

THE LAWS OF THE SEVERAL STATES

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THERE is no "federal general common law." *Swift v. Tyson*¹ has been overruled, as being both "unconstitutional" and in conflict with Section 34 of the Judiciary Act of 1789.² Unless otherwise required by Constitution, treaty, or Act of Congress, federal judges are required to apply, in the cases that are brought before them, the "laws of the several states."

The federal judges have always been aware of this. In his opinion in *Swift v. Tyson*, acquiesced in on this point by eight other justices, Mr. Justice Story said nothing to the contrary. He merely thought that "laws," as used in the Judiciary Act, was less inclusive than members of the Supreme Court have more recently believed. He said that this section of the Act was not designed to apply "to questions of general commercial law, where the state tribunals are called upon to perform 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." With respect to the effect of decisions of the state courts, Story said that the effect of a commercial instrument was 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."

A good many years ago, Holmes began to doubt the soundness of Story's interpretation of the phrase "laws of the several states." Like Cardozo, and others of a gifted few, Holmes had a genius of expression — a gift for the apt and attractive phrase. It has justly been said to be a dangerous gift. He has told us 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."³ What ideas are expressed by this figurative language? Who is the "sovereign" that can be identified and whose "voice" is the common law?⁴ Is it now to be supposed that

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1. 16 Pet. 1 (U. S. 1842).

2. *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

3. Dissenting in *Southern Pac. R. R. v. Jensen*, 244 U. S. 205, 218, 222 (1917).

4. Observe that he muddies the waters when he injects the phrase "or quasi-sovereign." "Quasi" is a weasel word. It is used to indicate, without stopping to explain, that there is some kind of analogy. It may not be very close.

when Story spoke of "the general principles and doctrines of commercial jurisprudence," he meant something that can justly be described as a "brooding omnipresence in the sky"?

Story's doctrine has now been disapproved by our Supreme Court; and the decision in *Swift v. Tyson* is said to be "overruled." If Story was once a "quasi-sovereign" who could be identified, or whose written words were the "articulate voice of some sovereign," it seems that it is true no longer. There is another sovereign with another voice.⁵ In *Erie Railroad v. Tompkins*, the Supreme Court has told us, through the articulate voice of Brandeis:

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied 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 purports to confer such a power upon the federal courts."⁶

Brandeis quotes Holmes to the effect that the doctrine of *Swift v. Tyson* rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what are the rules of common law, and that in the federal courts "the parties are entitled to an independent judgment on matters of general law." He quotes further:

"But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State

5. After the Restoration, Cromwell's poor remains were exhumed and dishonored. Story's opinion is now discredited because he is said to have been a pompous little man, with an egocentric disposition. He should not be made to bear the whole burden. Taney and seven other justices sat with him; and they were the liberal, democratic judges who succeeded the reign of Andrew Jackson. Catron differed with Story on the principle of commercial jurisprudence to be applied; but he said nothing against Story's method of finding it.

6. *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938). The Supreme Court has convinced us that Congress has very wide powers to declare substantive rules of law that are applicable to all the states in common; but when Congress declares such a common rule, it is not commonly called a rule of common law. Any such Act of Congress would be called a "statute." Congress has ample power to affect the law of contracts or of torts. It can impair the obligation of an antecedent contract—for example, a "gold clause." But Brandeis' statement is a mere dictum.

existing by the authority of that State without regard to what it may have been in England or anywhere else. . . . The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

Thus, it appears that the Supreme Court informs the federal judges that hereafter, in all cases that are to be decided by the unwritten common law or equity, they must look for that law within the confines of some one state; and finding it there, they must not disapprove it as unsound or incorrect, but must apply it to the case before them even though they are sure that it is contrary to the common law inherited by us from England, to the decisions of other states, or to supposed principles of general jurisprudence and justice.

It is undoubtedly the fact that even before this decision was rendered, the federal courts generally tried to discover and apply the common law of some particular state rather than the common law of all the states at once. In most cases they did not see fit to assert or apply Story's doctrine. For example, the question whether two persons can by contract with each other create an enforceable right in a third person as beneficiary is undoubtedly a question of common law and not a peculiarly local question. And yet the federal courts have very consistently applied a local state rule, if they found one to exist there. Of course, it is now the "general" rule that the third party has an enforceable right.⁷ Massachusetts may still hold the contrary; and in all probability a federal court would, in a Massachusetts case, apply the local law, if it could find it, rather than the "general" rule. The Supreme Court now holds that the federal court *must* do this. It may well be, therefore, that the overruling of *Swift v. Tyson* has not changed the actual practice of federal judges so greatly as it appears. It merely declares that in common law cases they must never disregard the local law, if they can find it, and apply some supposedly superior "general" law. It also declares, quite unnecessarily, that contrary action is unconstitutional usurpation of power.

