The decision in the *Tompkins* case may facilitate the joinder of actions in the federal courts and the decision of non-federal as well as federal claims when presented together in a case in which federal jurisdiction is properly invoked.[51] A serious objection to such a practice in the past was the likelihood that the federal decision would be different from the one that could be expected if the non-federal claim were to be tried in a state court.[52] With this likelihood diminished, there may be greater freedom in yielding to the felt needs for economy and convenience in judicial administration by disposing of the several claims in a single action.

Conflict of laws and the due process clause may assume an added importance. If a case is to be governed by decisions of a state court rather than by federal decisions, it becomes important to decide by the decisions of what state. And what state's rule of conflict of laws is to govern? Again, cases like *Gelpcke v. Dubuque*,[53] *Burgess v. Seligman*[54] and the *Black & White Taxicab* case[55] may raise substantial questions of due process, now that the escape of diversity of citizenship is shut off. Is the power of state courts to overrule previous decisions or to invalidate contracts on grounds of public policy unlimited?[56]

Further argument on the distinction between "substantive law" and what is "procedure" is probably another consequence. For federal power over procedure in the federal courts is left undisturbed by the *Tompkins* case.

Answers to these and other questions will be worked out primarily by the inferior federal courts. The Supreme Court, having given the direction, will probably be unable and unwilling to watch the road through the entire journey. In the meantime many a federal judge may writhe in pain at the prospect of having to follow "the last breath" of the state judges.

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THE COMMON LAW OF THE UNITED STATES

"There is no federal general common law." True, beyond doubt, in the sense that there is no system of universal general rules and principles, no "brooding omnipresence in the sky." In view of the action of the court in

51. *Cf.* Hurn v. Oursler, 289 U. S. 238 (1933).

52. Shulman & Jaegerman, *supra* note 42.

53. 1 Wall. 175 (U. S. 1863).

54. 107 U. S. 20 (1882).

55. 276 U. S. 518 (1928).

56. In the type of case represented by Gelpcke v. Dubuque, there was considerable vacillation between the theory of freedom from state decisions and the impairment of contracts clause of the Constitution. The former prevailed. See Tidal Oil Co. v. Flanagan, 263 U. S. 444 (1924). The Tompkins decision may leave that type of case undisturbed; but if not, will not the due process clause be pressed into service? *Cf.* Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358 (1932) and Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673 (1930).

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overruling *Swift v. Tyson*, it may now be pertinent to ask whether there is a "Pennsylvania general common law." Is there an omnipresence brooding over the state of Pennsylvania?

The Supreme Court sent the instant case back to the District Court with directions to find and apply the law of Pennsylvania, supposedly distinct from the non-existent "federal general common law." To what sources is that harassed trial court to go? Do the words of Section 34 of the Judiciary Act of 1789 now restrict the federal judge? Is it now "unconstitutional" for him to go outside the opinions of the judges of the Supreme Court of Pennsylvania?

If the answer to the foregoing questions is "yes," the federal judges are, for the first time in one hundred and fifty years, limited in a way in which the Pennsylvania judges are not themselves limited. The common law of Pennsylvania, like its statutory and constitutional law, is an evolutionary and variable product. In the main, it is the creative work of the judges, dealing with the living stream of dispute and conflict, searching in each new litigated case for a reasonable and workable guide to a solution. This guide is a rule of law, a generalization drawn from life history, one that is so well drawn from that history that it will successfully meet the pragmatic test of explanatory rationalization. The judge's work in constructing this generalization instantly becomes a part of the history that will be used by the judges in succeeding cases; it is one new step in the evolution of the law. Every new case has some new factors that require original consideration by the court. In some degree, every new case is a case "of first impression."

In dealing with each new controversy, the Pennsylvania judge must search for the applicable law, not merely in earlier Pennsylvania cases, not merely in the varying custom of Philadelphia or Pittsburgh or Bryn Mawr. He looks for enlightening direction to the decisions and doctrines and custom of England, old and new, of other states and countries, of other courts, federal or state or foreign. He is not hidebound by any antecedent doctrine, itself man-made by some judge or jurist like himself. Of course, he weighs all such doctrines with constructive and respectful care, and passes his independent judgment as to which form of worded rule will best serve for the solution of his immediate problem. He is far from certain of finding this worded rule in the opinions of Pennsylvania courts alone.

Are the federal judges now being directed to act differently from the Pennsylvania judges themselves? It can not be so intended; and if the Supreme Court does so intend, the federal judiciary, including the Supreme Court itself, will be quite unable to comply with the direction. On the new trial in the District Court, the applicable "Pennsylvania" law will be discovered by the same process and from the same broad general sources as before. If, on appeal, the new decision is considered by the Supreme Court, it will use the same process and the same sources.

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In the cases that are rightly before them, the federal courts have the same constitutional power, as have the Pennsylvania courts, of determining the law that is applicable to the instant case. And their decisions have the same effect as precedents and as a part of the new history. This will be true, whether on the new trial the court decides that there is a special rule that is applicable to trespassers on a longitudinal pathway by a railroad track, or decides that there is not. In either event, the court is making the law of the case and is helping to determine the rule that will be applied in later cases.

Did the founding fathers, sitting in constitutional convention, have other views than these? Did the members of Congress enacting the Judiciary Act of 1789 have other views? Did they command the federal courts to follow Pennsylvania "law" as yet unmade, at the same time that they gave these courts jurisdiction over cases in which new law must often be discovered and applied? We can not know what were their theories of the nature of the common law and of its evolutionary growth. It is not necessary for us to know them.

The overruling of *Swift v. Tyson* is a matter of much less importance than it may seem to many. On the whole, its effect may be beneficial. It will not affect "vested rights" or invalidate the numerous decisions rendered on the theory stated by Mr. Justice Story. In actual practice, it will not deprive the federal judge of the freedom and power that have been his. It is not an order by Brandeis, J., that hereafter Learned Hand, J., must take his law from the words of Finch, J. If it is an admonition to federal judges that there is no "federal general common law" that is to be found *solely* in the opinions of other federal judges, much is thereby gained. But if it is a direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread forty-eight states, something has indeed been lost.

A. L. C.

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