ laws 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 decision in the trials at common law in the courts of the United States in cases where they apply."[15]

The word "laws" was substituted for the portions struck out indicating clearly that the word "laws" was intended as a substitute not only for "statute law" but also for "unwritten or common law now in force."

The majority opinion denies that there is "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute" saying that the common law enforced in a state is not the common law generally but the common law of that state.[16] No advice is given to the Circuit Court of Appeals on how to ascertain the law of a state where the decisions of that state's courts are conflicting and no theory of the nature of law is indulged in. Justice Butler's dissenting opinion disagrees with the new construction of the statute on the ground that the failure of Congress to amend the act during nearly a hundred years since the interpretation in *Swift v. Tyson* indicates that it intended that the statute should continue to mean what the court said it meant in 1842.[17]

A constitutional question is also raised. The majority opinion takes the position that the use of the "general law" doctrine of *Swift v. Tyson* to prevent the application of state law was a violation of the powers reserved to the states in the Tenth Amendment.[18] In a concurring opinion Justice Reed said that having construed the statute and found that the previous interpretation was erroneous it was unnecessary to go further and hold that the previous interpretation was unconstitutional.[19] He thought the Constitution ambiguous on the point and that the ambiguity had induced the first Congress to enact the statute. He said that, in the absence of statute, federal courts may have the power to do justice without being bound by state law in diversity of citizenship cases[20] and that Article III and the "necessary and proper" clause of Article I, Section 8, might even authorize Congress to fix the substantive law to be applied in these cases. Justice Butler thought that the constitutional

[15]Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 87.

[16]58 Sup. Ct. 817, 823 (1938).

[17]"Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law." 58 Sup. Ct. 817, 826 (1938).

[18]58 Sup. Ct. 817, 822-823 (1938).

[19]58 Sup. Ct. 817, 828 (1938).

[20]Art. III, Sec. 2: "The *judicial power* shall extend . . . to controversies . . . between citizens of different states, ..." Judicial power may include power to determine the common law.

question was not properly before the Court because no litigant had raised the question and because the statute requiring the Court to certify constitutional questions before it to the Attorney General so that the United States could intervene in support of the constitutionality of the Act involved had not been complied with.[21]

INTERPRETATION

Is Justice Butler's canon of interpretation sound? What people subsequently understand by ambiguous language in a statute, especially government officials called upon to apply or amend it, throws some light on its meaning because the meaning of all words is to a large extent that which they have acquired by customary usage.[22] But the fact that Congress did nothing about the Court's interpretation of the statute in *Swift v. Tyson* is not evidence that they ever thought about the matter. If there was evidence of such thought it would not outweigh the evidence of the purpose of the Congress which enacted the statute as shown by the original draft of the section.[23] If an ambiguity exists, the purpose of the enacting body must prevail over subsequent practical interpretations made in the absence of evidence of that purpose. Furthermore, if the silence of Congress from 1842 to the present was a practical construction of the statute in accordance with the interpretation in *Swift v. Tyson,* its silence from 1797 to 1842 when the Supreme Court was construing the statute in the way which the majority has now construed it[24] in *Erie Railroad Company v. Tompkins* was a practical construction. One construction would tend to neutralize the persuasive force of the other as evidence.

Of course, Congressional silence does not amount to an enactment of the interpretation in *Swift v. Tyson.* It merely indicated that there was no group interested and powerful enough to attract the attention of Congress from more pressing problems.

The only objection which can be offered to the majority's interpretation is that there is no evidence that either the senators or representatives ever saw the original draft of Section 34. It was offered as an amendment to

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[21]58 Sup. Ct. 817, 827 (1938).

[22]A Brief History of the English Language, by James Hadley, revised by George Lyman Kittredge in Webster's New International Dictionary, 2d ed.

[23]Roche v. Jordan, 175 Fed. 234 (C. C. E. D. N. Y. 1909); Frey v. Michie, 68 Mich. 323, 36 N. W. 184 (1888); Deutchman v. The Town of Charlestown, *et al.,* 40 Ind. 449 (1872); Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526 (1896); Slutts v. Dana, 138 Ia. 244, 115 N. W. 1115 (1908); State v. Lancashire Fire Insurance Co., 66 Ark. 466, 51 S. W. 633 (1899); SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW (2d ed. 1874) 214; BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS (2d ed. 1911) 95.

[24]Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 88; Meigs, *Decisions of the Federal Courts on Questions of State Law* (1882) 8 So. L. REV. (N. S.) 452, 458, 45 AMER. L. REV. 47, 55.

the first draft of the Judiciary Act when the bill initiated by its committee was being considered by the Senate. Warren says that the wording of the amendment was changed by Ellsworth before it was introduced but does not give the evidence from which he draws this conclusion.[25] It is just as probable that the change was suggested by some other member of the Senate after the original draft had been read to the Senate sitting as a committee of the whole, and that the change was accepted by Ellsworth and then made on the document.

One view is that committee reports and the speeches of committee members explaining and supporting the bill, like the speeches of ordinary members, are not evidence of the purpose of the enacting body.[26] This is because they only tend to show the purpose of one house and not that of the other house nor of the executive,[27] just as the speeches of individual members only tend to show the purpose of that member. A realistic appreciation of the legislative process has made it clear that the use of this material is about the only way in which the collective intention of the legislative body can be ascertained.[28] If the meaning of the language is clear, the collective purpose can be derived from it. The inference is that the legislative body meant what it said. Where, however, there are ambiguities in the language the best that can be done is to infer that its purpose was the purpose of the committee in charge.

Similarly, where there is an ambiguity in a section added to a statute by amendment of the original draft, the purpose of the legislative body must be taken to be the purpose of the member offering the amendment.[29] This will be so whether or not that purpose was communicated to the legislative body in a report or by speeches.[30] The reports of a committee of one house and the speeches of committee members or of a member introducing an amendment are not necessarily communicated to the members of the other house or to the executive. The only possible inference is that the body or the executive approving without information as to the purpose behind ambiguous language intended to adopt the purpose of those responsible for the language regardless of what it was.

In this case, not only was Oliver Ellsworth, in whose handwriting the original draft and alteration is, the member responsible for the amendment,

[25]Warren, *supra* note 24, at 86.
[26]Davies, *The Interpretation of Statutes in the Light of Their Policy by the English Courts* (1935) 35 COL. L. REV. 519, 531.
[27]Millar v. Taylor, 4 Burr. 2303, 2332 (1769).
[28]Landis, *A Note on "Statutory Interpretation"* (1930) 43 HARV. L. REV. 886; Chamberlain, *The Courts and Committee Reports* (1933) 1 U. OF CHI. L. REV. 81.
[29]United States v. St. Paul, M. and M. R. Co., 247 U. S. 310 (1918); Chamberlain, *supra* note 28, at 82 and 85.
[30]"A mere expression of assent becomes in reality a concurrence in the expressed views of another." Landis, *supra* note 28, at 889.

but he was also chairman of the committee of ten senators appointed by the Senate to draft the bill. Although there is no evidence that the senators saw the original draft, it is probable that they did. There were only twenty men in the Senate and the creation of a federal judicial system was the first and most important matter to come before them. In all probability the original draft with the crossed out portions clearly legible was handed about. That it was available for inspection is a fair inference from the fact that it was found in the Senate files.