THE "COMMON LAW"

In this present discussion, the writer is not asserting that there is a "federal general common law," external to a state and superior to the law of that state. The federal courts have no power to create such a superior common system which state judges and executives must accept and apply, except insofar as the Supreme Court can do this by expanding

7. The degree of uniformity that now exists on this subject, or like subjects, is due to the fact that the state courts use the general sources of wisdom, without much regard to geographical boundaries, just as the federal courts have done. Luckily, it has not been regarded as unconstitutional for the judges to study and follow the sources that lie outside of their own territorial district.

and contracting the meaning of the Constitution and acts of Congress in the guise of interpretation. There is no intention here to dim the effulgence of Holmes's declaration that "the common law is not a brooding omnipresence in the sky." It renders a great service, in that it suggests that the common law does not consist of a number of eternal and universal rules or principles or doctrines, not man-made and not subject to be changed by man. But this is true without regard to the territorial acreage over which an omnipresence broods. No such omnipresence broods over the whole forty-eight states and District of Columbia. No more does one brood over the state of Pennsylvania, or over the state of Idaho with its shorter history.

The rules, or principles, or doctrines, of the common law are merely statements asserting uniformities of human action, based upon the past and influencing the future. They may be true or untrue, depending upon the knowledge and the skill and the wisdom of the men who make them. Even if well-made, they may be true only for a season. Anyone can make them: a Story in his court opinions or his treatises on "law," a Brandeis in a court opinion one hundred years later, a judge of an inferior court, or a mere professor in his classroom. Some of these have much greater influence on the future than others, depending in part upon the brightness of the particular judicial or professorial halo. But in every case alike they are man-made, they are not omnipresent, and they are not in the sky.

The question with which we are here concerned is one with which both Story and Brandeis were concerned. It is one with which every court, whether federal or state, high, intermediate, or low, is concerned. That question is: How shall the issues of a litigated case be decided? What juristic or societal effect shall be given to the facts when they are determined? The question may be put in other forms, in a more general form or in a more particular one. We may ask: What is the common law? What is the common law of the particular state? Is there a stated rule that can be safely used as the major premise of a decision? Is there a stated rule that *must* be followed? Can any court make such a rule?

And now, accepting the Supreme Court's declaration that it is the common law of a particular state that must always be applied, let us consider the further questions: How does a court discover law—or make it? To what sources is a judge permitted to go for this purpose? To what sources are the judges of a state court permitted to go? Are the judges of a particular state permitted to consult sources that are now forbidden to the judges of a sister state⁸ and to the federal judges? If

8. The Supreme Court is engaged in answering these questions and in making rules that must, under pain of reversal, be followed by the inferior federal judges. Suppose that the court of a sister state refuses to follow these rules, consults sources that are forbidden to a federal judge, and decides the case before it in accordance with its own judgment so induced. Is this an "unconstitutional assumption of power" and an "invasion

the answer to the last question is "Yes," then the decision of a case is still going to depend, in some degree, upon the accident of diversity of citizenship and the accident of venue.

Within the brief space of thirty days, beginning last December 9, the Supreme Court handed down opinions in five cases⁹ applying the doctrine expressed in *Erie Railroad v. Tompkins*. More will no doubt follow. They are all interesting cases; and all need critical analysis and comparison. The facts of three of these will be briefly stated here; and all of them will be used as the basis for comment on the nature of our common law, on the sources from which the law of a state may be determined, and of the part played by the judges (especially the federal judges) in making this law.

INFERIOR STATE TRIBUNALS AND THE FEDERAL COURTS

In *Fidelity Union Trust Co. v. Field*, decided on December 9, 1940, Edith Peck had caused her savings bank account to be changed on the books of the bank from her own name to "Edith Peck in trust for Ethel Field." After Edith Peck's death, Ethel Field sued the bank and the executors for a decree establishing her right to the balance as beneficiary of the trust. The federal district court gave judgment for the executors. This was reversed by the Third Circuit Court of Appeals, on the ground that a valid trust had been created, as provided by a New Jersey statute. This statute reads in part as follows:

"Whenever any deposit shall be made with any . . . bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the . . . bank, in the event of the death of the trustee, the same . . . shall be paid to the person in trust for whom the said deposit was made . . . and the legal representatives of the deceased trustee shall not be entitled to the funds . . . notwithstanding that the funds so deposited may have been the property of the trustee. . . ."

