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State Ex Rel. Dyer v. Sims: The Ohio River Valley Water Sanitation Compact Decision

J. B. Harvey

COMMENTS

STATE EX REL. DYER v. SIMS: THE OHIO RIVER VALLEY WATER SANITATION COMPACT DECISION

By J. B. HARVEY

History and Nature of the Controversy

About 1929, a movement was begun to reduce the pollution in the Ohio River. In 1936 Congress authorized the states in the Ohio River basin to enter a compact to control the problem. Thereafter, commissioners were appointed by the various states in the basin to negotiate such a compact. The Ohio River Valley Water Sanitation Compact was completed and submitted to the states for ratification in 1939. Congressional approval of the completed compact was given in 1940. Ratifications from all of the states were obtained by 1948, and in that year the pact was formally executed by the governors of the respective states.

Pursuant to the terms of the compact, the West Virginia Legislature appropriated $12,250 as its proportionate share of the budget for the fiscal year of 1949-50. A requisition was thereafter duly presented to the state auditor, one Sims, for the aforementioned sum. Sims refused to honor the requisition on the ground that the Legislature had no authority to enter into the compact. Proceedings were, therefore, started in the Supreme Court of Appeals of West Virginia to compel the auditor to honor the requisition.

The auditor asserted that the act ratifying the compact was in violation of the state's constitution on four grounds. Two of these were regarded as unsubstantial, but the two remaining grounds were deemed sufficient for the court to render a decision in favor of the defendant.

In a three to two decision,[1] the court decided that the compact violated the West Virginia Constitution, article X, section 4, which provides: "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war. . . ." The court also found that there was an unconstitutional delegation of the state's police power, citing no provision of the constitution, but reaching this conclusion on general principles.[2]

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[1]State ex rel. Dyer v. Sims, 58 S. E. 2d 766 (1950).

[2]The offending sections of the compact provide: "Article I. Each of the signatory states . . . agrees to enact any necessary legislation to enable each such state to place and maintain the waters of said basin in a satisfactory condition. . . .

"Article VI. . . . All sewage . . . shall be so treated . . . as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent of the total suspended solids; provided that, . . . in specific instances such higher degree of treatment shall

Certiorari was granted,[3] and the case was presented to the Supreme Court of the United States for decision. Briefs were filed for the United States, and for the states of Ohio, Indiana, Illinois, Kentucky, Pennsylvania and New York as amici curiae.

The Supreme Court, deeming the construction of interstate compacts a federal question, reversed the state court in an opinion by Mr. Justice Frankfurter.[4] Two concurring opinions were written, one each by Mr. Justice Reed and Mr. Justice Jackson.

The Supreme Court's Solution of the Controversy

Mr. Justice Frankfurter first asserted that the state is not the final authority on what its constitution says. "The Supreme Court of Appeals of the State of West Virginia is, for exclusively State purposes, the ultimate authority in construing the meaning of her Constitution."[5] But where the rights of other states under compacts are involved, the Supreme Court of the United States is free to determine the meaning of the state's laws for itself. For this unique proposition, he cited but two cases: *Kentucky* v. *Indiana*, 281 U. S. 163 (1929), and *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938).

Reed disagreed with this assertion of power on the part of the court "unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule."[6] This writer is compelled to agree with Mr. Justice

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be used as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"All industrial wastes . . . shall be modified or treated . . . to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing.

"The Commission is hereby authorized to adopt, prescribe and promulgate rules, regulations and standards for administering and enforcing the provisions of this article.

"Article IX. The Commission may from time to time . . . issue an order or orders upon any municipality, corporation, person, or other entity discharging sewage or industrial waste into the Ohio River or any other river, stream or water, any part of which constitutes any part of the boundary line between any two or more of the signatory states, or into any stream any part of which flows from any portion of one signatory state through any portion of another signatory state. . . . No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory states; and no such order upon a municipality, corporation, person or entity in any state shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state.

"It shall be the duty of the municipality, corporation, person or other entity to comply with any such order issued against it or him by the Commission, and any court of general jurisdiction or any United States District Court in any of the signatory states shall have the jurisdiction . . . to enforce any such order. . . . The Commission or, at its request, the Attorney General or other law enforcing official, shall have power to institute in such court any action for the enforcement of such order.

"Article X. The signatory states agree to appropriate their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory states. . . ."

[3]State ex rel. Dyer v. Sims, 340 U. S. 807 (1950).

[4]State ex rel. Dyer v. Sims, 341 U. S. 22 (1951).

[5]*Id.*, at 28.

[6]*Id.*, at 32-33.

