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HAS CONGRESS THE POWER TO MODIFY THE EFFECT OF ERIE RAILROAD CO. V. TOMPKINS?

MAXWELL H. HERIOTT*

A FUNDAMENTAL conflict as to the nature of the jurisdiction and the purpose of the Federal judiciary was discussed in constitutional convention and debated in connection with the adoption of our Federal Constitution. This conflict has reappeared from time to time in decisions of the United States Supreme Court. The outstanding contemporary resurgence of that conflict occurred in the reversal of Swift v. Tyson, decided in 1842, by the decision on April 25, 1938, in Erie Railroad Co. v. Tompkins. In the latter case Mr. Justice Brandeis stated as to prior Supreme Court decisions predicated upon Section 34 of the Judiciary Act as construed by Swift v. Tyson:

"If only a question of statutory construction were involved, we should not be prepared to abandoned a doctrine so widely

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1 41 U.S. (16 Peters) 1 (1842).
2 304 U.S. 64, 82 L.Ed. 1188, 58 Sup. Ct. 817 (1938).
applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so."3

Decisions of a court construing a statute can be unconstitutional only because beyond the jurisdiction of the court as constituted. The statute in question, Section 34 of the Judiciary Act of 1789, was part of Senate Bill No. 1 in the first session of the Senate of the first Congress of the United States. It is today in the identical form in which it was originally adopted, and the court in Erie Railroad Co. v. Tompkins expressly declined to hold the statute void on the ground of unconstitutionality. It is not only a matter of interest to lawyers, but of extreme importance to citizens to ascertain what the court deemed the unconstitutional character of its decisions construing this Federal statute. What is the jurisdictional limit of the Federal judiciary as presently established in Erie Railroad Co. v. Tompkins?

The situation in the Tompkins case was as follows. Harry Tompkins, while walking along the railroad right-of-way in the state of Pennsylvania, was injured when struck by "a black object that looked like a door" on the side of a moving refrigerator car in a train of the Erie Railroad. He was walking along a path frequently used by residents of Hughestown, Pennsylvania. Suit was brought in the Federal Court in New York where the railroad was incorporated. The jury brought in a verdict for $30,000 which was affirmed by the Court of Appeals for the Second Circuit. Both the trial court and the Circuit Court of Appeals held the issue of liability was not determinable by the law of Pennsylvania where the accident occurred, and the courts held a defendant obligated only "to refrain from willful or wanton injury" under the circumstances. Instead, both courts held the case to be controlled by the rule of law established by the Federal courts pursuant to the rule of Swift v. Tyson, to the effect that the Federal courts are not bound by the common law as determined by the state courts but are free to determine it in the exercise of their independent jurisdiction.

In all probability, Tompkins and his counsel were quite sanguine with respect to the application for certiorari. The granting of the writ, however, must have been a surprise, but nothing compared to the astonishment resulting from the filing of the decision on April 25, 1938. The majority opinion in the Tompkins case opened with the following statement by Mr. Justice Brandeis:

"The question for decision is whether the oft-challenged doctrine of Swift v. Tyson shall now be disapproved."4

3 304 U.S. 64, 77, 78, 82 L.Ed. 1188, 1194, 58 Sup. Ct. 817, 822 (1938).
4 304 U.S. 64, 69, 82 L.Ed. 1188, 1189, 58 Sup. Ct. 817, 818 (1938).
This statement is significant because the litigants had not raised it nor argued it. Mr. Justice Butler in his dissenting opinion complained that the Department of Justice had not been advised that a rule, which had been sustained in hundreds of cases over a period of ninety-six years, was being challenged upon the ground that decisions promulgating and affirming it were unconstitutional. The court held:

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution portends to confer such a power upon the federal courts. * * *

"Thus the doctrine of Swift v. Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."

The decision in *Swift v. Tyson* was written by Mr. Justice Story, who was then the oldest judge on the bench. The plaintiff Swift was an endorsee of a bill of exchange for $1,536.30, dated May 1, 1836, and drawn on the defendant Tyson by Messrs. Norton and Keith at Portland, Maine. Swift received the bill in payment of an antecedent debt and the bill was accepted by the defendant Tyson in the city of New York.

