

## BOOK REVIEWS

JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT. By Gerald T. Dunne. New York: Simon and Shuster, 1970. Pp. 459. \$12.95.

This book is a compilation of a long series of studies on the life and times of Justice Story together with many additions which appear for the first time in this volume (p. 5 acknowledgements) giving us a much-needed biography of Mr. Justice Story.

It is, in a sense, a parallel to Beveridge's *Life of John Marshall* but written on a totally different level. It compresses the life of this complicated lawyer, statesman, business man, philosopher and legal scholar, whose influence on the law of the United States is more widespread than that of Marshall, into about one-fourth the volume of Beveridge's work. It is a lawyer's and historian's book which requires broad, detailed knowledge of the contemporary discussions and political trends for full understanding of the author's exposition. In fact, so great is the author's intimate knowledge of the cases and of the historical and commercial conditions of the times in which Story lived and worked that he often becomes almost completely subjective. This makes the book an excellent introduction to further study of the historical material with which the author is obviously intimately acquainted, but which a non-professional reader or even a lawyer may have difficulty understanding.

Throughout the entire work there emerges a picture of Mr. Justice Story's view of American national law based on the Constitution and not on English precedents (pp. 98 ff.; pp. 129 ff.); his brief fight against grievous conditions of the early Federal union (ch. IX); his loyalty to stated constitutional precepts even when that involved legalizing slavery (pp. 240 ff.); and his broad scholarship and acquaintance with the law and philosophy of civil law countries as well as the English precedents, which he decided properly to ignore when dealing with questions of admiralty (pp. 99 ff.), bankruptcy (pp. 145-47; pp. 384 ff.: p. 403), corporations (p. 142, pp. 266 ff.) and state laws. Story's

contribution to the development of American law through his numerous treatises and his reorganization of the Harvard Law School is brought out in a summary but forceful fashion.

Mr. Dunne touches upon the legal technicalities, the political issues of the times, and the complicated social problems like a harpist scanning his strings. This leads to interesting chords but may cast some superficial doubt on the basic soundness of some of the conclusions to be derived from his inferences. No place is this better illustrated than in the author's discussion of the great Justice's philosophy on the nature of law itself, which resulted in the decision of *Swift v. Tyson*<sup>1</sup> and its subsequent overruling by *Erie Railroad v. Tompkins*.<sup>2</sup> This is covered in approximately twelve pages (pp. 403-14) wherein Mr. Dunne succeeds in touching upon most of the arguments of constitutionality, statutory interpretation and legal philosophy which have surrounded these two cases over the last thirty years.

*Swift v. Tyson*, it will be recalled, was the case in which the Supreme Court unanimously held that, under section 34 of the Judiciary Act, it was not bound in a diversity of citizenship case arising from New York to follow the decisions of the Supreme Court of New York as to whether a pre-existing debt constituted value so as to make one a holder in due course of negotiable paper, which decision Mr. Dunne, with tongue in cheek, concedes is unconstitutional (pp. 403-04).

Section 34 of the Judiciary Act provided "that the laws of the several states . . . shall be regarded as rules of decision" in such cases. The courts of New York having decided, contrary to the Law Merchant and most court decisions, that a pre-existing debt was not "value," the simple question before the court was whether or not such decisions were "law." In other words, whether or not the doctrine of stare decisis was part of the law of New York. The whole controversy surrounding these cases has overlooked the constitutional provision that judicial decisions, under article III, with the exception of equity, look wholly to the past, and laws are regulations looking to the future. Therefore, if courts' decisions can become "rules of law," courts are legislating. This is impossible for the federal courts because, by article I, section 1 of the Constitution, "all legislative power" is vested in the Congress, so without congressional delegation no federal court can make rules for the future.

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1. 41 U.S. (16 Peters) 1 (1842).

2. 304 U.S. 64 (1938).

