Volume 41 | Issue 2 Article 4

February 1935

Swift v. Tyson and the Construction of State Statutes

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West Virginia Law Quarterly
and The Bar

Published by the Faculty of the College of Law of West Virginia University, and issued in December, February, April and June of each academic year. Official publication of The West Virginia Bar Association.

Subscription price to individuals, not members of The West Virginia Bar Association, $2.00 per year. To those who are members of the Association the price is $1.00 per year and is included in their annual dues. Single copies, 50 cents.

SWIFT V. TYSON AND THE CONSTRUCTION OF STATE STATUTES

So much has been written for the law reviews about the doctrine of *Swift v. Tyson*[1] that it has become a part of the etiquette of the business to explain oneself before adding to the overgrown literature of the subject.[2] It is now nearly a century since this nationalistic[3] doctrine was written into our case law. There has been some vacillation and even more confusion in its exposition but in the large it has steadily become more deeply entrenched and more widely applied in the teeth of the persistent and highly crit-

[1] 16 Pet. 1, 10 L. Ed. 865 (1842).
[2] Notice the first paragraph in Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 HARV. L. REV. 328.
[3] See Waterman, *The Nationalism of Swift v. Tyson* (1933) 11 N. C. L. REV. 125.

ical opposition of legal writers.[4] But now, in a day of unparalleled nationalism, the Supreme Court has had occasion to impose a definite check upon the further extension of the doctrine.[5] That event calls for comment.

It is not the purpose of this note to consider all of the ramifications of *Swift v. Tyson*. A brief review of its major implications will suffice.

The reader is reminded that, in defining the jurisdiction of the federal courts in the First Judiciary Act, Congress enacted a requirement that "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."[6]

The provision plainly applies to actions at law where federal jurisdiction is based on diversity of citizenship. It seems equally plain that it was intended that in diversity cases the federal courts were to apply the law of a different sovereign.[7] There is no general common law in the United States. There is a common legal background and an important and persuasive interchange of legal ideas,[8] but in the last analysis there are as many independent systems of common law in this country as there are states which have a common law. The Supreme Court early made it plain that there was no criminal common law of the United States.[9] There is no more reason to assert that we have a federal common law govern-

[4] Much of the secondary literature of the subject is cited in Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 VA. L. REV. 225, 226. n.

[5] Burns Mortgage Co. v. Fried, 292 U. S. 487, 54 S. Ct. 813, 92 A. L. R. 1193 (1934).

[6] 1 STAT. 92, 28 U. S. C. A. (1926) § 725.

[7] See (HAMILTON) THE FEDERALIST (Dunne, 1901) No. LXXX.

[8] It has been suggested by an able scholar, in reliance in part at least upon studies revealing how freely an American state court cites and follows decisions from other states, that there is " . . . . an unwritten law, of which the decisions of every common law state are evidence; . . . . If we examine carefully our conditions, we shall find that the law which we really study and practice is not merely the local law of the state, but some more general law whose precepts will guide us in the solution of a question arising in any court of the country." Beale, *Juristic Law and Judicial Law* (1931) 37 W. VA. L. Q. 237, 246-247. This observation is a realistic one. It does not support *Swift v. Tyson*, however, since the influence of juristic law in *our system* is due largely to its persuasiveness; a state court is not bound to rely upon it, however strong its authority in reason, since the authority of the state is not behind it. See n. 16, *infra*.

[9] United States v. Coolidge, 1 Wheaton 415, 4 L. Ed. 124 (1816); United States v. Hudson and Goodwin, 7 Cranch 32, 3 L. Ed. 259 (1812). See Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 21 S. Ct. 561 (1901) (interstate commerce); Smith v. Alabama, 124 U. S. 465, 8 S. Ct. 564 (1888).

