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THE FEDERAL COURTS AND THE CONSTRUCTION OF UNIFORM STATE LAWS

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The prospect of the extension by the federal courts of the doctrine of *Swift v. Tyson*[1] to uniform state laws merits serious attention. The application of that familiar doctrine, that in cases of diverse citizenship governed by state common law, federal courts will determine questions of so-called "general jurisprudence" on their independent judgment and are not bound by state decisions, has already given rise to a body of federal-made state common law.[2] Should it be extended into the realm of state statutory law?

If the theory of some of the lower federal courts is correct the movement for uniform state laws has opened a large new field for the application of the doctrine. That theory is that in construing state statutes which are merely declaratory of the general commercial law the federal courts are no more bound to follow state court decisions construing those statutes than they would be to follow local decisions on such law before it was codified by statute. It is well known that most of the uniform state laws, and particularly those most widely adopted, are in large part codifications with some changes, of so-called "general commercial" law.[3] Reference to the cases reveals that the question has not yet confronted the Supreme Court. But, interesting to note, the judge who was among the first to approve the notion is now Chief Justice of the Supreme Court. In *Byrne v. Kansas City, F. S. and M. R. Co.*[4] Judge Taft voiced the dictum that a state statute as to the effect of contributory negligence when pleaded to a statutory cause of action, if declared by the state court to be simply declaratory of the common law, was to be construed independently by the federal courts.

In 1907 the federal district court for the eastern district of Georgia flatly disregarded the Georgia court's construction of a Georgia statute and adopted a contrary one on the grounds that the statute was merely a codification of general commercial law

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[1] 16 Pet. 1 (1842).

[2] This result is too familiar to require citation. For a recent example see Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., *infra* note 34.

[3] *E. g.*, the N. I. L. and the Uniform Sales Act.

[4] 61 Fed. 605 (C. C. A. 6th, 1894).

and that the local court's construction was erroneous, amounting to an amendment of the statute.[5] The case involved the question whether the statute rendered it unessential to the validity of an assignment of a policy of life insurance that the assignee have an insurable interest. No other decision has been found where a federal court has placed upon a state statute a construction directly contrary to that of the state court, because of the doctrine of *Swift v. Tyson*. However, there are other assertions of the view, largely in the field of bills and notes.

In a case decided in 1923 the federal district court for the eastern district of Oklahoma was called upon to construe sections 1 and 2 of the Negotiable Instruments Law.[6] It appeared that in the latest case in point before the Supreme Court of Oklahoma, the construction of the sections favored by the federal court had been adopted.[7] The federal court went on to declare, however, that since the sections were simply codifications of the common law-merchant it was not bound by the construction followed by the state court, whatever it might be. And a similar assertion has since been made by a federal court sitting in Iowa in a case where that conclusion was not necessary to the decision.[8]

Such dicta and the decision in the case of *Mutual Life Ins. Co. v. Lane*[9] depart from the earlier view of Judge Taft in that they leave the question of whether a state statute is a codification of the general common law to the federal courts instead of to the state courts. But the departure has not been universal. In a case in the second circuit Judge Learned Hand declared: "We feel no hesitation in finding, therefore, that when a state court, by a decision before the critical facts occur, has purported to find in a state statute language which is not intended merely to re-enact the common law, we are conclusively bound whatever our own judgment as to the propriety of their interpretation."[10] If accepted at all, the extension of the doctrine of the *Tyson* case under question certainly should be taken with this limitation.

[5] Mutual Life Insurance Co. v. Lane, 151 Fed. 276 (D. C. E. D. Ga. 1907).
[6] Capital City State Bank v. Swift, 290 F. 505 (D. C. D. Okla. 1923), N. I. L., §§1 and 2 set forth the requisites of a negotiable instrument and what constitutes certainty of sum.
[7] Bank of Massilon v. Mayfield, 71 Okla. 22, 174 Pac. 1034, 2 A. L. R. 135 (1918).
[8] Peterson v. Metropolitan Life Ins. Co., 19 F. (2d) 74 (D. C. S. D. Iowa W. Div. 1926).
[9] See note 5, *supra*.
[10] Babbitt v. Read, 236 Fed. 42, (C. C. A. 2d, 1916).

There is a suggestion from the second circuit in a case involving the construction of the Uniform Sales Act as adopted in New York that as to a state statute codifying a part of the commercial law the rule of compulsory conformity does not apply.[11] But it was found unnecessary in that case to decide the point.