Reed on both principle and authority. Whereas the court cited but two authorities for this attack upon the federal system, the cases are replete with statements to the effect that the court has no power in this regard. The contention that the Supreme Court has power to construe state law has been urged many times, but the answers have been uniform. In *Bank of Hamilton* v. *Dudley*,[7] Marshall said, "The judicial department of every government is the rightful expositor of its laws; and emphatically of its supreme law." In *Hunter* v. *Pittsburgh*,[8] the court's opinion reads, "We have nothing to do with the interpretation of the Constitution of the state and the conformity of the enactment of the assembly to that Constitution; those questions are for the consideration of the courts of the state, and their decision of them is final." Again, in *South Ottawa* v. *Perkins*,[9] "As a matter of propriety and right, the decision of the state courts on the question as to what are the laws of the state is binding upon those of the United States." And, in *Williams* v. *Eggleston*,[10] ". . . This court cannot hold that the state court was mistaken in its construction of the state constitution."[11]

To overcome this line of authority when a compact is under consideration, Frankfurter first invoked *Kentucky v. Indiana, supra.* In that case, Indiana had undertaken performance of its obligations under a compact when a suit was brought in a state court by certain of its citizens to restrain performance on the ground that the compact was in violation of the state's constitution. Kentucky brought an action in the Supreme Court against the State of Indiana to enjoin breach of the compact and to obtain specific performance thereof. Indiana replied that it fully intended to perform as soon as the matter was finally litigated in the state courts. Indiana conceded the constitutionality of the compact, and the private citizens who were complaining in the state court were not before the Supreme Court to urge the compact's unconstitutionality on their own behalf. The court gave the relief as prayed. Thus the matter was decided without the court's consideration of any provision of the local constitution. However, there is a very broad assertion of power in the case upon which Frankfurter relies:

> "It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this Court is invoked, this Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as acts of Congress, which are said to

[7] 2 Peters 492, 524 (1829).
[8] 207 U. S. 161, 176 (1907).
[9] 94 U. S. 260, 268 (1876).
[10] 170 U. S. 304, 311 (1897).
[11] *Cf.* Olcott v. The Supervisors, 16 Wall. 678, 689 (1872), and Memphis & Charleston Ry. v. Pace, 282 U. S. 241, 244 (1930).

> authorize the contract, in no way affects the duty of this Court to act as final, constitutional arbiter in deciding the questions properly presented. It has frequently been held that when a question is suitably raised whether the law of a state has impaired the obligation of a contract, in violation of the Constitutional provision, this Court must determine for itself whether a contract exists, what are its obligations, and whether they have been impaired by the legislature of the state. While this Court always examines with appropriate respect the decisions of state courts bearing upon such questions, such decisions do not detract from the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the Constitutional guaranty could not be properly enforced. [Citing authorities.]"[12]

It will be noted that no authorities are cited for the proposition that the Supreme Court may construe state law in compact cases, but it is developed by analogy from the cases involving impairment of the obligation of contracts. Reed contended that the argument was not in point, and this writer is again compelled to agree. The function of the court in obligation of the contract cases is to determine whether the statute as enforced by the state courts impairs the obligation of contracts within the meaning of the federal Constitution.[13] Of course, the state determination of this matter cannot be conclusive for it involves the interpretation of the federal Constitution. But here, the only question is as to the limitations of the local constitution. There is no question of testing them against Constitutional standards such as whether there is a "contract" or "obligation" or "impairment" within the meaning of the Constitution. Even if the argument were in point, it could not be cited for the proposition that the Supreme Court may interpret local legislation. As is stated above, the function of the court is to determine whether the statute "as enforced by the state court"[14] impairs the obligation. Hence, the construction of the state court is not questioned in these cases; the court merely reviews the legal conclusion of whether that construction is within the Constitutional prohibition. This is of necessity a federal question, for it involves the meaning and application of Constitutional terms. Thus, these cases really stand for the proposition that the state court is the tribunal to decide the meaning of its laws; while the Supreme Court is the tribunal to decide whether that meaning impairs the obligation of any contract.

The other authority which is cited for this assertion of federal power is *Hinderlider* v. *La Plata River & Cherry Creek Ditch Company, supra.* That case involved a compact between Colorado and New Mexico. These states had reached an agreement whereby the water of the La Plata River was to be divided between the two states. During the dry months when the level

