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# Courts--Province of Federal and State Courts--Questions of General Law--Validity of Doctrine of Swift v. Tyson (Erie R. R. v. Tompkins, 304 U.S. 64 (1938))

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and the group of people who would ordinarily rely upon it.[19] The law in New York as developed from the *Ultramares* case and the instant case may be summarized as follows:

1. In the absence of privity an accountant is not liable to third persons for honest blunder, on the theory of negligence, because he owes no duty of care.[20]

2. In the absence of privity an accountant is not liable to third persons for gross negligence on the theory of negligence, because he owes no duty of care.[21] But he is liable to third persons on the theory of *deceit* for gross negligence, because from this a jury may infer fraud.[22]

3. Negligence, no matter how gross, is never equivalent to fraud *as a matter of law;* it always remains a question of fact.[23]

R. A. K.

COURTS—PROVINCE OF FEDERAL AND STATE COURTS—QUESTIONS OF GENERAL LAW—VALIDITY OF DOCTRINE OF SWIFT V. TYSON.—Plaintiff sues to recover for personal injuries allegedly sus-

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equity * * * sue * * * (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him who has with his consent been named as having prepared or certified any part of the registration statement. * * *" (Italics ours.) This is, of course, subject to certain enumerated defenses for which see the Securities Act. However, under the present law, the Securities Act of 1934, 48 STAT. 881 (1934), 15 U. S. C. § 78a (1934) 78r, the defendant may escape liability for a false or misleading statement if he proves that he acted in good faith and had no *knowledge* that such statement was false or misleading.

[19] In REID, LEGAL RESPONSIBILITIES AND RIGHTS OF PUBLIC ACCOUNTANTS (1935), an excellent book on the whole subject of liability of public accountants, the author suggests: (1) If liability for mere negligence is to be extended it should be limited to those persons the accountant knows will use his statements for business transactions with his client. (2) That it would seem more just for the courts to require a different degree of care to third parties where the accountant's services are gratuitous. And (3) in the event of an extension of liability, the defense of contributory negligence should still be available against the third party. It is submitted that where an accountant knows that the balance sheet he prepared will be used for credit purposes, and after he has sent it to his employer he discovers that the condition of the items is not as represented, he owes a duty not only to notify promptly his employer, but to take reasonable steps to find out and notify every person who received a copy.

[20] See cases cited *supra* notes 7, 8 and 9.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

tained through negligent operation of a train.[1] Defendant contends that according to the common law of Pennsylvania [2] plaintiff was a trespasser, and by Section 34 of the Judiciary Act of 1789 [3] application of the Pennsylvania law was required. The trial judge, applying the doctrine of *Swift* v. *Tyson*,[4] stated that in matters of general law the federal courts are free to disregard state courts' decisions. A verdict for plaintiff Tompkins was affirmed by the Circuit Court of Appeals [5] on the ground that federal courts, in the absence of a local statute, are free to exercise their own independent judgment as to matters of general law; and it is well settled that the question of a railroad's liability for injuries caused by its servants is one of general law.[6] *Certiorari* was granted by the Supreme Court [7] and on *certiorari, held,* reversed. The phrase "laws of the state" was meant to include also the decisions of the state's highest tribunal, and therefore, the federal courts, in applying the *Swift* doctrine, were unconstitutionally invading rights which were reserved to the states.[8] *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817 (1938).

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[1] One night Tompkins was walking along defendant's right of way in Pennsylvania when he was struck by a door projecting from one of the defendant's freight trains. The plaintiff contended that he was rightfully on the premises as a licensee because of a commonly used footpath parallel to the tracks.

[2] Falchetti v. Pa. R. R., 307 Pa. 203, 160 Atl. 859 (1932); Koontz v. B. & O. R. R., 309 Pa. 122, 163 Atl. 212 (1932) (a person using a customary pathway, parallel to the tracks, is a trespasser and thus the only duty owed is to refrain from wilfully and wantonly injuring him).

[3] 1 STAT. 92, § 34 (1789), 28 U. S. C. § 725 (1934) provides: "The laws of the several states * * * shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."

[4] 16 Pet. 1 (U. S. 1842) (Decisions of courts do not constitute laws. They are, at most, only evidence of what the laws are).

[5] 90 F. (2d) 603 (C. C. A. 2d, 1937).

[6] Chicago v. Robbins, 2 Black. 418 (U. S. 1863).

[7] — U. S. —, 58 Sup. Ct. 50 (1937).