ing civil relations. *Swift v. Tyson* has simply created such a law for diversity cases. When the Judiciary Act became law, moreover, there was little statutory substantive law governing civil relations. If the requirement of the act were to be deemed applicable only to statutory state "laws" in diversity cases it would have been largely wanting in practical import. But in the absence of statute a federal court could use its own independent judgment in determining what was the law of a given case. That, however, was precisely the effect of Mr. Justice Story's opinion in *Swift v. Tyson,* though he apparently would not have exercised the power in a case involving settled rules of what he considered local law. He granted that the federal statute applied to positive statutes of a state but insisted that state decisions on common law matters were not "laws" within the Act. Recent researches support the view that Congress was using "laws" in the broader sense.[10] Whether the judges make the common law of a state or merely discover it is a bootless inquiry in the present connection. A becoming frankness on the part of notable contemporary jurists recognizes that judges do make law.[11] In *Swift v. Tyson,* Story was making law not only in that he was deciding that under the law merchant of New York a pre-existing debt was value for purposes of constituting one a holder in due course, but also, in effect, by giving the Judiciary Act a meaning not intended by its authors. But granting for the moment that judges only find the law, once the judges of a state have found the applicable rule of law, that determination is conclusive within the jurisdiction. In other words, the common law of the state is revealed only in the decisions and opinions of its courts and what they find to be the law is applied as the law till changed by decision[12] or statute. Thus, if it be admitted that the federal courts are applying the "laws" of another sovereign in actions at law based on diversity of citizenship, they should deem state court exposition of state law conclusive.

It is common learning that diversity jurisdiction was conferred upon the federal courts by the Constitution to secure equal-

[10] Warren, *New Light on the History of the Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 81-88.

[11] See the dissenting opinion of Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, 371, 30 S. Ct. 140, 147, 148 (1910); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1922), 115 *et seq.* In the *Kuhn* case, Mr. Justice Holmes pointed out the inconsistency on this point between Swift v. Tyson and Gelpcke v. Dubuque, 68 U. S. 175, 17 L. Ed. 520 (1863), citing GRAY NATURE AND SOURCES OF THE LAW (1909) §§ 535-550. The point had previously been made by Rand, *op cit. supra* n. 2, at 341 *et seq.*

[12] *Stare Decisis* is relatively seldom overriden. Courts, of course, sometimes overrule a past decision indirectly though verbally distinguishing it.

ity before the courts without regard to state citizenship. That object would plainly be secured and maintained by applying in a diversity case, as a matter of obligation, the law as administered in a similar case between citizens of the same state. It was long since pointed out,[13] on the other hand, that to apply *Swift v. Tyson* in diversity cases may work a discrimination, based solely on the factor of citizenship, which is just as objectionable as discriminating against an alien in behalf of a citizen. Can it fairly be said, then, that the doctrine promotes the object of diversity jurisdiction?

It has been the practice, with a few notable exceptions,[14] to apply *Swift v. Tyson* only in cases involving "general jurisprudence" or "commercial law".[15] There is, of course, no constitutional or statutory basis for the distinction,[16] and, if the doctrine is sound, it must be deemed to cover all common law matters. That is the logic of the federal decisions.[17] On consideration of policy alone, state common law decisions on matters which the federal courts regard as of local import are followed in diversity cases. (One might call to mind, parenthetically, familiar judicial protestations that the policy-making power is legislative and not judicial.) The real impact of the doctrine as an assertion of federal judicial power is to emasculate Section 34 of the Judiciary Act; the obligation to apply state law has given way to a power to mold state common law as the federal courts think it ought to be without regard to expositions of that law, which are final and unimpeachable for state purposes. As Professor Dobie has indicated,[18] it is quite an anomalous situation which presents the federal courts exerting the power to nationalize the common law for purposes of diversity cases, when the power has clearly not been granted to the federal Congress itself.

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[13] Rand, *op. cit. supra* n. 2, at 337.

[14] As to the extension of the doctrine into real property law, see Note (1934) 40 W. VA. L. Q. 258.

[15] These expressions have no definite legal content and thus it is not surprising that there is an uncommonly large twilight zone in their application. The cases are too numerous to require citation. A fairly recent sample is Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., *infra* n. 16. L

[16] See the dissenting opinion of Mr. Justice Holmes in Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U. S. 518, 532-533, 48 S. Ct. 404, 408-409 (1928).

[17] This does not always appear in the opinions, of course, but it is quite apparent in substance from such decisions as Kuhn v. Fairmont Coal Co., *supra* n. 11.

[18] *Op cit. supra* n. 4, at 234.