On the other hand the Circuit Court of Appeals for the fourth circuit has definitely decided in favor of conformity to state decisions construing uniform laws in a case decided in 1925.[12] The question had arisen as to whether the maker of a check who had not used sensitized paper or a protectograph in drawing the instrument, which was later "raised," was liable for the raised amount to a holder in due course. The case arose in North Carolina where the state court had previously held in a similar case that the question of negligence in drawing the check did not enter into the case under the applicable section of the Negotiable Instrument Law (sec. 124, N. C. C. S. 1919, sec. 3106) and thus that a holder in due course could recover only according to the original tenor of the instrument.[13] Mr. Justice Hoke of the North Carolina Supreme Court asserted that the Negotiable Instruments Law in this particular was in effect an adoption of a rule of liability expounded in common law decisions. In the case in the federal court the court followed the North Carolina construction of the statute. Judge Waddill used this language in his opinion (in referring to cases involving the construction of state statutes): "In such cases, the interpretations placed by the state's highest court upon its own statutes, passed within the inhibition of the Federal Constitution, will be accepted and followed, although questions of commercial law and jurisprudence may be involved or incidentally arise; and in a case like the present, where the statute under review is a section of the Uniform Negotiable Instruments Act enacted in the interest of uniformity of commercial law and decisions, and now in force in well nigh all the states of the Union, a federal court should be slow to attempt to maintain and enforce its own ideas and understanding of such law, against the

[11] American Mfg. Co. v. U. S. Shipping Bd. Emergency Fleet Co., 7 F. (2d) 565 (C. C. A. 2d, 1925). The question was as to the effect of acceptance of goods without giving notice of breach.

[12] Savings Bank of Richmond v. National Bank of Goldsboro, 3 F. (2d) 970, 39 A. L. R. 1374 (C. C. A. 4th, 1925). See ROSE, FEDERAL PROCEDURE (3rd ed. 1926) p. 524.

[13] Broad St. Bank v. National Bank of Goldsboro, 183 N. C. 463, 112 S. E. 11, 22 A. L. R. 1124 (1922), discussed in Note, (1924) 2 N. C. L. REV. 96. N. I. L., §124 relates to the effect of alteration of a negotiable instrument.

plain provisions thereof as construed by the highest court of the state."

These cases indicate the status of the doctrine in the federal courts. It is yet uncertain; there is want of uniformity among the lower federal courts themselves on the question. It remains for the Supreme Court to settle the matter.

The views of legal writers on the problem are also rather conflicting. Thus Professor Green of Illinois has concluded that "Since federal courts sit as courts of the state administering a law of their own jurisdiction, and not applying a foreign law, they possess whatever power a court has of establishing law by decision."[14] On the other hand we have this assertion from Professor Frankfurter of Harvard: "Whenever the state law is authoritatively declared by the state, either through legislation or adjudication, state laws ought to govern state litigation, whether the forum of application is the state or the federal court."[15] And that writer has gone much farther in urging the restoration to the states of exclusive jurisdiction of cases of diverse citizenship.[16] He has found the question to be one of policy not determinable by *a priori* reasoning or fixed political principles.

That the federal courts exercise some measure of the power claimed for them by Professor Green is undoubtedly true. Thus where the construction of the written law or the declaration of the common law of a state comes up in a federal court before the question has been ruled upon by the state court, the federal court must of necessity rely upon its own judgment in the matter.[17] And, apart from considerations of legal theory,[18] the doctrine of *Swift v Tyson* as applied to common law questions is firmly established in our system of jurisprudence. *Quaere,* are not the federal courts on the equity side, tending in this direction now, by building upon the uniformity of equity procedure a superstructure of uniform equity jurisprudence?[19]

[14] Green, *The Law as Precedent, Prophecy, and Principle; State Decisions in Federal Courts,* (1924) 19 ILL. L. REV. 217, 223.

[15] Felix Frankfurter, *The Federal Courts,* The New Republic for Apr. 24, 1929, p. 273.

[16] *Ibid.*

[17] Portneuf-Marsh Valley Canal Co. v. Brown, 274 U. S. 630, 47 S. Ct. 692 (1926).

[18] The writer has stated his conviction of the impropriety and fundamental fallacy of the doctrine in an earlier number of this review. (1928) 7 N. C. L. REV. 48.

[19] See Clark v. Andrew, 11 F. (2d) 958 (C. C. A. 5th, 1926); Headley v. Warmaltz, 111 So. 252 (Fla. 1926).