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[12]281 U. S. 163, 176-177 (1930).
[13]Appleby v. City of New York, 271 U. S. 364, 379 (1926).
[14]*Ibid.*

of the river dropped too far, instead of dividing the water by continuous apportionment, it was to be divided according to time—Colorado to have exclusive use of the water for ten days, then New Mexico for ten days. Colorado had a constitutional provision giving to prior users of water a vested right to that share of water which they were accustomed to using, which right could not be cut off by subsequent users. By virtue of this clause, the Ditch Company claimed that it had a vested right in a certain amount of water and that it was entitled to take it irrespective of the compact, and to deny its right so to do would be to deprive it of a property right conferred by the constitution. The Colorado Supreme Court agreed and gave a decree to enforce the company's claim to the water. The United States Supreme Court, far from overruling a construction of the local constitution, agreed with the state's interpretation of that document. However, it pointed out that a state doesn't own all of the water in interstate streams which flow through its borders. It owns only an equitable share. (*Kansas* v. *Colorado*, 206 U. S. 46 (1907).) The Colorado Constitution could only give vested rights in property which belonged to Colorado. The court attempted to make it apply to the equitable share of the river which belonged to New Mexico. That the two states had decided by compact to divide the river according to time instead of by apportionment of the continuous flow doesn't change the result. The compact merely provided a formula whereby each state's equitable share could be determined and used to the greatest benefit of both. The Ditch Company still had a vested right in the water of the river—the Supreme Court took pains to point out that it did not upset the state's construction in this regard—but it had a vested right only in Colorado's share of the river.

Although Mr. Justice Frankfurter made a broad assertion of power, it is uncertain whether he reconstrued the particular provision of the West Virginia Constitution that was in question. He cited what he regarded as two saving provisions of the compact[15] and said, "In view of these provisions, we conclude that the obligation of the State under the Compact is not in conflict with Article X, Section 4, of the State Constitution." This language can be read as meaning either that the compact as construed by the Supreme Court is not in conflict with the state constitution; or that the compact is not in conflict with the state constitution as construed by the Supreme Court. This ambiguity is unfortunate, for it leaves the basis of the decision in doubt. Did the court construe the compact or the constitution? If the latter interpretation is the correct one, it can only be said that this is an unfortunate opinion based upon no authoritative cases.

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[15]Article X, *supra*, note 2 and "Article V. . . . The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory states, except by and with the authority of the Legislature thereof."

But even if the court construed the compact and not the state constitution, the decision is still erroneous. The state court held that the compact invalidly delegated the state's police power. This does not appear to be well decided. The compact provides that no order is to be enforced within any state unless there is a concurrence of a majority of the commissioners from that state.[16] Governments may create administrative agencies with the power of making rules and enforcing them by majority vote. This is not an invalid delegation of police power if limits to the usable discretion are defined.[17] That commissioners from outside the local jurisdiction are to formulate the rules would not seem to render such delegation invalid if enforcement is at the sole discretion of the locally appointed officials. What is created, in effect, is a state agency with extra-state advisors to recommend rules, with power of adoption and enforcement resting solely in the local officials. But the state court decided that West Virginia could not so constitute a state agency, basing the decision on no provision of the local constitution, but on principles of general jurisprudence. The United States Supreme Court overruled this determination. If, then, the specific provision of the local constitution was not reconstrued, the case stands only for the proposition that the Supreme Court, in cases where a compact is involved, is not foreclosed by the state court's determination of matters of general jurisprudence. There is thus resurrected the law established by *Swift* v. *Tyson*[18] and buried by *Erie R. Co.* v. *Tompkins*.[19] *Swift* v. *Tyson* held that federal courts need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court. *Erie R. Co.* v. *Tompkins* overruled this decision by stating, "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." The opinion then went on to point out the fallacy underlying the *Swift* case. It is unnecessary to go into that here, as Mr. Justice Brandeis very ably considered the matter in the *Erie* case. It need only be mentioned that if the doctrine is fallacious, it should not be reasserted even in the limited number of cases which involve interstate compacts. The state court's determination of West Virginia's legislative power should be conclusive upon the federal courts. The remedy for the state's decision is proper draftsmanship (see below) and not redetermination of a state's constitutional powers by the federal courts.

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[16]Article IX, *supra*, note 2.
[17]People v. Globe Grain & Milling Co., 211 Cal. 121, 244 Pac. 3 (1930).
[18]16 Pet. 1 (1842).
[19]304 U. S. 64 (1938).

Mr. Justice Reed felt that a compact must be binding on a state irrespective of local constitutional provisions inhibiting its action. Mr. Justice Jackson felt that the state should be estopped from denying its power to ratify the compact. These contentions disregard a principal which is fundamental in constitutional government. This principle is that the legislature's only powers are those defined by the organic law. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."[20] "An unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[21] Hence, the state did not ratify the compact and cannot be bound to it. Estoppel should not be invoked, for this would leave a power in the legislature to alter the fundamental law, a power which must be left to the people if the constitution is to be of any efficacy. But these opinions need not be dealt with further as they did not win the approbation of the court.