Prior to the passage of this statute, the highest court of New Jersey had held that such an act as that of Edith Peck would not create a valid

of the independence" of the state whose law is thus being found? Let us hazard the prediction that the United States Supreme Court will not on such a ground reverse the decision so made. The fact is that it is not an "invasion" and involves no assumption of superiority.

9. *Six Companies of Calif. v. Joint Highway Dist.*, 61 Sup. Ct. 186 (U. S. 1940); *Fidelity Union Trust Co. v. Field*, 61 Sup. Ct. 176 (U. S. 1940); *West v. American Tel. & Tel. Co.*, 61 Sup. Ct. 179 (U. S. 1940); *Stoner v. New York Life Ins. Co.*, 61 Sup. Ct. 336 (U. S. 1940); *Vandenbark v. Owens-Illinois Glass Co.*, 61 Sup. Ct. 347 (U. S. 1941), (1940) 50 YALE L. J. 315. *Voeller v. Neilston Warehouse Co.*, 61 Sup. Ct. 376 (U. S. 1941), does not refer to the doctrine, but will be noted herein as possibly affecting it.

trust, either *inter vivos* or as against the depositor's legal representatives after death. To the circuit court of appeals, as to the present writer, the legislature seemed to have clearly intended to give full effect to such a deposit as a declaration of trust, fully operative as to any balance in the bank at the time of the depositor's death.

This legislation had been examined, however, by a Vice-Chancellor of New Jersey in each of two cases just like the instant case; and in each case the Vice-Chancellor had held that the statute was ineffective to change the prior judge-made law and that the executors of the deceased depositor were entitled to the money. These decisions do not seem to have been reviewed by the New Jersey Court of Errors and Appeals.

The circuit court of appeals recognized that it must apply New Jersey law and also that the issue was identical with that decided by the Vice-Chancellor. It held, however, that a decision by an inferior court, such as the New Jersey Court of Chancery, was not conclusive in any other case as to what is the existing law of New Jersey, that the New Jersey statute was valid, and that the action of Edith Peck created a valid trust for Ethel Field.

The Supreme Court reversed this decision. The federal courts now are bound to accept a statement of state law, upon the basis of which a decision is made, even if it is made by a single judge in an inferior state court, so long as it stands unreversed and the highest state court has not declared it to be incorrect. The federal courts must declare and apply the law of the state; and in this process they may not determine the construction and effect of a state statute independently of the opinions of the inferior state courts. In the instant case, they were bound to follow the decision of the Vice-Chancellor. When that is properly overruled, they will be bound to follow the later state decision. Mr. Chief Justice Hughes said: "An intermediate state court in declaring and applying the state law is acting as an organ of the State, and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."¹⁰

10. The express words are "an intermediate state court." But the Vice-Chancellor is the judge of a court of first instance. It is possible that he also has some appellate jurisdiction over decisions of town or city courts. The opinions of the Vice-Chancellors happen to be printed, along with those of the Supreme Court of Errors and Appeals, in the single set of volumes known as New Jersey Equity reports. This fact often causes beginning law students to cite their opinions as if they were of equal weight with those of the higher court. Of course, a Vice-Chancellor's opinion may be so well done that it is more persuasive to a student of "general" law, or comparative law, than is a contrary opinion supported by a full upper bench.

All that the Court says about the Vice-Chancellor as a law-making "organ" of the state (Holmes's "quasi-sovereign") can also be said about any other court of first instance, from a justice of the peace up. In addition, it may be asked whether the judge is not as much an "organ" of the state when he decides the issues of a case without writing (or without publishing) an opinion as when his opinion is published.

"In the absence of more convincing evidence of what the state law is" Is not an enactment by the state legislature "more convincing evidence"? No, because the federal court is "not at liberty" to determine "the construction and effect of a state statute." It may not use "its own reasoning independent of the construction and effect which the State itself accorded to its statute." In the instant case, the Vice-Chancellor is the state. "We have no other evidence," says the learned Chief Justice, "of the state law in this relation."