Mr. Justice Story granted in *Swift v. Tyson* that Section 34 of the Judiciary Act applied to the positive statutes of a state and the construction thereof adopted by the courts of the state.[19] If the judicial exposition of a statute be deemed a part of it this conclusion is obvious.[20] Its soundness, however, does not depend upon the literal application of that theory.[21] State statutes are in reality what they are interpreted to be in administration by authoritative state agencies, in the last analysis, by the state court of last resort.[22]

In practice, however, Story's conclusion has not been strictly adhered to. *Gelpcke v. Dubuque,*[23] strangely enough as a matter of legal theory, accepted the notion that judicial construction is part of a statute as a basis for holding that with respect to rights arising after and depending upon a former state construction of a state statute the federal courts will not follow a change in the state construction. The court has recently repudiated the idea that *Gelpcke v. Dubuque* was based on the contract clause of the federal Constitution.[24] If that be true, there is no basis for such a decision since nothing is plainer in our system of law than the proposition that judicial decisions may operate retrospectively.[25] Later decisions, however, establish the even more tenuous notion that a federal court will make its own independent construction of a state statute, where the first state construction was made after the federal case arose.[26] Logically, if the state exposition of a

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[19] 16 Pet. 1, 18, 10 L. Ed. 865, 871 (1842),

[20] The Supreme Court early embraced this theory in Green v. Lessee of Neal, 6 Peters 291, 8 L. Ed. 402 (1832).

[21] The theory is not acceptable. The court's interpretation of the statute is conclusive on everyone else, but it, in common with any other decision, is subject to be overruled or modified by the court itself and thus is not literally a part of the enactment.

[22] The writer has previously stated his views on this point in *The Federal Courts and the Construction of Uniform State Laws* (1929) 7 N. C. L. REV. 423.

[23] *Supra* n. 11.

[24] Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197 (1924). Mr. Justice Taft's opinion in the case has been ridiculed as a plain contradiction of the express language of the *Gelpcke* case. 2 BOUDIN, GOVERNMENT BY JUDICIARY (1932) 329, 343n. The criticism is well taken. Mr. Boudin asserts further that the *Gelpcke* case has been repudiated by the Court. It is true that the Court might take a different view today on the merits of the legal question presented in that case but there has been no repudiation of the theory under discussion.

[25] The proposition is too clear to require citation. Notice the language of Mr. Justice Holmes' dissenting opinion in Kuhn v. Fairmont Coal Co., *supra* n. 11, at 215 U. S. 372.

[26] Burgess v. Seligman, 107 U. S. 20, 2 S. Ct. 10 (1882). The same idea has been applied as to a real property question under the common law of a state. Kuhn v. Fairmont Coal Co., *supra* n. 11.

statute is conclusive, it is authoritative for any case not yet decided, though already pending. People do not have vested rights in what they think statutes mean. That the interests of the parties accrued before the state decision obviously does not preclude a construction on the merits by a state court, which determines what the law of the state is.[27] These views find ample support in a freshly-decided Supreme Court case, which, in effect, repudiates the last-stated federal court aberration. In *Marine National Exchange Bank of Milwaukee, Wisconsin v. Kalt-Zimmers Mfg. Co.*,[27a] the Court decided that a Wisconsin construction of the Negotiable Instruments Law was controlling in a diversity case involving transactions conducted after the enactment of the statute but before the state court decision was rendered. The Wisconsin decision, wrote Mr. Justice Cardozo for the Court, ". . . . supplies the governing rule irrespective of the date when the decision was announced."

Apart from these two anomalies the Supreme Court has adhered rather consistently to the idea that state court construction of state laws is authoritative in diversity cases. With the advent of uniform state laws, however, some ingenious mind suggested a further exception, which several of the lower federal courts have taken seriously.[28] In short, it is urged that insofar as state legislation is merely codification of the common law or law merchant, *Swift v. Tyson* applies. The reported cases have involved relatively little actual exertion of the asserted power but the possibility of its approval by the Supreme Court gave the matter a serious cast. In 1929 the writer published a brief discussion of the subject in which he expressed the view that it had no sound basis either in law or policy.[29] In this position he has not stood alone.[30]

And now the Supreme Court has spoken plainly to the point.

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[27] The Court followed a state construction made after the federal case arose without mention of the notion in People of Sioux County, Neb. v. National Surety Co., 276 U. S. 238, 48 S. Ct. 239 (1928). The Court doubtless approved the state construction on the merits. The state construction was followed in Fidelity National Bank and Trust Co. of Kansas City v. Swope, 274 U. S. 123, 47 S. Ct. 511 (1927). The Court pointed to the fact that the state decision effected no change in the local law upon which the parties relied. But that is true in any case in which the first authoritative state construction is made after the question comes up in a federal court.