Insofar as the doctrine of stare decisis attempts to do this, it is not found in the definitions of law in the Constitution of the United States.<sup>3</sup> It is strictly an English common law anomaly based on the illogical and unscientific argument that the law should grow from the particular case to general rules. Thus courts, by making decisions in single cases, can bind the future. It has been outlawed in civil law countries since Justinian<sup>4</sup> and was not part of the definition of law contained in the Constitution of New York of 1821,<sup>5</sup> under which *Swift v. Tyson* was decided. Story, being fully acquainted with the civil law and with the constitutions of the United States and of New York, of course found no difficulty in writing the opinion excluding the doctrine of stare decisis from the definition of "laws" in section 34 of the Judiciary Act. It is only muddle-headed, traditional thinking which has caused American lawyers to apply the doctrine of stare decisis in discussing the implications of the term "laws" in the "rule" of *Swift v. Tyson*.

Mr. Warren's attempt to read stare decisis into the Judiciary Act<sup>6</sup> is not one of his better achievements because it begs the question

3. U.S. CONST. art. VI:

This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .

Nowhere are court decisions or stare decisis ever mentioned. *Contra*, and plainly wrong if taken out of context, see Mr. Chief Justice Warren and the whole Court, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958): "It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."

4. JUSTINIAN CODE, VII-45, 13; see C. CIV. art. 5, nn. 107-10 (Dalloz); R. POUND, READINGS IN ROMAN LAW 11-12 (2d ed. 1914); B. WRIGHT, FRENCH CIVIL CODE 2 n.c (1908).

5. N.Y. CONST. art. VII, § 13 (1821) defined "law" as follows:

Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, and of the convention of the state of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed, or altered; and such acts of the legislature of this state, as are now in force, shall be and continue the law of this state, subject to such alterations, as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.

That stare decisis was no "part of the common law" of New York at that time is clearly demonstrated by Mr. Justice Story's citation of New York decisions on value, 41 U.S. (16 Peters) at 16, 17.

6. Warren, *New Light on the Federal Judiciary Act*, 37 HARV. L. REV. 49, 86 ff. (1923). Cited by Dunne at 406 n.6.

whether court decisions are "law" by assuming that the doctrine of stare decisis as law was in the minds of the Congress when it passed the Judiciary Act, the very question he is attempting to prove. Only a person obsessed with the idea that stare decisis is law could reach the conclusion on Warren's evidence that the Congress in section 34 intended to include state court decisions in the term "laws" binding on the federal courts. The fact that the words "unwritten common law" were stricken out by amendment equally supports an opposite inference. Stare decisis for two hundred years has dulled the wits of Anglo-American lawyers and impeded the development of a just American legal system.<sup>7</sup> Mr. Justice Brandeis's citation of Warren's article in *Erie*<sup>8</sup> and his subsequent strictures on constitutionality go far beyond anything that can be found in Warren's thesis.<sup>9</sup> It is undoubtedly true, as Mr. Dunne himself points out so effectively (p. 404), that as a contemporary, Story knew far better the meaning of section 34 of the Judiciary Act than did Warren or Brandeis with their vision clouded by modern ideas of stare decisis.

The fact that Mr. Dunne indicates this conclusion in such a summary manner without even discussing stare decisis and without even bothering to question Mr. Justice Brandeis's abortive attempt to put the case of *Erie v. Tompkins* on constitutional grounds<sup>10</sup> is typical of the manner in which the author cuts his way through the underbrush of legal technicalities to reach these conclusions without even bothering to state or discuss the premises.

It must be said that, in spite of its briefness and subjectivity, this book gives a much needed picture of one of the greatest American legal minds. Though you will not find it easy to read, it is well worth the effort.

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7. See F. BEUTEL, *EXPERIMENTAL JURISPRUDENCE* 70 ff (1957).

8. 304 U.S. at 73.

9. On this point, see Mr. Justice Reed's concurring opinion rejecting stare decisis, 304 U.S. at 91, cited with approval by Dunne at 403 n.1.

10. 304 U.S. at 78 ff. The learned justice overlooks U.S. CONST. art. III, sec. 2, pars. 1 & 2; art. I, sec. 8, pars. 9 & 18, which clearly give Congress the power to create federal courts and to prescribe their rules of law in places where they have jurisdiction, of which this is one. Mr. Justice Butler and Mr. Justice Reed in their opinions make this too clear for argument. See 304 U.S. at 80.

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