Constitutional Question

It would seem that there was no constitutional question before the court. It was not suggested that the construction of the phrase "laws of the several states" to include the decisions of state courts violated any provision of the Constitution. Justice Brandeis apparently felt that something was needed besides a showing that the previous interpretation was erroneous in order to change a construction adhered to for nearly a century. Why should not error be corrected when discovered no matter how long it has been adhered to? It does not appear that either party had changed his position relying upon the previous construction. The change does not involve any unfairness to the parties. Justice Brandeis unwittingly assumes that the previous decisions are "law" which the court cannot change unless it violates the Constitution. He assumes that unless the "law" is unconstitutional, change is the province of Congress even though the "law" involved was made by the Court. If the previous decisions or the rule announced in them is "law", it would seem that the Court conld undo what it has done, could change what it has made. If it could go ahead in the cases which established the old construction without waiting for an authoritative interpretation from Congress, it can apply a different rule as soon as it has determined that the original construction was erroneous, without waiting for an Act of Congress. We have the authority of the Supreme Court itself for this.[31]

[31]Benson v. United States, 146 U. S. 325 (1892); Rosen v. United States, 245 U. S. 467 (1918); Funk v. United States, 290 U. S. 371 (1933). In *Funk v. United States,* Justice Sutherland said, "It may be said that the court should continue to enforce the old rule however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. And that implication, we think, rests upon substantial ground." (pp. 381-2). "To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice', and at the same time to say that the courts of this country are forever bound to perpetuate

If the constitutional question should arise how should it be decided? Justice Brandeis said that no clause in the Constitution conferred on either Congress or the federal courts the power to fix the rules of substantive law for cases arising under the diversity of citizenship jurisdiction. This is a conclusion, for it is a question whether or not the power is conferred by Section 2 of Article III and the "necessary and proper" clause of Article I, Section 8. Article III, Section 2 provides:

> "The *judicial power* shall extend . . . to controversies . . . between citizens of different states . . . ."

What is judicial power? Is it merely power to try the enumerated classes of cases or does it also include power to decide what the substantive law is which is to be applied? State courts determine what the law is in adjudicating controversies to which statutes do not apply. The judicial power conferred on the Federal Government must include this power.[31a] However, it does not follow that the law thus ascertained would be *federal* law. What kind of law did those who framed Article III intend that the federal courts should determine? Was it their purpose to confer power to decide what *national* law is in the enumerated fields or was it merely to confer jurisdiction to adjudicate cases involving the enumerated subject matters, the law incidentally determined to be state law?

An examination of the proceedings of the Constitutional Convention reveals that the words "The judicial power" were substituted for the words "The jurisdiction of the Supreme Court" with which the Section began when it was reported to the Convention by the committee of detail.[32] By Section 1 of Article III the judicial power was vested in "one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish". It would seem that the purpose of the change was to make it clear that jurisdiction over the enumerated subject matters was conferred not only on the Supreme Court but also on such inferior courts as Congress should establish. It would seem that no change in meaning was intended by the change from the word "jurisdiction" to the words "judicial power", the latter being used merely because they already appeared in Section 1. Apparently the meaning is the same as though the section read: "The jurisdiction

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such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin." (p. 383).

[31a] Powell, *loc. cit. supra* note 1.

[32] 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911) 425, 431; 5 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION (2d ed. 1881) 483. The wording as reported by the committee of detail may be found in 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION (1911) 186. See Powell, *loc. cit. supra* note 1.

of the Supreme Court and such inferior courts as the Congress shall establish shall extend to . . . ," etc. The conclusion to be drawn from the proceedings of the Convention is that the purpose of the framers of Article III, Section 2 was merely to confer jurisdiction to adjudicate cases involving the enumerated subject matters and not to confer power to determine national law on these matters.

However, the Supreme Court, by a vote of five to four in *Southern Pacific Co. v. Jensen*,[33] reached the opposite conclusion. It held that the legislature of New York could not make its workmen's compensation act applicable to injuries received by men employed in unloading vessels although there was no federal statute applicable to the case. Justice McReynolds said that the *judicial power* conferred on the United States by Section 2 of Article III conveyed power to apply "*national* law". In the absence of statute, national law was "*general* maritime law as accepted by the federal courts". Some state legislation was permissible but not any which "interferes with the proper harmony and uniformity of that law in its international and interstate relations". The New York statute "destroyed" uniformity, "hampered and impeded" navigation, and injured commerce. Thus an important factor in the decision was the idea that the statute imposed a burden on interstate and foreign commerce, a question which should have received separate consideration. A factor which influenced the decision was a statute which conferred on the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it".

Justice Pitney, dissenting, said that:

(1) "The framers of the Constitution intended *to establish jurisdiction* —the power to hear and determine controversies of the various classes specified—and *not to prescribe particular codes or systems of law* for the decision of those controversies; . . . ."
(2) At the time the Constitution was adopted the jurisdiction of admiralty courts was not exclusive, and the common law courts had concurrent jurisdiction in a large class of matters.
(3) Admiralty courts then applied local law, including statutes.[34]

Justice Holmes dissented, saying that there was no common law of the United States; that "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified; . . . . It always is the law of some state." Justice Brandeis

[33]244 U. S. 205 (1917).
[34]Admiralty courts in adjudicating transitory causes of action arising in foreign territorial waters apply foreign law. STIMSON, CONFLICT OF CRIMINAL LAWS (1936) 146-147, and cases there cited.

joined in the dissent, continued to dissent in subsequent cases in which the decision was followed,[35] and from his dictum in *Erie Railroad Co. v. Tompkins* it is plain that he is of the same opinion still. Justice McReynolds' dogmatic assertion that the judicial power conferred by Article III, Section 2 included power to apply national law, his confusion of the issue with the question whether interstate or foreign commerce were burdened, and the arbitrary character of the decisions sustaining the application of local law on the ground that in the particular case it did not interfere with "the proper harmony and uniformity" of the "general", "national" maritime law "in its international and interstate relations",[36] indicates that now the *Jensen* case is more likely to be overruled than it is to offer an obstacle to the contrary conclusion suggested by the records of the Convention.