In the action commenced in the Circuit Court of New York, Tyson offered to prove that the bill was accepted by him as part consideration for the purchase of certain lands in the state of Maine, of which Messrs. Norton and Keith had represented themselves to be the owners; that the representations were in every respect fraudulent and that the lands were of little or no value.

The judges of the Circuit Court were divided in opinion on the question of whether "the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill." This question was certified to the United States Supreme Court.

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5. 304 U.S. 64, 78-80, 82 L.Ed. 1188, 1194, 1195, 58 Sup. Ct. 817, 822, 823 (1938).
It is of interest, in view of Mr. Justice Butler's complaint in 1938, that Mr. Justice Catron remarked that "the principal opinion was presented last evening; and therefore I am not prepared to give any opinion, even was it called for by the record." Though in some confusion, apparently the law of the state of New York as it then stood answered the question in the affirmative. However, Mr. Justice Story, on behalf of the court, answered the question in the negative.

Section 34 of the Judiciary Act read then as it does now, and 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."8

In construing the word "laws," Mr. Justice Story held it related to positive statutes of the state, saying:

"It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to question of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."9 (Italics supplied.)

As stated by Mr. Justice Brandeis, the doctrine of Swift v. Tyson has been severely criticized, perhaps by none more so than Professor Gray. In his book on "The Nature and Sources of the Law," he says:

"Among the causes which led to the decision in Swift v. Tyson, the chief seems to have been the character and position...

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7 41 U.S. (16 Peters) 1, 23 (1842).
9 41 U.S. (16 Peters) 1, 18, 19 (1842).
of Judge Story. He was then by far the oldest judge in commis-
sion on the bench; he was a man of great learning, and of reputa-
tion for learning greater even than the learning itself; he was
occupied at the time in writing a book on bills of exchange,
which would, of itself, lead him to dogmatize on the subject;
he had had great success in extending the jurisdiction of the
Admiralty; he was fond of glittering generalities; and he was
possessed by a restless vanity. All these things conspired to pro-
duce the result.  

But Judge Story was not without eminent support in his position.
In 1818 in the case of Robinson v. Campbell, Mr. Justice Todd speak-
ing for the court said with respect to Section 34 of the Judiciary Act:

"The court therefore think, that to effectuate the purposes
of the legislature, the remedies in the courts of the United States
are to be, at common law or in equity, not according to the prac-
tice of state courts, but according to the principles of common
law and equity, as distinguished and defined in that country from
which we derive our knowledge of those principles."  

However, the converse had been held by the Supreme Court in
1834 in Wheaton v. Peters, wherein the court said:

"It is clear there can be no common law of the United States.
The Federal government is composed of twenty-four sovereign
and independent States, each of which may have its local usages,
customs and common law. There is no principle which pervades
the Union and has the authority of law that is not embodied in
the Constitution or laws of the Union. The common law could
be made a part of our federal system only by legislative adoption.
"When, therefore, a common law right is asserted, we must
look to the State in which the controversy originated."  

Manifestly the Supreme Court, both prior to and after Swift v.
Tyson as well as in Erie Railroad Co. v. Tompkins, has been strug-
gling with a fundamental conflict in constitutional theory. Only by con-
sidering the nature and extent of the judicial power conferred upon
Federal courts by the Constitution can there be any clear understanding
of that conflict in constitutional theory which has caused the varied
judicial interpretations of Section 34 of the Federal Judiciary Act
while the courts consistently considered it constitutional.

The constitutional provisions defining the judicial power of the
Federal courts and providing for their jurisdiction are as follows:

Article III, Section 1.

"The Judicial power of the United States shall be vested in
one supreme court, and in such inferior courts as the Congress
may from time to time ordain and establish.* * * *"

13 33 U.S. (8 Peters) 591 (1834).
Article III, Section 2.