Thus, it appears that in determining the law of a state the federal judiciary, including the Justices of the Supreme Court themselves, are forbidden to use their own "reasoning." They are restricted to no more than a good clear reading glass — one, of course, that can distinguish between a ratio decidendi and an obiter dictum.

It appears, further, that Ethel Field has been deprived of all opportunity to question the validity of the Vice-Chancellor's opinion, rendered in a case to which she was not a party. Had she been before that Vice-Chancellor himself she could have questioned it. In any other court of New Jersey, she could have questioned it; and she could have appealed to the Court of Errors and Appeals. But in the federal courts, it is inviolate. Be it remembered that under our Constitution she can be dragged into the federal court wholly against her will. She must submit her fortunes to the decision of a court that can read but must not reason. Even its reading is limited. It must not read the act of the legislature, if a Vice-Chancellor has decided in a collateral case that it is meaningless or invalid. Is this "due process of law"? Is this a day in court? A federal judge cannot call in the Vice-Chancellor or the numerous judges of the Court of Errors and Appeals, to sit as a referee on the question of state law. On that question, Ethel Field gets no hearing before a court that will listen to her arguments, weigh their soundness, and determine the justice of her claim. Of such a hearing she is deprived by the accident of diversity of citizenship. Yet the decision of this helpless federal tribunal is final. She can not appeal to the state court. And if, in some later case, the highest state court overrules the Vice-Chancellor, it will do Ethel Field no good.¹¹

In *Six Companies v. Joint Highway District*, decided on the same day, the question was whether a provision for the payment of \$500 per day as liquidated damages for delay in completion was applicable in the case of a California construction contract, after the contractor had totally

11. In this article, we are not passing judgment on the meaning and validity of the New Jersey statute. Neither does the Supreme Court pass such judgment. The Court merely holds that it is "unconstitutional" for the federal judges to refuse to follow the opinion of the Vice-Chancellor, "in the absence of more convincing evidence of what the state law is," and that the legislative enactment cannot itself be such evidence. As to this, the Vice-Chancellor is the "organ" of the state, and the legislature is not.

abandoned work. The Ninth Circuit Court of Appeals held that the provision was applicable, and figured up \$142,000, although it knew that the California District Court of Appeal had held the exact contrary. The Supreme Court reversed the decision of the circuit court of appeals, holding that it must follow the California court. The Chief Justice said: "We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the state is otherwise." From this statement, it appears that the federal courts may listen to evidence that the California court was wrong. It is not "unconstitutional" to receive and weigh this evidence. In this case the California legislature had enacted no contrary statute; and a general study of the law of damages indicates that the California court's doctrine is at least as good as any other. A study of the general sources of law is not likely to justify a reversal of that doctrine in California. If this is true, the action of the lower federal court was "erroneous"; but it was not "unconstitutional." It tried to apply state law; but it failed to do so and it was corrected by the Supreme Court.

In *Vandenbark v. Owens-Illinois Glass Co.*, decided on January 6, 1941, the state law to be applied was the law of Ohio; and the particular rule involved was one on which the Supreme Court of Ohio had recently reversed itself, overruling two former decisions. In the federal district court, the judge held that by the law of Ohio the plaintiff Vandenbark had no right to damages against her employer for injury caused by silicosis, the basis for his holding being the two previous decisions to that effect by the Ohio Supreme Court. The plaintiff appealed to the Sixth Circuit Court of Appeals. Pending this appeal, the Ohio Supreme Court in a wholly separate action overruled its two earlier decisions. The Supreme Court of the United States held that the circuit court of appeals must apply the law of Ohio as the Supreme Court of Ohio now declares that it is *and that it was* when the plaintiff caught her silicosis. But was not the Ohio Supreme Court as much the "organ" of the state five years ago as it is today? Was not the federal district judge required to follow those earlier decisions? And were not Vandenbark's rights and the Glass Company's duties determined by the law as then made?

By the Court's present decision, the last question is answered in the negative. From this we must conclude either (1) the Supreme Court of Ohio could not and did not make the common law of Ohio by its former decisions and the federal district judge was in error in following them and in not using his own better judgment; or (2) the Supreme Court of Ohio could and did then make the common law of Ohio, and the federal district judge was bound to decide as he did, but the Supreme

Court of Ohio can and does now remake the common law of Ohio, can and does now make tortious that which was not a tort when it was committed, can and does now create a right in Vandebark that she did not have when she brought the present suit. The writer prefers the first of these alternatives; but the Supreme Court seems to prefer the second, unless it is willing to permit the soundness of the latest Ohio decision, as well as the earlier Ohio decisions, to be tested by other available data.