In a dictum in *Southern Pacific Co. v. Jensen,* Justice McReynolds said that the "necessary and proper" clause of Article I, Section 8, gave Congress power to legislate on admiralty and maritime matters. Justice Reed suggested in his concurring opinion in *Erie Railroad Co. v. Tompkins* that power may have been conferred on Congress by this clause. It is as follows:

> "The Congress shall have power. . . . To make all laws which shall be necessary and proper for *carrying into execution* the foregoing powers [those specifically conferred on Congress] and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."[37]

The dictum seems unwarranted because:

(1) The clause seems only to enable Congress to make laws for *carrying into execution* the powers conferred on other departments of the government and not to authorize them to exercise those powers.

(2) The Convention refused to amend Section 2 of Article III by inserting after the sentence fixing the original jurisdiction of the Supreme Court the words:

> "In all the other cases mentioned the judicial power shall be exercised in such manner as the legislature shall direct."[38]

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[35]Chelentis v. Luckenbach S. S. Co., 247 U. S. 372 (1918); Union Fish Co. v. Erickson, 248 U. S. 308 (1919); Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1919); State of Washington v. W. C. Dawson and Co., 264 U. S. 219 (1923); London Guarantee and Accident Co. Ltd. v. Industrial Accident Commission of California, 279 U. S. 108 (1929); Baizley Iron Works v. Span, 281 U. S. 222 (1930); Employer's Liability Assurance Corp. Ltd. v. Cook, 281 U. S. 233 (1930). Except in Union Fish Co. v. Erickson, *supra.*

[36]Western Fuel Co. v. Garcia, 257 U. S. 233 (1921); Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469 (1922); Millers' Indemnity Underwriters v. Brand, 270 U. S. 59 (1926); Alaska Packers' Ass'n v. Industrial Accident Commission of California, 276 U. S. 467 (1928); Sultan Railway and Timber Co. v. Department of Labor and Industries of Washington, 277 U. S. 135 (1928). For example, a state workmen's compensation act was held to interfere with the uniformity of national maritime law in the *Jensen* case while a state wrongful death statute was held not to in *Western Fuel Co. v. Garcia, supra.*

[37]Italics the writer's.

[38]2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 425, 431; 5 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION (2d ed. 1881) 483.

> This would seem to indicate that the Convention did not intend that this section should confer power on Congress to make the substantive law in the classes of cases in which judicial power was given to the federal government.

The Problem

The real problem involved in *Swift v. Tyson* and *Erie Railroad Co. v. Tompkins,* a problem left unsolved by the opinion in the latter, is the question of what the law of a state is when the decisions of its courts are conflicting. Similar problems were involved in most of the cases in which the doctrine of *Swift v. Tyson* was applied. What is the law of a state when its courts have never passed on the issue? What is it when the latest decision is very old and the whole course of decision has changed since that day, or when it is recent but obviously unjust so that the state court itself might be expected to overrule its previous decision? If the applicable law has been changed since the occurrence of the event the legal effect of which is in question, by a reversal of previous decisions, as of what time should the federal courts ascertain it?[39] These problems confront not only the federal courts but also any court; that is, whether the law to be applied is that of another state or its own.[40] They are aspects of the question: What is law?

Nature of Law

Without attempting to examine the nature of law in all of its aspects, it will help in the solution of the questions raised above if two different meanings of the term "law" which are well recognized are kept in mind.[41] It may be used in the sense of principle, rule, or hypothesis of right or justice, just as a law of physics is a principle of truth.[42] While some of these principles

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[39]See Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336, 1350. Story's dictum may have been due to his nationalism as suggested by Waterman, *The Nationalism of Swift v. Tyson* (1933) 11 N. C. L. REV. 125; but the problem in that case and in practically all of the cases in which the "general law" doctrine has been applied is the problem of what the law of a state is under peculiar conditions of the case law such as those stated. Shelton in his article completely ignores the problem, assuming that the decisions of (state) courts are law. Shelton, *Concurrent Jurisdiction —Its Necessity and Its Dangers* (1928) 15 VA. L. REV. 137, 144.

[40]Stimson, *Which Law Should Govern?* (1938) 24 VA. L. REV. 748, 756 n. 27.

[41]Pound, *Theories of Law* (1912) 22 YALE L. J. 114; *More About the Nature of Law,* LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY (1935) 513; Green, *The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts* (1924) 19 ILL. L. REV. 217.

[42]Green, *supra* note 41. Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts* (1910) 4 ILL. L. REV. 533.

Professor Gray attempted to reduce the view that law preexists, is found by the courts, and is not their decisions (*i.e.,* that non-statutory law is a principle of truth, right or justice) to an absurdity by asking, "What is the law in the time of Richard Coeur de Lion on the liability of a telegraph company to the persons to whom a message was sent?" GRAY, THE NATURE AND SOURCES OF THE LAW (1909) § 222. While it is true that the question of the liability of a telegraph company for its failure to deliver a

may vary with local custom, many are universally or generally true in the sense that justice would require the same solution to the problem anywhere. Law as a principle of right or justice may be universal or general. The term law may also be used to mean the principles, rules, or hypotheses which the courts will enforce. These would be difficult to predict without inferences from decisions or rules announced in the past by authoritative agencies of the state whose law is applicable. Authoritatively announced rules are territorial and local since the authority of a state's agency does not extend beyond the territory controlled by it.

Authoritatively announced rules are not the sole basis of decisions and therefore not the sole basis for predicting the future action of courts. When statutes are applicable courts must apply them regardless of the justice of the result (that being the responsibility of the legislature); but in cases where statutes do not apply, the function of a court is to do justice between the parties if practicable. The rules announced in previous decisions are persuasive only and will be changed and the decisions overruled if they produce injustice. They are constantly subject to critical comparison with principles of justice and give way before them.

Not all of the finer principles of ethics or good conduct can be enforced. Absolute justice is impracticable. Time, expense and inconvenience would be too great a price to pay for the minor good secured. There is an area within which public opinion will not consent to regulation and conduct must be left uncontrolled except for the moral restraint which individuals impose of themselves.[48]

General Law

Who was right, Story or Holmes? Is there a general law or is there no such "brooding omnipresence in the sky". Does this not depend upon the aspect of law which you have in mind? If one has in mind authoritatively announced rules, then there is no general law; for each pronouncement is authoritative in a certain area only. It is territorial and local. If one has in mind principles or rules of justice, then while some may vary with local custom, many will be general in the sense that everywhere the application of the same principle will be essential to a just solution of the problem. Thus both Story and Holmes were right. More specifically each was right in the case in which he expressed his view. In *Swift v. Tyson* where there were conflicting state court decisions, Story was right in resorting to a general

message correctly could not have come before the courts in the time of Richard Coeur de Lion, had a court of that day had the problem it would have endeavored to render a just decision and the principle of truth, right or justice would be the same then as it is now. Professor Gray's *reducto ad absurdum* assumes that truth does not exist unless it is written.