On the other hand, it is equally clear that the federal courts follow, as a matter of obligation,[20] state court construction of state statutes.[21] There are variations from this rule which it is unnecessary to outline here.[22] As late as 1926, Mr. Justice Holmes in speaking for the Supreme Court said: "No case has yet gone the length of undertaking to correct the construction of State laws by State courts. The exclusive authority to enact these laws carries with it final authority to say what they mean. The construction of these laws by the Supreme Court of the State is as much the act of the State as the enactment of them by the Legislature."[23] This tends to demonstrate that Professor Green's proposition, whatever be its merits as an abstraction, does not coincide with the facts of the practice in the federal courts. A most common form of judicial lawmaking is that of adopting a new construction of a statute, and yet the United States Supreme Court has held that it will abandon its own former construction of a state statute in such a case in favor of a new one by the state court as being binding upon it in the same way that would be bound by a change in the statute itself.[24] And

[20] Jones v. Prairie Oil and Gas Co., 273 U. S. 195, 200, 47 S. Ct. 338, 71 L. Ed. 602 (1926); People of Sioux City, Neb. v. Nat'l Surety Co., 276 U. S. 238, 48 S. Ct. 239 (1928). But see note 22 *infra*.

[21] The cases are too numerous for citation here. See collection of cases. 28 U. S. C. A. §725, note 8. Likewise state courts follow federal construction of federal statutes. Inge v. Seaboard Air Line Ry. Co., 192 N. C. 522, 135 S E. 522 (1926).

[22] Such as the decision in Gelpcke v. Dubuque, 68 U. S. 175, 17 L. Ed. 520 (1863), which, strangely enough, treats a change in state construction as a change in the state law just as it would treat a statutory change. It was held that the federal court would not follow a change in state construction where rights of parties had accrued under the former construction, citing Ohio Life Ins. and Trust Co. v. Debolt, 16 How. 416 (1853). There is a further suggestion in the case that the federal courts will always in exceptional cases disregard state construction if opposed to their ideas of law and justice, which has met with the approbation of Prof. Green. See his, *The Law as Precedent, Prophesy and Principle; State Decisions in Federal Courts, supra* note 8.

[23] Jones v. Prairie Oil and Gas Co., *supra* note 20.

[24] Green v. Neal's Lessee, 6 Peters 291 (1832); approved in Wade v. Travis County, 174 U. S. 508, 19 S. Ct. 718, 43 L. Ed. 1006 (1899). The following expressions of Justice McLean in Green v. Neal merit quotation: "If the construction of the highest judicial tribunal of a State form a part of its statute law, as much as an enactment by the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government in the exercise of its acknowledged functions, should by construction, give a different effect to a statute from what had first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it."

in a recent case before the Supreme Court it was held that that court would reject the construction placed upon a state statute by the federal court below in favor of the construction followed by the state court, which had been arrived at since the entry of judgment in the court below.[25] These results must be considered as restricted by, but not in conflict with, those important decisions of the Supreme Court to the effect that as to rights arising after and depending upon a former state construction of a state statute it will not be bound by a change in the state construction of the statute.[26]

Our conclusion is that the doctrine of *Swift v. Tyson* should not be applied in the construction of uniform state laws. It is required neither by considerations of authority nor policy.

The consideration of authority is governed by section 34 of the Judiciary Act of 1789, which is still in force.[27] It provides: "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases where they apply." Even Mr. Justice Story in his opinion in *Swift v. Tyson*[28] granted that this federal statute applied to the positive statutes of a state and the *construction thereof adopted by the local tribunals.* And, certainly, the federal statute makes no distinction between statutes on local matters or those changing the general commercial law and those codifying the general commercial law. As recent researches by Charles Warren, the historian of the Supreme Court, have revealed,[29] the whole doctrine of *Swift v. Tyson* probably violates the original import of the federal statute; but even assuming that that statute applies only to

[25] People of Sioux City, Neb. v. Nat'l. Surety Co., *supra* note 20.

[26] See note 20 *supra.* The same result has been reached where the first state construction was made after the case arose in a federal court. Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359 (1883); Carroll County v. Smith, 111 U. S. 556, 4 S. Ct. 542, 28 L. Ed. 519 (1884); Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910). *Contra*: U. S. v. Morrison, 4 Peters 124 (1830). And see Fidelity Nat'l Bank and Trust Co. of Kansas City v. Swope, 274 U. S. 123, 47 S. Ct. 511, 71 L. Ed. 959 (1927), where the Supreme Court followed the state construction of a Missouri statute since the institution of the suit in the federal court in view of the fact that it effected no change in the local law upon which the parties had relied. See also People of Sioux City, Neb. v. Nat'l Surety Co., *supra* note 20.