THE SOURCES OF STATE LAW

In two of the five recent cases,¹² the decision can be supported without any reference to *Erie Railroad v. Tompkins*. They were cases in which the litigating parties had themselves been before inferior state courts and had there obtained a decision on the same common law issues that were later determined in the federal courts. It seems that these issues, whether of law or of fact, were *res judicata*, without regard to the rank of the state court that decided them. If this is true, it would certainly be an "invasion of the independence" of the state and an attempt at "supervision" for a federal court to reverse the state court's decision or to refuse to give it "full faith and credit." *Res judicata* is a very different doctrine from *stare decisis* and from even slighter doctrines such as that of "comity."

In both of these cases, the fact of identity of parties and issues is noted in the opinion; but both of them are principally devoted to discussion of the applicability of *Erie Railroad v. Tompkins*. The opinion in *West v. American Telephone & Telegraph Co.* is by Mr. Justice Stone who discusses briefly the sources to which a federal judge (or any other) may go in determining the common law of a state. The following paragraph is from his opinion:

"A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them.¹³ In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts; and it is the duty of the

12. *West v. American Tel. & Tel. Co.*, 61 Sup. Ct. 179 (U. S. 1940); *Stoner v. New York Life Ins. Co.*, 61 Sup. Ct. 336 (U. S. 1940).

13. Probably we should not infer from this sentence that the individual members of the bar, or even the bar associations, are regarded as law-making "organs" of the state, whose expressed opinions must be followed by a federal judge "in the absence of more convincing evidence." But it is reasonable to infer that they are sources to which a court may go as a basis for judgment "as to what the state law is."

former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however, superior [inferior] the state rule may appear from the viewpoint of 'general law' and however much it may have departed from prior decisions of the federal courts. . . . Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Taken as a whole, this statement has much merit. The federal court, like a state court, must determine what the state law is by use of "all the available data." A decision by an intermediate state court is a "datum"; but the federal court may disregard it if it is "convinced by other persuasive data that the highest court of the state would decide otherwise." Justice Stone does not say of what these "other persuasive data" may consist, other than opinions of the bar and of inferior courts. Is it not reasonable to believe that they include all the data which the state court itself would be free to use? They include the state constitution and statutes, former opinions of the state courts of every rank, opinions of the courts of other states, the Restatements of the American Law Institute, the works of juristic writers, the mores and practices of the community. Justice Stone might not be willing to include all the data just enumerated; but he indicates, as did the Chief Justice in *Ethel Field's* case, that the federal court need not accept and follow a rule if there is "convincing evidence" that it is wrong. The fact is that in the present instance it was not wrong.

It is the contention of this Article that in any case in which a federal court has constitutional jurisdiction, whether by reason of diversity of citizenship or otherwise, it is its sworn duty to administer justice as it would be administered in the state court, using the same "persuasive data" to determine the state law. If it is the law of Ohio that is to be determined and applied, the sources and processes by which it is determined should be the same, whether the suit is in an Ohio court, or in a federal court, or in the court of a sister state.

It is obvious that this must be so if the law to be applied has not yet been considered or declared by any court of the particular state whose supposed law is to be applied. In creating our vast, and ever vaster system of law, Anglo-American courts have always drawn from all the sources that are enumerated above. They do not refuse to decide a case because there is no precedent and no previously stated rule. Even if there are precedents, they may disregard them; and a previously stated rule is one to be distinguished or modified or totally repudiated. The Supreme Court cannot, and does not deny that this is the judicial process by which

our law is made, whether or not that law be regarded as confined within the territorial boundaries of a state. The sources from which state law has been drawn are no more confined within the territorial limits of the state than are the sources of the father of waters that flow at last into the state of Louisiana. The absence of precedent is not the absence of law; there is law to be discovered and applied, by any court having jurisdiction. The French Civil Code expressly makes it a misdemeanor for a judge to refuse to render a decision on the ground that there is no applicable law. We have no similar provision; but our judges follow the identical practice. They must and do decide either that the facts create rights, or that they do not. The issue is determined and is *res judicata* in either case. In either case we have a precedent leading to a stated rule.