[48]Pound, Law and Morals (2d ed. 1926) 63-64.

principle or rule of justice as evidenced by the weight of authority elsewhere. In *Southern Pacific Co. v. Jensen,* Justice Holmes was right in pointing out that the authoritative aspect of law could not be ignored; that since there was no national common law the authoritative New York workmen's compensation act could not be set aside in favor of any general principle derived from common law.

Customary Law

Much law is customary and formal. A formal ceremony which is customary induces parties to think twice before taking an important step, fixes the transaction in their memories, establishes it in point of time and gives it publicity or objectivity which makes subsequent successful denial of the occurrence difficult. It does not make much difference what the formality is. All that is essential is that it be understood in the locality where it is employed. Customary or formal law is frequently different in different states and countries. That which prevails in one is neither more nor less just than that which prevails in another. It is not general law because application of the same rule is not everywhere necessary to a just solution of the problem. Since the state court's duty to do justice will not require it to overrule its previous decisions of this type, Story was right in recognizing that the authoritatively announced local rules must be applied. This applies to such real property rules as are customary and formal.

Effect of the Decision

Types of Cases in Which the Judicial Process and the Result Will Be the Same

1. conflicting decisions

If the problem is one upon which the decisions of the highest court of the state whose law is applicable are conflicting and the inconsistent earlier decisions have not been specifically overruled, what is the state law which the federal court must apply? In *Swift v. Tyson,* the New York Court of Errors had never passed on the question; but, according to Story, the New York Supreme Court had three times decided it one way and three times the other. In *Folsom v. Ninety Six,*[44] two absolutely inconsistent decisions of the state supreme court had been handed down between the time when the cause of action arose and the time when it came before the federal court. The Supreme Court said: "There not being shown to have been a single decision of the state court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, *nor any settled course of decision* upon the subject, even since his purchase, the question of the validity of these

[44]159 U. S. 611 (1895).

bonds must be determined by this court according to its own view of the law of South Carolina."[44a] On the other hand, in *Townsend v. Todd,*[45] where the decisions of the state supreme court were conflicting, the United States Supreme Court followed the last state court decision without attempting to exercise its own independent judgment.

Folsom v. Ninety Six involved the interpretation of the state constitution; and *Townsend v. Todd,* the construction of a statute. Although Story said that the term "laws" in Section 34 of the Judiciary Act was to be understood as meaning "statutes" and "the construction thereof adopted by the local tribunals",[46] the problem presented by conflicting decisions is the same whether they involve the interpretation of a statute, the construction of the state constitution, or a question of "common law".[47] The course pursued in *Folsom v. Ninety Six* and *Swift v. Tyson* is preferable to that pursued in *Townsend v. Todd.* The federal courts must continue to pursue it. They must proceed in the same way that the state court would proceed.[48] That court would not be bound to follow the last decision. It would reëxamine the question and attempt to reach the best solution. In cases like *Folsom v. Ninety Six,* the federal courts will make their own effort to ascertain the purpose of the state constitutional convention. In cases like *Townsend v. Todd,* they will endeavor to ascertain independently the object of the legislature.[49] In cases like *Swift v. Tyson,* they will exercise their own independent judgment in seeking a just solution. They will seek to find a principle of justice. In doing so all pertinent knowledge will be employed, including the truths of the social sciences and the solutions arrived at by courts in other jurisdictions. In this type of case the result can be said to follow from an application of general law, for the law of the state is a principle which would be required anywhere to secure a just solution of the problem.

2. NO DECISIONS

If the courts of the state whose law is applicable have never passed on the problem, what is the law which the federal court must apply? Is there any law? The federal court must do what it thinks a court of the state whose law is applicable would do, but that court would have the same problem. Should it impose and enforce a duty when there has been no prior announcement of it by an authoritative agency of the state? Whether non-statutory

[44a]159 U. S. 611, 627 (1895).
[45]91 U. S. 452 (1875).
[46]See the analysis of *Swift v. Tyson, supra* pp. 54-56.
[47]See Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 HARV. L. REV. 328, 338.
[48]See Green, *The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts* (1924) 19 ILL. L. REV. 217, 221-224.
[49]See notes 51, 52, and 53 *post.*

law is a principle which the courts will enforce or a principle of justice practically enforcible, authoritative announcement is not essential to it. If there is no decision of a court of the state whose law is applicable, it is more difficult to predict and so more difficult for a federal court to do what the state court would do. There are, however, other means of prediction. The decisions of courts in other jurisdictions are useful although not authoritative. Other learning may be pertinent. In the absence of decisions elsewhere a state court would endeavor as best it could to reach a just result. That courts do this is well known. The fact that a case is one of first impression either in the state or in the world will not prevent them from imposing and enforcing a duty which is just and practically enforcible.

The objection has been made that in doing this courts are legislating or making law and applying it retroactively. Whether this objection has any validity depends upon (1) whether courts make law, and (2) whether if they do there is any injustice in applying it retroactively. It would seem that in deciding these cases courts merely ascertain and apply custom or a principle of justice practically enforcible. It would seem that the custom or practically enforcible principle of justice was the law rather than the decision. However, since decisions are the principal means of predicting what courts will do in future decisions and are relied upon by the public, they are law in the sense that persons who change their position in reliance upon the rules announced in them will have those rules applied to their conduct even though it is subsequently determined that they were erroneous.[50] In this sense, then, the courts can be said to make law or legislate. If they do, the law made is applied to determine the legal effect of conduct or an event which occurred at a time prior to the decision—a retroactive application. There seems to be no injustice in this for two reasons. (1) Only the authoritative aspect of the rule is new, the custom or principle of justice being in existence or ascertainable at the time of the conduct or event the legal effect of which was determined. (2) The parties have not been misled because they were not justified in relying on any other course. It is preferable to require them to expect law in the sense of custom or justice to be applied than to leave them free to assume that there is no law on the question.

There are a number of decisions in cases of this class by the Supreme Court of the United States. They all involve the interpretation of state statutes. In two, *Swift v. Tyson* is referred to in the opinion.

In *Burgess v. Seligman*,[51] the federal district court was called upon to determine whether a Missouri statute exempting the pledgees of corporate stock from the personal liability of stockholders applied to one who received

[50]See § 3, b, *"Erroneous Decisions—Relied Upon," post.*
[51]107 U. S. 20 (1882).

stock as a pledge from the issuing corporation. It held that the statute applied. Subsequently the Supreme Court of Missouri in two decisions reached the opposite conclusion. The United States Supreme Court held that it was not obliged to follow the state decisions because the duty of the federal courts was "to exercise an independent judgment in cases not foreclosed by previous adjudication".