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, between a state and citizens of another state, between citizens of different States, between citizens of the same state claiming lands under grant of different States, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. ** ** **"

The Federal Judiciary Act of September 24, 1789, was Senate Bill No. 1 in the first session of the First Congress. Perhaps one reason that so little is known of the history of this Bill is that while the debates in the House were open to the public and reported in the newspapers, the Senate debates were held behind closed doors. On July 26, 1789, Washington wrote:

"Why they (the Senate) keep their doors shut when acting in a legislative capacity, I am unable to inform you, unless it is because they think there is too much speaking to the gallery in the other House, and business is thereby retarded."15

The fundamental issue was whether the jurisdiction of the inferior Federal courts should be limited to admiralty and other maritime matters peculiar to the Federal Government while all other matters should first be tried in the state courts with right to an appeal to or for a writ of error from the Supreme Court, or whether the Federal courts should have jurisdiction commensurate with the judicial power provided for by the Constitution.

Those who feared that the new Government might destroy the rights of the state desired the constitutional convention to provide that all suits be decided in State courts with only a review by the Federal courts. The Federalists desired that full judicial power be vested by the Constitution in the Federal courts. By way of compromise only the Supreme Court was created and vested with judicial power by the Constitution. Moreover, the jurisdiction conferred upon the Supreme Court by the Constitution was very limited. To Congress was given the authority to create such other Federal courts as might be required and to limit the appellate jurisdiction of the Supreme Court.

15 10 WRITINGS OF WASHINGTON, Spark's Ed.
The refusal of the northern states to enforce the Fugitive Slave Law through their state officers culminated in the *Prigg* case in 1842,\(^{16}\) which ended support for the doctrine of Congressional power to vest Federal jurisdiction in the state courts.

One of the primary reasons for providing inferior Federal courts was to prevent discrimination against non-residents. Thus, in *Bank of the United States v. Deveaux*,\(^ {17} \) Chief Justice Marshall said:

"The judicial department was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the Nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established National tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States.\(^ {18}\)"

Section 34 was not contained in the original draft of the Senate Bill but was an amendment written in longhand by Oliver Ellsworth on a slip of paper about four by five inches, and as originally drafted read as follows, the material in brackets being scratched out by pen:

"And be it further enacted, that the Laws [Statute 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 trials at common law in the courts of the United States in cases where they apply."\(^ {19}\)

The changes, as indicated above, appear on the original handwritten memo. With those changes the law was enacted and Section 34 remains unchanged to this day.\(^ {20}\)

The Act was adopted by the Senate on July 17, 1789, by a vote of 14 to 6. Passage through the House was delayed because of consideration at that time of many amendments ultimately incorporated in the Bill of Rights. After vigorous debate the House amended and

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\(^{16}\) 41 U.S. (16 Peters) 539 (1842).
\(^{17}\) 9 U.S. (5 Cranch) 61 (1809).
\(^{18}\) 9 U.S. (5 Cranch) 61, 87 (1809).
\(^{19}\) A photostatic copy and a complete discussion of the history of this enactment will be found in the article of Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923). Justice Brandeis was referring to this article in Erie Railroad Co. v. Tompkins when he mentioned "the more recent research of a competent scholar," and undoubtedly this article was largely instrumental in persuading the court to render the decision in Erie Railroad Co. v. Tompkins.
passed the Act on September 17th. The Judiciary Act in its final form was signed by the President on September 21st, the same day on which the Senate and House finally agreed on the twelve amendments to the Constitution to be submitted to the states. Thus the Judiciary Act was adopted in an atmosphere of constitutional debate.

That the compromise in the Judiciary Act was both wise and successful is shown by the fact that the jurisdiction of the Federal courts was not increased for forty-five years. Nullification in South Carolina brought about the extension of the right of removal in 1833. Another thirty years passed before removal acts following the Civil War were adopted. Not until 1875 were the Federal Courts vested with jurisdiction in all cases arising under the Federal Constitution and laws. The Act of February 13, 1801, passed by Federalists in the closing days of President Adams' administration had granted this full jurisdiction, but it was repealed by the Act of March 8, 1802.

While the Constitution by Section 2, Article III, appears to contain a self-executing grant of judicial power to any inferior court created by Congress, the provision has been treated as permitting Congress to vest inferior courts with such judicial power as it may desire to specify. If so, the Judiciary Act, and particularly Section 34 thereof, becomes the limitation beyond which the inferior Federal courts cannot constitutionally pass only because Congress imposed those limits on their jurisdiction.