The truth of the foregoing is equally obvious if the decisions within the particular state are confused and conflicting. Intermediate appellate courts, sitting in separate divisions, may lay down contradictory rules, just as may our federal circuit courts of appeals and district courts. The highest court of a state, like our United States Supreme Court, may decide analogous cases in conflicting and inconsistent ways, and render confused opinions that determine little or nothing for the future.

But even if we have a decision of the highest court, with a clear-cut opinion laying down a definite rule, our judicial system is such that the rule there stated may not be followed tomorrow. The decision binds the litigants. It binds nobody else. As to the two litigants, the court is indeed the "organ" of the state, the "quasi-sovereign" whose voice they must obey. But its rationalizations are not legislative enactments, general in application. They are merely "persuasive data." The beautifully stated rule may work tomorrow, or it may not.

Observe the rule in *Swift v. Tyson*. It was clearly stated by Mr. Justice Story, a great judge and scholar. It was declared to be the law by a unanimous court of nine justices. It was respected for a hundred years. It was applied in hundreds of cases. But no Justice of our present Supreme Court is now so humble as to do it honor. Ah well! Any rule of law may regard itself lucky if it lives a hundred years. No centenarian should ever rule a nation, or a court, or even a law office. All rules of law are for the courts to apply — yes; but all rules of law are also for the courts to change. And the changes, like the applications, will be made by the courts that have jurisdiction of the cases in which they are involved. These changes and these applications should indeed not depend upon the accident of diversity of citizenship. But as good reason can be found therein as in the accident of location of a territorial line, or in the accident that a court is described as federal with a small initial instead of State with a capital letter. The poor litigating parties should not be forgotten. In each case alike they are entitled to a day in a court of justice, operating according to our judicial system, making use of all those sources of wisdom by which justice is determined.

THE JUDICIAL POWER

Article III, Section 2, of the Federal Constitution, provides that "The judicial power shall extend . . . to controversies . . . between citizens of different states." The Constitution does not prescribe by what law these controversies shall be determined, or to what sources the federal court may or may not go in determining this law. It is very difficult to see any "unconstitutional assumption of power" when the federal court decides a case over which the Constitution expressly gives it jurisdiction and determines as best it may, from such sources as it can find, what the "law" is by which the rights of the litigant are determined. If there is any such "unconstitutional assumption," the court would seem to be just as guilty of the offense when it decrees that the Vice-Chancellor is the state as when it holds that he is not. In either case, the "law" that determines Ethel Field's property or personal rights is chosen and applied by the court before which she bows. To this, she will always be a competent and willing witness, since she loses forever her claim to the money in the bank.

Story's rule in *Swift v. Tyson*, now abandoned, did not purport to empower the federal courts to impose an external, and perhaps unwelcome, rule upon a state and upon its courts. It was never an attempt at "supervision over either the legislative or the judicial action of the states," or an "invasion of the authority of the state and a denial of its independence," as Justice Field once supposed it to be.¹⁴ Such a notion vastly overweighs the function of the judges in making law and their power to impose their rationalizations upon other people. The "judicial power" is the power (and the duty and the necessity) to determine the issues between litigating parties. Upon these, a court does indeed "impose" its will; it determines the juristic effect of the facts that are established — the extent to which society (the rest of us as organized) will or will not use its force against them. To this extent, and to this extent only, any court having "jurisdiction" is the "organ" of our societal "organization"; and to this extent a federal court is as much the "organ" of a state that has adopted our Constitution, as it is of the federal union of states that was created by their adopting it.

Most judges have, in the past, strenuously denied that they made the law. "Judge-made law" was usurpation. The fact that they and most critical jurists have now abandoned this denial should not now cause judge or jurist to jump to the opposite extreme — to assert that the law, even for others than the litigating parties, is what the judge *says* that it is. The rationalizations — the rules or doctrines or principles — that are expressed by a court in justifying its decision, are a part of the law-making process only because they may have helped to determine the rights

14. *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368, 401 (1893).

of the specific litigants and because they may be strongly persuasive in subsequent litigated cases. The phrase is "may be strongly persuasive." No court has ever had more reason to know the truth of this than the present United States Supreme Court. It has for itself weighed the "sanctity" of precedent, determined when the doctrine "stare decisis" should be honored only in its breach, and constructed new doctrine on the basis of "all available data." As the Court itself says, the rule of law as applied by a court "is a datum . . . which is not to be disregarded . . . unless. . . ."