[27a] 55 S. Ct. 226 (Dec. 10, 1934).

[28] The lower federal courts have been divided on the point. The cases decided before 1929 are discussed in Fordham, *op. cit. supra* n. 22. See the collection of cases in the principal case, *supra* n. 5, at 54 S. Ct. 813, 815, nn. 11 and 12.

[29] *Op. cit. supra* n. 22.

[30] See Dobie, *op. cit. supra* n. 4, at 236-238.

Burns Mortgage Co. v. Fried[31] was a diversity case in a federal court in Pennsylvania. Plaintiff sued on six promissory notes executed and payable in Florida, which were acquired from the payee before maturity and which were payable in series at intervals of six months, "with interest thereon (the principal) at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually . . . . Deferred interest payments to bear interest from maturity at ten per cent per annum . . . ." The district court decided that the notes were not negotiable for want of certainty in amount and gave judgment for defendant since under the local practice an assignee could sue in his own name only on negotiable paper. The Circuit Court of Appeals in affirming refused to consider as controlling a Florida case relied upon by plaintiff, but, relying on *Swift v. Tyson,* determined the question of negotiability in accordance with what "we find to be the general commercial law". The court recognized that state construction of statutes modifying the common law or the law merchant would be binding in a diversity case. Judgment was reversed in the Supreme Court. Mr. Justice Roberts, speaking for the whole Court, reaffirmed the view that under Section 34 of the Judiciary Act state construction of state legislation was as binding in diversity cases as if "the state court's decision were literally incorporated into the enactment" and added that this was true without regard to whether the statute altered the common law or whether it related to matters of general interest.

It is true that the Court could have decided the case without reference to *Swift v. Tyson* since there was no Florida case in point. The Court recognized that in the case[32] relied on by plaintiff it was decided merely that a provision for periodical payment of interest before maturity of principal did not destroy negotiability but reasoned that the logic of the decision would apply to a stipulation for interest at a specified rate upon overdue interest. This, taken with the fact that the decision of the Circuit Court of Appeals was attributable, at least in part, to the view that *Swift v. Tyson* applied, rendered it appropriate for the Court to pass on the question. In an even more recent case, which involves a clear cut application of the *Burns* dictum, and thus constitutes a decision on the point, the Court was content to declare that by the "judgment" in the *Burns* case "the law is settled".[32a]

[31] *Supra* n. 5.

[32] Taylor v. American National Bank of Pensacola, 63 Fla. 631, 57 So. 678 (1912).

[32a] Marine National Exchange Bank v. Kalt-Zimmers Mfg. Co., *supra* n. 27a. The quoted language is significant. Mr. Justice Cardozo is frankly saying

In one respect the *Burns* opinion goes even further than to declare that a state decision in point would control in a diversity case. In the absence of such a decision it would be the duty of the federal court, it was asserted, to construe the statute in the light of the decisions of courts of other states interpreting the same sections of the uniform law, and the court proceeded to do just that. Decisions from other states would thus be persuasive in a diversity case just as in a state court case. This, it is believed, will do more to promote uniformity than *Swift v. Tyson.* It is difficult to perceive, moreover, how complete uniformity could be attainable without important changes in the distribution of powers under the federal system.[33]

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for the Court that it has previously made a ruling with the authority of law for future cases.

[33] Since the body of this note was completed there has come to the writer's attention an adverse criticism of the views of the court in the principal case. See Beutel, *Common Law Judicial Technique and the Law of Negotiable Instruments — Two Unfortunate Decisions* (1934) 9 TUL. L. REV. 64. (The title to this article is misleading. Professor Beutel approves the decision in Burns Mortgage Co. v. Fried but is dissatisfied with the "dictum" about Swift v. Tyson.) In brief, it is Professor Beutel's theory that judicial decisions are not law but "rise no higher than evidence of the common law", and that when the law is embodied in a statute court decisions are not even the best evidence of the law but "can rise no higher than mere interpretation of the law". He contends that this must necessarily be so as to the Negotiable Instruments Law since it "is a codification of the whole body of the law of negotiable instruments for the entire United States." Since, he argues, state courts do not feel bound by their own decisions, where they are out of harmony with the weight of authority or the true interpretation of the Act, why should the federal courts be bound to follow such decisions blindly.