In *Burns Mortgage Co. v. Fried,*[52] the question was whether a stipulation in a note made it non-negotiable. The stipulation was for interest at a specified rate until paid and at a higher rate on deferred interest payments. The applicable law was that of Florida. The Uniform Negotiable Instruments Law adopted in that state provided that for an instrument to he negotiable the promise or order must be to pay a "sum certain in money" and that a sum is certain "although it is to be paid with interest". There were no decisions in Florida construing the statute. In the opinion Justice Roberts said:

> "The absence of a decision by the Supreme Court of the state did not relieve the courts below from applying the Florida statute. Lacking such authoritative construction, their duty was to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to the same sections of the Negotiable Instruments Law."

Applying the decisions of courts of other states just as Story did in *Swift v. Tyson,* the Court held the note negotiable, denying at the same time that the general law doctrine could be applied to the construction of statutes codifying the common law.

The method employed in the two decisions above is employed in the others.[53] The same judicial process would seem to be required when statutes are not involved.

3. ERRONEOUS DECISIONS

If the problem is one upon which the decisions of the courts of the state whose law is applicable are erroneous, what is the state law which the federal court must apply? Are the rules announced in these decisions law which the court must apply? If the rules applied in previous decisions are law, courts would be bound to apply them until they were changed by the legislature. They could not repudiate the rule, overrule the decisions and apply a different

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[52]292 U. S. 487 (1934).

[53]Siler v. Louisville and Nashville R. R. Co., 213 U. S. 175 (1909); Risty v. Chicago R. I. and Pac. Ry. Co., 270 U. S. 378 (1926); Railroad Comm. of California v. Los Angeles Railway Corp., 280 U. S. 145 (1929). See Fordham, *Swift v. Tyson and the Construction of State Statutes* (1935) 41 W. VA. L. Q. 131; *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. CAR. L. REV. 423; and McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 33 ILL. L. REV. 126, 136.

rule. If the rules applied in previous decisions are not law, they can never be relied upon. Persons who change their position relying upon them would be unfairly or unjustly treated if a different rule were applied. A loss would be caused them by changing the rule after they had altered their position relying on the previous rule.[54] In this dilemma it would seem well to treat cases in which a party had changed his position relying on the previous rule differently from those in which there had been no such change or reliance That is what the courts do.

a. *Not relied upon*

When the rule announced in previous decisions has not in fact been relied upon, courts generally will repudiate the rule, overrule the decisions and apply a new rule to the prior conduct or prior event when convinced that the old rule is erroneous or produces injustice. They do so whether the decisions are old or recent, many or few, although more hesitant about repudiating a rule recently or repeatedly followed than one announced in one or two old cases. It would seem, therefore, that law is not a rule applied in previous decisions but a practically enforcible principle of justice or the purpose of the legislature or constitutional convention and a forecast of what courts will do in the future. There are, of course, some melancholy instances where courts have sorrowfully applied the rule of previous decisions although convinced that it was erroneous or would produce injustice.[55] They have looked upon rules applied in previous decisions as law which must be applied until changed by the legislature[56] although those rules were established in cases where they were attempting either to do justice in the absence of legislation or to ascertain correctly the purpose of the legislature or constitutional convention. Neither party having relied upon it, previous error ought not prevent a just or correct decision.

Is the course generally followed objectionable because the newly discovered rule is applied to prior conduct or a prior event? It would seem not to be for two reasons. (1) The application of the new rule is retroactive only in its authoritative aspect since the principle of right or justice or the purpose of the legislature or constitutional convention was ascertainable at the time of the conduct or event to which it is applied. (2) The parties have not been

[54]See *supra* p. 68.

[55]See, for example, *Ex parte* Carey, 306 Mo. 287 (1924). In this case a statute provided that in case of an appeal from a criminal conviction a judge "may" let the defendant to bail. In several earlier cases the Supreme Court of Missouri had held that this entitled the convicted man to be released on bail as a matter of right. In this case Ragland, J., stated that these previous cases were obviously wrong but that "the remedy lies with the legislature rather than with this court".

[56]This view is taken by Charles N. Campbell. Campbell, *Is Swift v. Tyson an Argument For or Against Abolishing Diversity of Citizenship Jurisdiction?* (1932) 18 A. B. A. J. 809, 810, discussing Cole v. Pennsylvauia Railroad Co., 43 F. (2d) 953 (C. C. A. 2d 1930).

misled. Not knowing the decisions they should have expected that the courts would do justice or interpret statute or constitution correctly.[57]

May an inferior court refuse to apply a rule, applied in the decisions of the highest court of the state whose law is applicable, which it believes is erroneous or unjust, or must it obey? Some have thought that an inferior court must obey.[58] It is submitted that it has no such duty. Its duty is to apply constitution and statute as the constitutional convention and legislature intended them to be applied, and in cases where constitution or statutes do not apply, to do justice between the parties. If it is convinced that the rule applied in the decisions of the highest court of the state whose law is applicable is wrong, it should not apply it. It should anticipate the overruling of these decisions. By doing so it is less likely to be reversed. By correctly forecasting what the highest court of the state will do, it will save the parties time and expense in case of an appeal and hasten the adaptation of the law to changing conditions.

It would seem that a federal court in diversity of citizenship cases should do what a court of the state whose law is applicable would do. If a party's case is tried in a court of the state whose law is applicable, he would have an opportunity to argue that an unfavorable rule previously followed was erroneous or productive of injustice. If successful in persuading the court, the rule would not be followed when neither party had relied upon it. In a federal court he should have the same opportunity. Otherwise he will be denied a right which he would have had in a court of the state whose law is applicable.[59]

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[57]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (*Lecture IV, Adherence to Precedent*) 142, 146. At p. 128 he says: "Obscurity of statute or of precedent or of custom or of morals, or collision between some or all of them, may leave the law unsettled, and *cast a duty upon the courts to declare it retrospectively* in the exercise of a power frankly legislative in function." Italics the writer's.

[58]Justice Miller dissenting in Gelpcke v. City of Dubuque, 1 Wall. 175, 208 (U. S. 1863); GRAY, NATURE AND SOURCES OF LAW (1909) §§ 541, 542.