[8] There were two concurring opinions in the instant case. One was by Mr. Justice Butler in which Mr. Justice McReynolds concurred, and one by Mr. Justice Reed. Mr. Justice Butler agreed in reversing the judgment because of the plaintiff's contributory negligence but disapproved of changing the *Swift* doctrine. He based his objections on five grounds: (1) *Stare decisis* (nearly 100 years of continuous use of the doctrine); (2) Congressional consent (by implication because Congress had not changed the rule by legislation); (3) No constitutional question was suggested or argued below or here. (Generally the court will not consider any question not raised by the petition); (4) Congress has not been represented in this case. (The case impliedly takes away from Congress the power or right to pass any legislation which may reiterate the *Swift* rule); (5) This case may be decided on other grounds. (Even if the common law of Pennsylvania were applied in this case the plaintiff would have lost because of contributory negligence, and this court, as is its custom, will not hold legislation invalid, reason (4) *supra*).

Mr. Justice Reed, in his concurring opinion, objected to the majority holding the *Swift* doctrine unconstitutional, "instead of merely erroneous. * * * 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".

Prior to 1842, federal courts, exercising diversity of citizenship jurisdiction, were bound by decisions of the highest state courts, if there were such decisions, whether they rested upon local law or upon general principles of common law.[9] They even declared it their duty to do so.[10] Then in 1842 the case of *Swift* v. *Tyson*[11] decided that statutes of the state, its constitution, or long established local customs having the force of laws, are the only "laws of the state" intended by the Judiciary Act. This was later amplified to include the state courts' interpretations of their constitution or statutes (if no federal quesion was involved)[12], and also all matters relating to the acquisition of, or rights to, real property situated within the state.[13] So the rule was settled. In all matters of general commercial law the federal courts were not bound to follow the state courts' decisions. But due to the generality of the phrase "general commercial law" difficulty was met with in the application of the rule. It was no longer a question of whether the federal courts should follow the state courts when there existed concurrent jurisdiction, but whether a given matter was one of general or of local law.[14] The federal courts, attempting to evade as much as possible the state courts' decisions, have enlarged the field of general law.[15] General law has been held to include ecclesiastical questions,[16] liability of a bank accepting commercial paper for collection,[17] validity of municipal corporation bonds,[18] liability for punitive or exemplary damages,[19] stipulations limiting carrier's liability for negligence,[20] contracts generally,[21] waiver of right to pursue tort remedy,[22] mental anguish,[23] liability of master to fellow-servants,[24] negli-

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[9] Brown v. Van Braam, 3 Dall. 344 (U. S. 1797); Smith v. Clapp, 15 Pet. 125 (U. S. 1841).

[10] Taylor v. Brown, 5 Cranch 234 (U. S. 1809); Green v. Neal, 6 Pet. 291 (U. S. 1832).

[11] 16 Pet. 1 (U. S. 1842).

[12] U. S. *ex rel.* Butz v. Muscatine, 8 Wall. 575 (U. S. 1869); Webb v. So. Ry., 235 Fed. 578 (S. D. Ala. 1916), *rev'd*, 248 Fed. 618 (C. C. A. 5th, 1918), *cert. denied*, 247 U. S. 518, 38 Sup. Ct. 581 (1918).

[13] Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526 (1915).

[14] Baltimore & O. R. R. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914 (1893).

[15] Sharp and Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900* (1929) 4 IND. L. J. 367.

[16] Sherard v. Walton, 206 Fed. 562 (W. D. Tenn. 1913).

[17] Taylor, etc., Co. v. Nat. Bank, 262 Fed. 168 (N. D. Ohio 1919).

[18] Gelpcke v. Dubuque, 1 Wall. 175 (U. S. 1863).

[19] Lake Shore & M. S. Ry. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261 (1893).

[20] *Ibid.*

[21] Delmas v. Merchants' Mut. Ins. Co., 14 Wall. 661 (U. S. 1872).

[22] Reynolds v. Trust Co., 188 Fed. 611 (C. C. A. 1st, 1911).

[23] Western U. Co. v. Burris, 179 Fed. 92 (C. C. A. 8th, 1910).