The first and most real objection to Professor Beutel's position is that he has not shown that the application of his views will bring us any nearer that important objective — uniformity in construction of uniform laws. Within a single state federal recognition of state construction is the only way to attain uniformity. A change in state construction would call for a like change of interpretation in the federal courts; the latter would follow a trail blazed by state tribunals. On the other hand, federal court independence of state construction, where asserted, leads inevitably to conflict. It is hardly to be supposed that state judges are going to be brought in line by the pressure of federal decisions which they are likely to consider a challenge to their independence. Whether Swift v. Tyson would conduce to national uniformity cannot be answered categorically. This much can be said, the possibilities of divergence would obviously be greatly increased by the very fact that the number of courts speaking independently would be much greater. Thus, in each federal circuit the various district courts would act independently until the circuit court of appeals had passed upon a given problem of interpretation and the same would be true as regards the several circuit courts of appeals until the Supreme Court had spoken. Despite judicial participation in the desire for uniformity, why is there not substantially the same likelihood that the lower federal courts will be divided at points of cleavage as that the state courts will be? There is no assurance, moreover, that a given question will reach the Supreme Court soon after it is first aired in a lower federal court. Consider the long career (over twenty-five years) of the point, which is the subject of this note, before the Supreme Court had its say, and then

Little is to be gained by speculating about the principal case as a suggestion of future judicial inroads upon the doctrine. But one can say not only that the Court has taken a sound position but also that its position relative to the construction of state statutes is basically inconsistent with *Swift v. Tyson* as applied to the common law. It is true that legislation and common law differ in important respects, but they are not material to the true construction of Section 34 of the Judiciary Act. Both in construing state statutes and in declaring the common law a state supreme court is expounding with finality for state administration the law of the state. If in a diversity case the federal court disregards either type of decision the effect is the same, — the law of the state is not being given the content it has as administered by the state. Thus, the overruling of *Swift v. Tyson* is quite in order.[34] Meanwhile the extent of a state's freedom from the doctrine will depend upon how far legislation has supplanted its common law.[35]

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only by dictum. Conceivably a negotiable instruments question might have a similar experience in the federal courts. On top of this, what assurance is there that the federal interpretation when established will conform to the majority state court interpretation? It should not escape notice that in the very case under scrutiny the circuit court of appeals applied Swift v. Tyson only to reach a result contrary both to the majority of the state decisions and to what Professor Beutel considers a sound conclusion. Beutel, *op. cit. supra* at 66.

The text of this note is the writer's answer to Professor Beutel's theoretical arguments. It may be added that, though *stare decisis* is loosing its hold upon the courts in negotiable instruments law cases, as Professor Beutel, in effect, asserts, the soundness of excluding *Swift v. Tyson* in such cases is unaffected. The Negotiable Instruments Law is a separate law in every state; under our system it could not be otherwise. And to permit federal judicial administration of that law different from state administration is to put different content into the law for diversity cases. I cannot believe that so liberal a thinker as Professor Beutel would deny that where interpretation is required the courts are really settling the content of the law. If that be true a change in interpretation has the same effect upon the citizen as an amendment to the statute. Thus, the principal effect of *stare decisis* upon the law in action is doubtless to make for less flexibility either in behalf of greater fairness to particular litigants or for other reasons.

Professor Beutel's insistence that we should get away from "outmoded" common law judicial technique in interpreting uniform laws is quite commendable insofar as it tends to confine the process of interpretation to an attempt to arrive at the true meaning of legislation without weighing extrinsic factors. But it should be kept in mind that the desire for uniformity may, in a given case, as might *stare decisis*, be just such an extrinsic factor. Would he insist that a state court give up its convictions on the merits simply to get in line with the majority of state courts that had spoken to the point?

[34] This, of course, would not impair the jurisdiction of the federal courts to disregard a state decision which discriminated against aliens.

[35] Were the West Virginia Legislature, for example, to adopt the Restatement of Contracts of the American Law Institute as the law of the state would the decision in the principal case apply? Since the process would be codification and the product legislation an affirmative answer seems proper.