The doctrine laid down by Story in *Swift v. Tyson* was merely a "datum." It was very frequently openly criticized; it was sometimes consciously or unconsciously disregarded; it was finally excoriated as both erroneous and "unconstitutional." The most surprising thing about it is that such a "datum" should have had its troubled influence for as long as a hundred years. It may yet find a court to do it honor. There it stands, in the 16th volume of Peters, as long as a single law library escapes destruction by the Hun and the Vandal. It is still a "datum"; but it is a dated datum. So also are the similar data of more recent date.

Where, because of diversity of citizenship, a party is forced into a federal court, it is reasonable to hold that his rights should be determined in accordance with the same system of law as would have applied had the case been in a state court. This seems to have been the chief purpose behind the decision in *Erie Railroad v. Tompkins*. The overruled doctrine in *Swift v. Tyson* has been thought to assert that a federal system of common law, differing from that of a state, might be applied by the federal court even though it knew that a different result would be reached under the applicable state system of common law. This well deserved to be overruled. It asserted that the substantive law of the forum, as well as its procedure, determines the rights of the litigants, a doctrine that is quite inconsistent with generally accepted theory.

It follows that the court of the forum should use the very same juristic data in determining the rights of the litigants, whether the forum be a federal court or a state court. The Supreme Court has rightly held that the rights of the litigant should not depend upon the accident of diversity of citizenship. Therefore, when the forum is a federal court, that court must determine the applicable law by recourse to all the juristic data that are available to the state court. If the federal judge is required to disregard some of those available data, the litigant is not getting the same justice that he would get if the forum were a court of the state whose system of law is applicable; his rights, by reason of this limitation, will vary with the forum and will again depend upon the accident of diversity of citizenship.

This is not an argument against respect for precedent. Federal and state judges should give exactly the same degree of respect to precedent;

each should give the same degree of respect to a dictum, or to a treatise, or to a statute. Story himself expressed that very degree of respect. But no precedent is conclusive except against the litigating parties therein. And no judge, especially a minor court judge, can force a rule upon the judges and litigants in other cases by stating it in his written opinion. Very recent history in the United States Supreme Court is the best evidence of this; and the case of *Erie Railroad Co. v. Tompkins* is itself a star witness.¹⁵

When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination — statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive. Shall a litigant, by the accident of diversity of citizenship, be deprived of the advantages of this judicial process? Shall the Supreme Court, by what superficially appears to be an unselfish and self-denying ordinance, foreclose the use of such a process by federal judges? It is in fact a denial of justice to those for whom a court exists. We must not forget that a litigant has only one day in court. When forced into a federal court, that is his only court. If he is denied life, liberty, or property by the narrow syllogistic use of a state judge's worded doctrine, he is not restored by the fact that intelligent state judges later refuse to apply that doctrine to other litigants. True, he has had his day in court; but what a court!

Remember that in Ethel Field's case, the reversal of the lower federal court deprived the litigant, finally and forever, of the money deposited in the bank. It nullified what appears clearly to have been the intention of the depositor. And it gave the money to the donor's personal representative, in spite of the fact that the New Jersey legislature pretty clearly enacted that it should belong to the donee. Why did it do this? Because a Vice-Chancellor, in another case could not, or would not, see what the legislature meant. A court of first instance, and a single judge!¹⁶

15. "It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV." HOLMES, *The Path of the Law* in COLLECTED LEGAL PAPERS (1920) 187. This is quoted with apparent approval by Mr. Justice Stone in *The Common Law in the United States* (1936) 50 HARV. L. REV. 4, 7. In place of "Henry IV" in the above quotation, we may perhaps be permitted to substitute "Harding I." It is as yet too early to substitute "Roosevelt II." But would not Holmes have added another dissenting opinion against the Vice-Chancellor of New Jersey? It was Holmes who said that what he meant by "law" was a "prediction of what the courts will do in fact." What they *will do*, not what they *have said*.