[27] 28 U. S. C. A. §725.

[28] *Supra* note 1.

[29] Warren, *New Light on the History of the Federal Judiciary Act, supra* note 3, pp. 81-88. The writer concludes from a study of the senate files with reference to the drafting of the section that it was intended to make state decisions on common law questions rules of decision for the federal courts in actions at common law.

state statutory "laws," still it would apply to *all* state statutes applicable to actions at common law in the federal courts.

Moreover, though it be granted that state court decisions construing state statutes are not literally a part of those statutes, it is quite apparent that in the final analysis the courts do play a dominant part in giving statutory law its content.[30] Until the highest court of a state has spoken, the significance of the less obvious statutes in particular, of that state is not finally settled. For all practical purposes the statute is, before that time, no more than a prediction of what that court will decide. And to hold that the phrase "laws of the several states" in the federal statute does not extend to state court decisions construing state laws would be to continue the error that the "laws" of a state are not *what they are understood to be in the courts of that state* but what the federal courts say they are. The fundamental importance of the functions of courts of last resort in settling the law cannot be stressed too vigorously in this connection.[31]

This leaves the consideration of policy to be disposed of. If the desirability of uniformity in matters of so called "general jurisprudence," once a myth which the federal courts have converted into a reality, be the real justification for the application of the doctrine of *Swift v. Tyson,* does it exist with reference to the construction of uniform state laws? Obviously, uniformity is the object most desired in those enactments and uniform enactment without uniform construction would be quite ineffectual in the attainment of that object. This, of course, means uniform construction by the courts of the states. Were the federal courts to construe such statutes as the Negotiable Instruments Law independently of state decisions they would effect uniformity in the federal courts as to all questions of construction upon which the Supreme Court of the United States had spoken but at most they could contribute little more than that to the cause of uniformity. State courts are not likely to look to the decisions of the federal Supreme Court to learn what construction

[30] W. W. Cook, *loc. cit. supra* note 4, 308. Speaking with reference to a judge confronted with a case of first impression: "The case is by hypothesis a new one. This means that there is no compelling reason of pure logic which forces the judge to apply any one of the competing rules urged on him by opposing counsel. His task is not to find the pre-existing but previously hidden meaning of the terms in these rules; it is to give them a meaning." This view applies with like force to construing statutes as to declaring the common law.

[31] Yntema, *The Hornbook Method and the Conflict of Laws,* (1928) 37 Y. L. Journ. 468, 479. "The ideal of a government of laws and not of men is a dream which will have to wait for the time when law becomes calculus to be realized".

to place upon the laws of their respective states or to be brought in line by any supposed moral pressure from federal decisions in general.[32] On the contrary many of them might be expected to resent the pressure which arises from a departure by the federal courts from the local construction.

The question remains whether this limited uniformity of construction taken with the other consequences of independent federal construction of uniform state laws is more desirable than the rule of compulsory conformity to state construction. Already much of American business is conducted on a nation-wide scale. And the tendency is progressingly toward the more complete elimination of state lines in the American business world. Looking to the future, then, since diversity of citizenship giving federal courts jurisdiction over controversies governed by state law will no doubt be increasingly prevalent in business transactions, independent federal construcion of uniform state laws (of a commercial character at least) will become increasingly desirable to big business units. On the other hand local intra-state businesses still play a real part in our economic life. Such units are interested in the local construction of state statutes of the character of the Negotiable Instruments Law. And it may often be that a small town merchant will be on one end of a transaction of sufficient size to give the federal courts jurisdiction while a corporaton of another state doing a nation-wide business is on the other. There, the case would be one subject to the jurisdiction of the federal courts and one in which it probably would be to the interest of one party that the state construction of the governing state statute be followed and to the interest of the other that a uniform federal construction be followed. This illustrates a conflict in interest which the dual nature of our federal system is most ill-adapted to adjust. Moreover, to have two rules of construction of the same statute within the same state, a situation which would result inevitably from the application of the doctrine of *Swift v. Tyson* to the interpretation of uniform state laws, would be very undesirable.[33] Parties would naturally be inclined to attempt to throw a cause into

[32] Thus the holding in *Swift v. Tyson*, that a pre-existing debt constituted value for purposes of making one a holder in due course was not adopted in New York, where the case arose, and whose courts followed the old rule of Bay v. Coddington, 29 Johns. 637 (1822), till the adoption of the N. I. L. in 1897 which follows the federal rule. And for some time thereafter the rule was not clear in New York. It was the uniform state law movement that brought New York in line and not pressure from the federal courts.