Did the decision in *Erie Railroad Co. v. Tompkins* hold that Section 34 of the Judiciary Act of 1789 unnecessarily repeated, i.e., declared, the constitutional limitation of the judicial power which could be exercised by Federal Judiciary, or did it hold that Section 34 constitutes the congressional limitation on the jurisdiction of the inferior courts which Congress has created? Since this decision the Supreme Court has granted certiorari and reversed a large number of cases. One of peculiar interest is that of *Ruhlin v. New York Life Insurance Co.* That case involved false and fraudulent answers contained in the application for insurance. The insurance company instituted a suit in equity to rescind the policy because of the alleged fraud. In the course of the decision Mr. Justice Reed said with respect to the construction of the incontestability clause:

"The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity."\(^2\)

Taking this statement literally, it would seem that the limitation was on the judicial power since Section 34 related only to actions at

\(^1\) 304 U.S. 202, 82 L.Ed. 1290, 58 Sup. Ct. 860 (1938).
\(^2\) 304 U.S. 202, 205, 82 L.Ed. 1290, 1292, 58 Sup. Ct. 860, 861 (1938).
law. The constitutional provisions as to judicial power are general, even if not self-executing, upon congressional creation of inferior Federal courts. It is equally manifest that Congress was vested with power to prescribe the jurisdiction of those courts to the full or any lesser degree of judicial power as to the matters specified in Article III. The rule in *Swift v. Tyson* was unconstitutional on this hypothesis because Section 34 of the Judiciary Act restricted the jurisdiction of these Federal courts by specific provision. By change in the statute such jurisdiction might perhaps be vested in the courts.

It is assumed that by the provision "except where the constitution, treaties or statutes of the United States shall otherwise require or provide" of Section 34 of the Judiciary Act of 1789, Congress made inapplicable the rule in *Erie Railroad Co. v. Tomkins* to questions arising under Federal Statutes, e.g., the Sherman Anti-Trust Act and the patent laws.

Thus in the recent decision in *Apex Hosiery Co. v. Leader*, Mr. Justice Stone noted:

> "For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited."

However if, as Mr. Justice Brandeis asserted, "there is no Federal general common law," is the United States Supreme Court following the "well-understood meaning at common law" of England in 1890 at the time of the adoption of the Sherman Anti-Trust Act, or the non-existent "Federal general common law" as determined by the Federal courts? As a matter of fact, the "common law" with respect to price fixing agreements has varied both in England and in our state courts from generation to generation.

There is a seeming inconsistency in asserting that while Congress may not by statute make or change the law with respect to purely intra-state matters, e.g., contract and tort liability as between private citizens, nevertheless Federal courts by their decisions may do so if Congress by statute vested them with full judicial power. This, however, arises from the limitations on the legislative power of Congress, on the one hand, and the broad definition of judicial power appearing in Article III.

If this analysis is sound, it would permit Congress by legislation to achieve some of the benefits which Justice Story sought, namely, uniformity of decision on same matters. At the same time it would

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23 310 U.S. 469 (1940).
24 310 U.S. 469, 494, 495 (1940).
permit elimination of those manifest abuses which arose from the unrestricted application of the rule of *Swift v. Tyson*, which were referred to in the decision of *Erie Railroad Co. v. Tompkins*.

It is suggested that "the course pursued" was unconstitutional not because the judicial power thus exercised cannot be vested in the Federal courts by the Congress under the Constitution, but because Section 34 did not expressly vest the courts with that jurisdiction. Certain it is, the Constitution does not expressly or by implication restrict the Federal courts in their exercise of judicial power as therein defined.

Since deviation from the statutory limitation would be unconstitutional upon either theory, it may be that Mr. Justice Brandeis intentionally refrained from attempting to resolve the problem. While the problem is not without difficulty, it justifies complete investigation by legal scholars, to the end that the Federal courts may become more effective instrumentalities in the administration of "equal justice under law."