16. It may be argued that the federal courts have long followed a self-denying ordinance in the special matter of construction of state statutes. This particular point

Will the next Vice-Chancellor follow the last one? Will the New Jersey Court of Errors and Appeals follow suit? It may indeed do so. The fact that the United States Supreme Court has declared that all federal judges must honor the draft of the Vice-Chancellor gives added weight to his words. The Court of Errors and Appeals may hold, in new cases, that the Vice-Chancellor was right, and that the legislature did not mean what it said, or that it meant nothing. But the Court of Errors and Appeals will at least give the legislature a chance; it will try to determine, by a judicial process, whether the Vice-Chancellor was right or wrong. Are we now compelled to say that this is what the federal judges (or the judges of other states) must not do? Happily, the answer to this is "No," if we may give full weight to the words of the Chief Justice: "in the absence of more convincing evidence of what the state law is," and to the words of Justice Stone: "all the available data of what the state law is."

If the federal judges use the customary judicial process in determining and applying state law with respect to the litigating parties before them, it is quite possible that conflict may exist between a federal decision and a state decision. Is conflict such a new and unusual phenomenon? The Supreme Court, and every other court, bears witness that there may be conflict between judges on a single bench in the same case, or between a court and its predecessors on the same court. We may not like such conflict; but it is an inevitable part of our judicial process, or of any other. It is by such variation as this that the evolutionary growth of law is possible. Each litigant, whether in the federal or the state courts, has a right that his case shall be a part of this evolution — a live cell in the tree of justice. He asks for justice; and that is our kind of justice, whether the decision is for or against him.

Moreover, conflict is not avoided by requiring the federal judges to follow the doctrines of a Vice-Chancellor to the disregard of sources that he should have used but did not. The most that can be said is that it avoids conflict with a former decision by the Vice-Chancellor, in a case where competent search of those sources shows that he was wrong. It has sometimes been said that "*communis error facit lex*." But when the state court subsequently makes its own search, and overrules the Vice-Chancellor, the ugly face of conflict again shows itself. Conflict with the past is to be preferred over conflict with the future.¹⁷

will not be discussed here, further than to question whether a *nisi-prius* judge should be accepted as the construction boss.

17. The fact that a federal court differs with a state court in its determination of the legal operation of the specific facts in the litigated case shows no invasion of the state's independence or supervision of its courts and legislature. The very reason for which jurisdiction was given to the federal courts in diversity of citizenship cases was that it was contemplated that such a difference ought sometimes to exist. This applies

Of course, the federal courts may in subsequent cases (or in subsequent hearings in the same case) avoid conflict with the later state opinion. A weather vane in the shifting winds of doctrine may at least show the change in the wind. We do well to remember that the state court's variation may be based upon the very best judicial process. And if we are to pay respect to the opinions of a judicial hierarchy, no doubt we should pay the most to the highest and the latest.¹⁸ It is far from the purpose of the present Article to advocate denial of such respect, or the restoration of Story's doctrine in *Swift v. Tyson* as it has been understood. It advocates only that every litigant's day in court shall be a day in a real court of justice, a court that consults "all the available data" and reaches its decision as to his rights by that high judicial process that has made constitutions and statutes and the common law render a living service according to the changing needs of men. This is the "judicial power" that is conferred by our Constitution.¹⁹

also to differences in the rationalizations and generalizations on which the court rests its determination of the rights of the parties. These may be disturbing to the minds of the state judges; but there is not the slightest compulsion to follow them.

18. As, for example, in *Vandenbark v. Owens-Illinois Glass Co.*, discussed *supra* p. 769.

19. As a final query, somewhat aside from the exact subject of this article, the writer would like to inquire what kind of law was made in *Voeller v. Neilston Warehouse Co.*, 61 Sup. Ct. 376 (U. S. 1941), and who was making it. The Supreme Court of Ohio held that an Ohio statute was void because it authorized the taking of property without "due process of law." The United States Supreme Court, exercising a "supervisory" jurisdiction over the state court, now reverses that decision. It holds that the Ohio statute is valid and that its prescribed process is "due process." The 14th Amendment provides that no state shall deprive a citizen of property without due process of law. Due process of *what* law? Is it not the state law? The state supreme court held that notice to the officers of a corporation was not notice to an individual shareholder, and that to deprive him of his rights as shareholder without such notice is not "due process." To the writer, as to the United States Supreme Court, the decision seems erroneous. But the 14th Amendment makes the Supreme Court the custodian of due process, only as against deprivation of life, liberty, and property, not for the purpose of creating a federal general law of "due process." It does not empower the federal court to tell the state court that it must not erroneously *increase* the requirements of due process. Which court was guilty of an "unconstitutional assumption of power?"