[33] It is true, of course, that this unhappy result has already followed in the application of the doctrine to common law questions.

whichever court, state or federal, followed the rule of construction most favorable to them.[34] It requires no further discussion to demonstrate the evil of a system wherein the law of a state is one thing in the federal courts and quite another in the state courts.

Consider the situation in North Carolina. A review of the cases cited in *Brannan*[35] reveals that the North Carolina Supreme Court has adopted the minority construction of some six or more sections of the Negotiable Instrument Law.[36] Such variations in construction are simply the expected thing where forty-eight highest courts are settling the matter with independent finality for as many distinct jurisdictions. They suggest the futility of attempting to effect real uniformity through the agency of the federal courts. Complete uniformity, or even substantial uniformity, cannot be achieved under our present system unless the state courts are prepared to follow a

[34] This appears to be what happened in Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U. S. 518, 48 S. Ct. 404 (1927), commented upon in (1928) 38 Y. L. Journ. 88; (1928) 2 Sou. Cal. L. Rev. 80; (1929) 7 Tex. L. Rev. 283; (1928) 7 N. C. L. Rev. 48.

[35] BRANNAN'S NEGOTIABLE INSTRUMENTS LAW ANNOTATED (4th edition) by Zechariah Chafee, Jr., 1926).

[36] Probably the most important North Carolina variation is the holding that notwithstanding §51 of the N. I. L. (N. C. C. S. 1919, §3032) an agent for collection though the holder of an instrument cannot sue on it in his own name because not the real party in interest. First Nat'l Bank of Columbus, Ga. v. Rochamora, 193 N. C. 1, 136 S. E. 259 (1926). There is split of authority as to burden of proof of consideration for a negotiable instrument. North Carolina has taken the view that it is on defendant under §28 of the N. I. L. (N. C. C. S. 1919, § 3009). North Carolina holds that the mere possession of an unindorsed instrument is *prima facie* evidence of ownership as against the maker. Hayes v. Green, 187 N. C. 776, 123 S. E. 7 (1924). This appears to be against the weight of authority. Brannan, *op. cit., supra* note 35, at page 342. It is held in North Carolina that a transferee without indorsement, notwithstanding the N. I. L. §49 (N. C. C. S., 1919, §3030) acquires only the equitable title to the instrument plus a right to have an indorsement. Crichter v. Ballard, 180 N. C. 111, 104 S. E. 134 (1920). A later case cites Brannan's criticism of this view but does not abandon it. Planters' Bank and Trust Co. v. Yelverton, 185 N. C. 314, 117 S. E. 299 (1923). It is held in North Carolina that as between himself and the indorsee an indorser can show by parol an agreement varying the contract ordinarily implied by his indorsement. Sykes v. Everett, 167 N. C. 600, 83 S. E. 585 (1914); McRae v. Fox, 185 N. C. 343, 117 S. E. 396 (1923). It is said in (1924) 2 N. C. L. REV. 123, citing (1919), 4 A. L. R. 764 that twenty-eight states and the federal courts exclude such evidence. The applicable statute is N. I. L. §66 (N. C. C. S. 1919, §3047). The majority view under §119 of the N. I. L. (N. C. C. S. 1919, §3101) is that a plea that one of the makers of the note to the knowledge of the payee-holder signed as surety only and had been discharged by an extension of time by payee to the principal debtor is bad. Brannan, *op. cit., supra* note 35, at p. 721. The North Carolina court has suggested that such a plea when supported by proof would be good. Robertson v. Spain, 173 N. C. 23, 91 S. E. 361 (1917). The North Carolina view as to the question of negligence under the N. I. L. §124 (N. C. C. S. 1919, §3106) has already appeared in the text of this paper. See Broad St. Bank v. National Bank of Goldsboro, *supra* note 13.

uniform construction of their own laws laid down by the courts of the nation, a thing utterly out of the question. And any permanent solution of the problem that might come about through a change in our political structure is too remote and unlikely to warrant speculation. It is believed, therefore, that as a solution of the immediate problem the rule of compulsory conformity on the part of federal courts to the state construction of uniform state laws should be followed.