In the course of his opinion in the Hinderlider case, Mr. Justice Brandeis mentions that in determining the rights of the parties, the federal common law in regard to interstate relationships is to be applied.[22] This suggests a sounder rule than that enunciated by the court in *State ex rel. Dyer* v. *Sims*. In accord with the authorities, each state must be the final judge of what its own constitution means. However, when it enters into a compact with another state, it should not be the final authority on what obligations it has assumed. If each state were free to construe the compact, there could be no certainty of obligation in interstate compacts. Hence, the final arbiter of what the compact means must be the Supreme Court applying the common law of interstate relationships. Such a rule preserves the integrity of each state's constitutional decisions, but, at the same time, insures a uniform construction of any particular compact.

Avoiding Future Controversies

Whatever the merits of this particular controversy, the important thing is to discover the mistakes that led to the litigation and how they can be avoided in the future.

The West Virginia court thought that the agreement to appropriate contained in the compact was in violation of the debt limitations imposed by the local constitution. Similar language is contained in the constitutions of

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[20]Marbury v. Madison, 1 Cranch. 137, 177 (1803).
[21]Norton v. Shelby Co., 118 U. S. 425, 442 (1886).
[22]304 U. S. 92, 110 (1937).

a few other states. Arizona's reads, "The state may contract debts to supply the casual deficits or failures in revenues, or to meet expenses not otherwise provided for. . . ."[23] Oregon and Nevada merely have limitations as to the amount of debt which may be contracted.[24] California has a provision which reads ". . . no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a State institution . . ."[25] There is also one which reads "The Legislature shall have no power to give or to lend or to authorize the giving or lending, of the credit of the State . . . in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever."[26] However these provisions may be construed in a particular situation, it is a general rule that no legislature may bind its successors as to appropriations.[27] Hence, care must be taken in drafting compacts in regard to these matters. The trouble in the instant case could have been avoided by insertion of any of several provisions. Had the compact contained a clause permitting the legislature to withdraw upon proper notice to the other states, it is doubtful whether the local court could have held that a debt had been created. If the legislature decided it didn't wish to appropriate further, it could withdraw. Another method which should be kept in mind in the drafting of these compacts is to have the budget estimates considered only as recommendations to the legislatures of the signatory states. A separability clause, such as is contained in much of the present-day legislation, would preserve the legal obligation of those states without constitutional inhibitions, while future West Virginias could disregard those sections repugnant to its organic laws and yet remain within the binding force of the rest of the agreement.[28]

West Virginia also considered the compact to involve an invalid delegation of its police powers. This objection, too, could have been met with a few changes in the draft of the compact. The interstate commission should be specifically designated as an administrative agency of each state. Perhaps, too, a provision for veto by the members from any state of the commission's rules and orders as well as of enforcement thereof would satisfy the court.

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[23]Ariz. Const., art. IX, § 5.
[24]Ore. Const., art. XI, § 7, and Nev. Const., art. IX, § 143.
[25]Calif. Const., art. IV, § 22.
[26]Calif. Const., art. IV, § 31.
[27]11 Am. Jur. 983.
[28]The foregoing suggestions as to possible remedies to be applied at the drafting stage as well as those which follow in the next paragraph are found in Zimmermann and Wendell, THE INTERSTATE COMPACT SINCE 1925, 98-100 (1951).

Another device would be to extend the veto to the legislatures—providing that no rule should become effective within any state if specifically disapproved by the legislature within a specified period. If such provisions as these were contained in a compact, the local court would have no choice but to find that a local administrative agency had been created. It would have seemed to this writer that the Ohio River Valley Water Sanitation Compact went far enough so that this result would obtain, but since the West Virginia court served notice that more is required as far as it is concerned, these further provisions, or provisions similar thereto, should be inserted in any contemplated compacts in order to prevent further needless litigation in this regard.

In framing these provisions, the draftsmen should take care that all legal obligation is not deleted from the agreement. Although enforcement of a judgment against a state would probably be so burdensome as to preclude effective redress, still the moral obligation which a state would feel upon a judgment from the Supreme Court would undoubtedly be greater than any obligation it would feel if the compact stated that performance was to be discretionary with either party. The Supreme Court has said that its judgments against a state are enforceable, but by what means is not altogether clear.[29] Probably the effectiveness of interstate compacts will depend, in the long run, on the desire in the states to cooperate with one another. Still the states have shown a willingness to abide by the Supreme Court's judgments in these suits without coercion. Hence it would seem to be wiser to frame the agreements so that there is an obligation upon which the judgment can be rendered.

It is to be hoped that future draftsmen look more carefully to the terms of the compacts and of the applicable constitutions. The compact is a much better way of settling interstate problems than relying on litigation such as was involved in *Kansas* v. *Colorado, supra.* Yet its advantages are lost if it must be taken to the courts as was that in the case herein discussed.

[29]Virginia v. West Virginia, 246 U. S. 565 (1918).