[24] Wabash R. R. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932 (1883).

gence and contributory negligence,[25] construction of wills,[26] liability under insurance policies,[27] and mineral conveyances.[28]

Uniformity of law throughout the nation, which was supposed to be one of the attributes of the doctrine,[29] was never accomplished. But this was not the only defect of the doctrine. The more important one was that it went *contra* to the *raison d'etre* of conferring jurisdiction upon the federal courts because of diversity of citizenship. Such jurisdiction was given to the federal courts so that justice would be dispensed upon the same principles upon which it was administered between citizens of the same state,[30] ergo, there would exist no discrimination against the non-citizen. The *Swift* v. *Tyson* case so abused this privilege that the citizen became the loser. The non-citizen had the option of either a federal court or the state court, and because of the *Swift* v. *Tyson* doctrine, which gave rise in many instances to conflicting views between state and federal courts in matters of general jurisprudence, a choice of a theory partial to his viewpoint. The citizen had to rely upon his own state court's interpretation.[31]

Consequently, there has been much said against the doctrine since 1845, advocating either a reversal or limitation.[32] Mr. Justice Field's analogy in his dissenting opinion in *Baltimore & Ohio R.* v. *Baugh* [33] is worthy of mention: "When the Fourteenth Amendment ordains that no State shall deny to any person within its jurisdiction 'the equal protection of the laws' it means equal protection not merely by the statutory enactments of the State, but * * * by all the rules and regulations which * * * govern the intercourse of its citizens with each other and their relations to the public * * *." [34] In *Kuhn* v. *Fairmont Coal Co.*[35] Mr. Justice Holmes dissented and stated that "the law of a state * * * does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures * * * (it) does not become something outside of the state court and independent of it by being called the common law." [36] Mr.

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[25] Chicago v. Robbins, 2 Black. 418 (U. S. 1863); Hough v. Texas R. R., 100 U. S. 213 (1880).

[26] Lane v. Vick, 3 How. 464 (U. S. 1845).

[27] Equitable Life v. Nikilopulos, 86 F. (2d) 12 (C. C. A. 3d, 1936), *cert. denied*, 300 U. S. 660, 57 Sup. Ct. 436 (1937).

[28] Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140 (1910).

[29] See note 7 of Mr. Justice Brandeis' opinion in Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).

[30] Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 84.

[31] See note 9 of Mr. Justice Brandeis' opinion in Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).

[32] See notes 1, 3, 4, 5, 6, and 10 of Mr. Justice Brandeis' opinion in Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).

[33] 149 U. S. 368, 390, 13 Sup. Ct. 914, 920 (1893).

[34] *Id.* at 398.

[35] 215 U. S. 349, 370, 30 Sup. Ct. 140, 146 (1910).

[36] *Id.* at 372 (White and McKenna, JJ., concurred in this dissent).

Justice Holmes dissented also in *Black & White Taxicab and Transfer Co.* v. *Brown & Yellow T. & T. Co.:* [37] "If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow * * *. I see no reason why it should have less effect when it speaks by its other voice. If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words * * *." [38]

No doubt all these dissenting opinions, in conjunction with the extensive criticisms,[39] have been responsible for the instant case, so that we may now say that the *lex loci* would govern in all diversity of citizenship suits in the federal courts where questions of general jurisprudence arise. It is submitted that the instant case is only a precursor, for there are many questions left unanswered. Is Congress free to enact a law reiterating the *Swift* doctrine? Is equity involved? If there are no statutes or decisions upon certain matters of general law, will a Supreme Court decision be followed in a subsequent state case, or will the state judges pride themselves on being able to overrule the United States courts? The answers to all these questions must be left to the future.[40]

A. M. A.

INTERNATIONAL LAW—SOVIET DECREES NATIONALIZING RUSSIAN INSURANCE COMPANIES—ASSIGNMENT OF ASSETS TO THE UNITED STATES—EXTRATERRITORIALITY.—As a consequence of nationalization by Soviet decrees in the years 1918 and 1919 of the Russian insurance companies and the confiscation of their property, cancellation of their debts, and extinguishment of the rights of shareholders, there followed a liquidation of the American branches of the Russian insurance companies here. However, because of the nonrecognition of Russia in 1931, the surpluses could not be remitted to domiciliary receivers in that country. Lest the surpluses be lost, it

[37] 276 U. S. 518, 532, 48 Sup. Ct. 404, 408 (1928).
[38] *Id.* at 534 (Brandeis and Stone, JJ., concurred in this dissent).
[39] See notes 1, 3, 4, 5, 6, and 10 of Mr. Justice Brandeis' opinion in Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).
[40] For recent criticisms of the instant case see Note (1938) 13 ST. JOHN'S L. REV. 71; Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; Schweppe, *What Has Happened to Federal Jurisprudence?* (1938) 26 A. B. A. J. 421.