[59]See Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336, 1350, where he says: "Does this carry the power to disregard a state decision on the ground that it will doubtless be overruled by the state court at the first opportunity?" and McCormick and Hewins, *The Collapse of "General" Law in the Federal Courts* (1938) 38 ILL. L. REV. 126, 136, where they say: "A Federal District Court, or even the Circuit Court of Appeals or the Supreme Court, will endeavor to rule as it believes the state supreme court would now rule, as evidenced by its past decisions or considered dicta, and not as it believes that court *should* do, unless some patent mistake in a past decision, or some radical change of conditions, gives realistic grounds for believing that the past decision would not be adhered to."

Prof. Frankfurter in emphasizing the desirability of uniformity of decision in causes arising within a state overlooks the fact that if justice is to be done rules of law springing from erroneous decisions must be corrected in the first case in which the question arises. If law is to advance and the rules to be improved there must be pioneer decisions. For a time these decisions will diverge from the weight of authority but if they are just they will be followed and the old erroneous rule be abandoned. See HOLMES, THE COMMON LAW (1881) 35-36; Yntema, *The Jurisdiction of the Federal*

In *Railroad Co. v. Lockwood*,[60] the owner of cattle shipped from Buffalo to Albany was riding with them when injured. He was riding on a pass received as a part of the contract of carriage which contained a clause exempting the railroad from liability for personal injuries caused by the company's negligence. The applicable law was that of New York. Its courts had held the limitation of liability valid. The United States Supreme Court sustained the district court in its refusal to follow these cases.

In *Bucher v. Cheshire Railroad Co.*,[61] a passenger on a railroad in Massachusetts was injured while traveling on Sunday. A Massachusetts statute provided that, "Whoever travels on the Lord's Day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars." The Supreme Court of Massachusetts, in a long line of decisions, had held that violation of the statute barred recovery though the injury was due to negligence attributable to the railroad. A statute, enacted after plaintiff was injured, intended to reverse the rule established in these cases was held inapplicable to prior conduct. The United States Supreme Court sustained the district court which followed the state court decisions. It said the question was one of local law.

In each case the district court could have found that the application of the rule of the state decisions would produce such injustice that the high court of the state would itself refuse to follow its previous decisions if the case were before it. Is not the course pursued in *Railroad Co. v. Lockwood* preferable to that followed in *Bucher v. Cheshire Railroad Co.*?

In *Baltimore and Ohio Railroad Co. v. Baugh*,[62] a fireman sued his railroad company employer for damages for personal injury caused by the negligence of the engineer with whom he worked. The applicable law was that of Ohio. The supreme court of that state in several like cases forty years or more old had permitted recovery. In most of the decisions in other states recovery was denied on the ground that the engineer was a fellow servant. The United

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Courts in Controversies Between Citizens of Different States (1933) 19 A. B. A. J. 71, 74. Federal courts applying state law must do their part.

Prof. Frankfurter points out that the rule of *Swift v. Tyson* was not followed in New York; that subsequently the contrary was decided in Stalker v. McDonald, 6 Hill 93 (N. Y. 1843), but he fails to note that *Stalker v. McDonald* was superseded by Section 25 of the Uniform Negotiable Instruments Act adopted by the legislature of New York (Consol. Laws, c. 39, § 51) so that the federal rule eventually prevailed in New York. Kelso v. Ellis, 224 N. Y. 528, 121 N. E. 364 (1918). It is submitted that it was the just rule. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORNELL L. Q. 499, 528-529.

[60] 17 Wall. 357 (U. S. 1873). Accord: Liverpool and Great Western Steam Co. v. Phenix Insurance Co., 129 U. S. 397 (1888). See also Lane v. Vick, 3 How. 476 (U. S. 1845); Russell v. Southard, 12 How. 139 (U. S. 1851); Watson v. Tarpley, 18 How. 517 (U. S. 1855). With the last two cases, *cf.* Camden and Suburban Railway Co. v. Stetson, 177 U. S. 172 (1900).

[61] 125 U. S. 555 (1887).

[62] 149 U. S. 368 (1893).

States Supreme Court sustained the district court in its refusal to follow the Ohio decisions. It thought that principles of right and justice embodied in the "common law" required a different result. While it is difficult to agree with the Supreme Court's idea of right and justice, it was right in seeking to ascertain what justice was instead of blindly following the old Ohio decisions. It erred in relying on the weight of authority as the sole evidence of right and justice at a time when workmen's compensation laws had come into existence in some states.

Only if we assume that the rule applied in erroneous decisions of the courts of the state whose law is applicable is the law of that state will *Erie Railroad Co. v. Tompkins* prevent the federal courts from employing the method sustained in *Railroad Co. v. Lockwood* and *Baltimore and Ohio Railroad Co. v. Baugh.*[63]

b. *Relied upon*

Although the rules applied in previous decisions are not law, they are the principal evidence of what the practically enforcible hypotheses or principles of truth, right and justice are which courts will enforce in the future. They are the most reliable means of forecasting what courts will do in the future. Persons who change their position in reliance upon them ought not suffer loss by reason of a change in the rules. So when a party has changed his position in reliance on a rule applied in previous decisions, the courts will apply that rule in adjudicating his case although they are convinced that it is erroneous or that it would produce injustice if applied in cases where neither party had parted with property or made commitments in reliance upon it. When a party has changed his position in reliance on the erroneous old rule, an *ex post facto* application of newly discovered truth would be unfair and unjust.[64] Because of the difficulty of knowing what justice is, a party who has relied upon the rule previously applied is favored over the

[63]It is submitted that the sound view is that expressed by Justice Matthews in a dictum in Smith v. Alabama, 124 U. S. 465, 478 (1887). He said: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. Wheaton v. Peters, 8 Pet. 591. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. v. Lockwood, 17 Wall. 357, where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of that state."

[64]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 147, 151.

party who relied upon justice or the correct principle when he could have acquainted himself with the previously applied rule.

An example of this is *Edward Hines Yellow Pine Trustees v. Martin.*[65] Suit was brought in a federal district court in Mississippi to quiet title to land there. Both petitioner and defendants relied upon patents issued by Mississippi to those through whom they claimed by mesne conveyances. The patent to petitioner's predecessor was prior in time. In 1888 after both patents had been issued, the Supreme Court of Mississippi had occasion to consider the patent upon which petitioner relied in a case involving other parcels. It held that the statute pursuant to which the patent was issued requiring a bond to be filed by the patentee was not satisfied by one signed by more than the requisite number of "good securities" but not signed by the patentee and that the patent was void.[66] In 1900 the Circuit Court of Appeals for the Fifth Circuit reached a contrary conclusion.[67] In 1924 the Supreme Court of Mississippi refused to reëxamine the correctness of its decision of 1888[68] on the ground that it had become a rule of property which could not then be departed from.[69] The federal district court did the same. Judgment for defendants was affirmed by the United States Supreme Court. It did so on the ground that the rule applied in the Mississippi decision of 1888 was a rule of property affecting title to real estate upon which the federal courts follow the decisions of state courts. Although the dates of the mesne conveyances are not given, the defendants must have acquired their interests after 1888 as the case was not argued in the Supreme Court until 1925.

The rule that rules of property will not be departed from and Story's exception to his general law doctrine for "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matter immovable and intraterritorial in their nature and character" are merely ways of stating the principle. The reason for this refusal to correct error is the fact of a change in position by one of the parties relying on the rule announced in the previous erroneous decision.[70] That the principle is not limited to real estate[71] or "things having a permanent locality" is shown

[65]268 U. S. 458 (1925).
[66]Hardy v. Hartman, 65 Miss. 504 (1888).
[67]Southern Pine Co. v. Hall, 105 Fed. 84 (1900).
[68]Reaffirmed in Becker v. Columbia Bank, 112 Miss. 819 (1917).
[69]Edward Hines Yellow Pine Trustees v. State *ex rel.* Moore, 134 Miss. 533 (1924).
[70]See Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 COL. L. REV. 230; Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal* (1931) 17 A. B. A. J. 180.
[71]Heiskell, *Conflict between Federal and State Decisions* (1882) 16 AMER. L. REV. 743, 759; Trickett, *Non-Federal Law in Federal Courts* (1906) 40 AMER. L. REV. 819, 823.
"I think it will be found that the high regard of courts for rules of property is in a large part based upon their total want of power to make decisions operate other than prospectively." Heiskell, *loc. cit. supra.*

by *Anderson v. Santa Anna*[72] where the validity of the bonds of an Illinois municipality was sustained by applying Illinois Supreme Court decisions existing when the bonds were issued. *Gelpcke v. Dubuque*[73] and similar cases subsequently considered illustrate the same principle.

When courts apply a rule established in previous erroneous decisions although convinced that it is wrong they should declare that it will not be applied to subsequent conduct or events, thus giving fair warning and effectively preventing future change of position in reliance on the old rule.[74] This should be done by federal courts in diversity cases as well as by state courts since both independently declare the law of the state. There may be a temporary divergence but truth will ultimately triumph.

4. DECISIONS SUBSEQUENT TO THE CONDUCT OR EVENT THE LEGAL EFFECT OF WHICH IS IN QUESTION

What is the law of a state when the only decisions or the latest decisions of its highest court on the point in issue were decided subsequent to the time of the conduct or event the legal effect of which is in question? Must federal courts in diversity cases apply the rules of these decisions? If law is a practically enforcible principle of truth, right or justice, the answer must be no, for the federal courts employing their independent judgment are as capable of ascertaining what truth, right or justice is as are the state courts.[75] If law is a forecast of what the courts of the state whose law is applicable will do, then subsequent decisions would seem to be some evidence of their future conduct. However, if they are followed without question the court would be abandoning its duty which in every case is to do justice or to apply constitution or statute as the constitutional convention or legislature intended it to be applied. It must exercise its independent judgment in doing so. If it is convinced that the state decisions are erroneous or would produce injustice the only proper forecast is one which assumes that the state court will ultimately correct its error and that truth, right and justice will prevail. If law is the rule applied in previous decisions, then the rule applied in the decisions being considered here was not law at all at the time of the conduct or event the legal effect of which is in question.

In a great many cases the Supreme Court of the United States has held that the district courts were not bound to apply decisions of the Supreme

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[72]116 U. S. 356 (1886).
[73]1 Wall. 175 (U. S. 1863), *post* note 81.
[74]*Supra* note 70.
[75]Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts* (1910) 4 ILL. L. REV. 533; Green, *The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts* (1924) 19 ILL. L. REV. 217; Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship* (1929) 78 U. OF PA. L. REV. 179, 190.

Court of the state whose law was applicable which were decided after the conduct or event the legal effect of which was in question. In doing so they apply the principle that the applicable law is the law to which persons or property were subject at the *time* of the conduct or event the legal effect of which is in question.[76] Since the authoritative character of decisions subsequent does not extend back to that time, they are perceived to be no more obligatory than the decisions of the courts of other states. The United States Supreme Court decisions will now be considered.

a. *No previous decisions*

In *Kuhn v. Fairmont Coal Co.*,[77] Kuhn had sold and conveyed the coal under his land in West Virginia to Camden. The deed granted the right to "mine, excavate and remove all of said coal". Camden conveyed to the Fairmont Coal Co. which removed all of the coal, causing the surface to subside. Kuhn sued in a federal court in West Virginia. Shortly after suit was filed, the Supreme Court of West Virginia construing an identical deed held that the grantee was not obliged to support the surface.[78] There were no earlier decisions. The Circuit Court of Appeals asked the United States Supreme Court whether it was obliged to follow the West Virginia decision. The Supreme Court said no. It told the inferior court to exercise its independent judgment to determine what the rights and obligations of the parties were under the deed. It did the same in many other cases.[79] Only if it is

[76]". . . where the liability of a municipal corporation upon negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the *time* such securities were issued." Anderson v. Santa Anna, 116 U. S. 356, 361 (1886). "But being long posterior to the time when the securities were issued, they can have no effect upon our decision and may be laid out of view. We can look only to the condition of things which subsisted when they were sold. . . . That brings them within the rule laid down by this court in *Gelpcke v. The City of Dubuque.*" Swayne, J., in Havemeyer v. Iowa City, 3 Wall. 294, 303 (1865). "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. . . . We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." Waite, C. J., in Douglas v. County of Pike, 101 U. S. 677, 687 (1879). "In our opinion, the rights of the parties to this suit are to be determined by the 'law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.'" Waite, C. J., in County of Rolls v. Douglas, 105 U. S. 728, 732 (1881), quoted by Bradley, J., in Green County v. Conness, 109 U. S. 104, 105 (1883). See the quotation from Swayne, J.'s opinion in Gelpcke v. The City of Dubuque, *supra* note 70.

See the statement and discussion of this principle in the writer's *Which Law Should Govern?* (1938) 24 VA. L. REV. 748.

[77]215 U. S. 349 (1910).

[78]Griffin v. Fairmont Coal Co., 59 W. Va. 480 (1909).

[79]Rowan and Harris v. Runnels, 5 How. 134 (U. S. 1847); Supervisors v. Schenck, 5 Wall. 785 (U. S. 1866); Butz v. City of Muscatine, 8 Wall. 575 (U. S. 1869); Boyce v. Tabb, 18 Wall. 546 (U. S. 1873); Pana v. Bowler, 107 U. S. 529 (1882); Barber v. Pittsburg, Fort Wayne and Chicago Railway Co., 166 U. S. 83 (1896);

assumed that decisions are law which a court is obliged to follow[80] will the result be changed by *Erie Railroad Co. v. Tompkins.*

b. *Decisions overruled after party relying had changed position*

In *Gelpcke et al. v. The City of Dubuque,*[81] an Iowa statute authorized municipalities to issue bonds to be exchanged for the stock of railroad companies to encourage the construction of railroads. In several decisions the Iowa Supreme Court upheld the constitutionality of the statute. After the City of Dubuque had issued bonds for the authorized purpose, the Iowa Supreme Court, reversing its previous decisions, held that the statute violated provisions of the state constitution and was invalid. The holder of the bonds sued in a federal district court to recover money due on interest coupons. The district court, applying the last decision, denied recovery. It was reversed by the United States Supreme Court which held that the late case in Iowa should not be applied. Justice Swayne said:

> "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. . . . To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."[82]

In many other cases the United States Supreme Court has refused to apply the decisions of courts of the state whose law was applicable which were decided after a party had changed his position in reliance on earlier decisions thus overruled.[83]

Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532 (1903); Presidio County v. Noel-Young Bond and Stock Co., 212 U. S. 58 (1908). *Cf.* Folsom v. Ninety Six, 159 U. S. 611 (1895), *supra* note 44.

[80]Justice Holmes assumed this in his dissent in Kuhn v. Fairmont Coal Co., considered *supra* at note 77. He said that the state court could make its decisions retroactive. In this he was correct as is shown by the cases where there are no previous state court decisions. He erred in assuming that the state court decision was law. The decision may have been so unjust and erroneous, as indeed it was, that the state court would subsequently overrule it.

[81]1 Wall. 175 (U. S. 1863). See Thayer, *The Case of Gelpcke v. Dubuque* (1891) 4 HARV. L. REV. 311.

[82]1 Wall. 175, 206 (U. S. 1863).

[83]Havemeyer v. Iowa City, 3 Wall. 294 (U. S. 1865); Olcott v. The Supervisors, 16 Wall. 678 (U. S. 1872); Douglas v. County of Pike, 101 U. S. 677 (1879); County of Rolls v. Douglas, 105 U. S. 728 (1881); Green County v. Conness, 109 U. S. 104 (1883). *Cf.* Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458 (1925), *supra* note 65, and Anderson v. Santa Anna 116 U. S. 356 (1886), *supra* note 72. In Olcott v. The Supervisors, *supra,* Strong, J., said, "This court has always ruled that if a contract when made was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice." In Douglas v. County of Pike, *supra,* Waite, C. J., said, "We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made."

Type of Case in which Result Will Differ

In *Black and White Taxicab Co. v. Brown and Yellow Taxicab and Transfer Co.*,[84] the validity of a contract with a railroad company for the exclusive privilege of bringing cabs into and soliciting business in its station at Bowling Green, Kentucky, was in question. There were Kentucky decisions holding such contracts void on the ground that they were detrimental to the public. The weight of authority elsewhere was *contra*. The United States Supreme Court sustained the district court which refused to follow the Kentucky decisions. It said the question was one of general law.

Under *Erie Railroad Co. v. Tompkins*, the federal court would be obliged to apply the rule of the state decisions since it cannot be said that it would produce injustice. The Kentucky rule would secure reasonable taxicab fares through competition. The majority rule would leave the question of reasonable fares to the city council. It could regulate them in the same way that railroad rates are regulated. One system is no more just than the other though the Kentucky system would seem preferable since the question of reasonable rates is not left to the city council. A decision either way would be just. In such cases *Erie Railroad Co. v. Tompkins* will require the federal court to apply the local rule. It must be applied when not erroneous or productive of injustice.

Equity Cases

The fact that Section 34 of the Judiciary Act of 1789 applies to "trials at common law" raises the question whether or not it applies to equity cases. It will be helpful to examine again the full text of the original draft of the section which is as follows:

> "And be it further enacted, that the ~~statute law~~ 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 decision in the trials at common law in the courts of the United States in cases where they apply."[85]

"Trials at common law" is ambiguous. "Common law" is first used in the section as a synonym for "unwritten law", but it cannot mean that in the phrase "trials at common law" because the section contemplates the application of state statutes. It could have been intended either (1) to distinguish

[84] 276 U. S. 518 (1928).

[85] Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 Harv. L. Rev. 49, 87, *supra* note 15.

such trials from equity proceedings, or (2) to mean ordinary court proceedings as distinguished from special statutory proceedings established by federal law. The latter would seem to be its true meaning.

Mason v. United States[86] and companion cases were equity suits brought by the United States to quiet title to land in Louisiana, to enjoin defendants from extracting oil or minerals and to secure an accounting for oil and gas removed. The District Court found for the United States and applied a Louisiana statute fixing the measure of damages. The statute required the deduction of mining or drilling expenses from the value of minerals or oil removed without right by those acting in good faith. The Circuit Court of Appeals held that it was error to apply the Louisiana statute. In the United States Supreme Court it was argued that the words "trials at common law" in the thirty-fourth section made it inapplicable to equity suits, but the Court held that the state statute should be applied. Justice Sutherland who wrote the opinion said that, whether or not the thirty-fourth section was applicable to equity suits, it was merely declarative of the rule which would be applied in its absence. So state law will be applied in equity suits.

However, this was subject to the general law doctrine of *Swift v. Tyson*. In *Black and White Taxicab Co. v. Brown and Yellow Taxicab and Transfer Co.*,[87] the Supreme Court sustained a decree enjoining interference with plaintiff's contract rights on the ground that the district court was not obliged to follow state court decisions by which the contract was void.

The problems arising with reference to the application of state law are treated in the same way in equity as they are in actions at law.

Conclusion

The problem of *Swift v. Tyson* is the problem of what is law. It is submitted that, apart from constitution or statute, law is a practically enforcible principle of truth, right or justice. Whether or not this is called "general law" as in *Swift v. Tyson* is of little importance. Federal courts must apply state law, but since this is nothing more than principles of truth, right or justice they must use their independent judgment in ascertaining what that law is. Since (state) courts can reverse their own decisions, decisions are not law; but when a party has changed his position relying on a rule applied in previous decisions which have not been overruled, justice requires the application of that rule to his case although it would be unjust to apply it where there had been no such reliance. In such cases the effective time as of which the authoritatively pronounced rule must be ascertained is the time of the conduct or event the legal effect of which is in question.

[86] 260 U. S. 545 (1922). See also Brine v. Insurance Co., 96 U. S. 627, 639 (1877); Missouri Kansas and Texas Trust Co. v. Krumseig, 172 U. S. 351, 358 (1899); and Johnson, *State Law and the Federal Courts* (1929) 17 Ky. L. J. 355, 359.

[87] 276 U. S. 518 (1928), discussed *supra* at note 84.