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## THE FEDERAL COURTS AND A UNIFORM LAW

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There can be no doubt that the present organization of the courts in this country makes the development of a general and uniform common law an impossibility. It is clear also that the independent state courts, as at present organized, are incapable of developing a system of law which will satisfy the needs of the whole country. Is there any remedy for this unsatisfactory state of things? A condition which grows worse every day and which does not promise in any length of time to result in the creation of a system of law which will answer the needs of the whole community, cannot be ignored forever.

It was impossible of course that the common law of England, as adopted by the separate states in this country, should become a uniform common law for the whole country without the adoption or creation also of courts corresponding to the English courts and having jurisdiction to determine and declare the law for the whole country. It is perhaps possible even now for us to abandon the English common-law theory, give up the respect for precedents and require our independent state courts to pursue an ideal and perfect system of law, which, if it does not exist now, may possibly be made to exist at some future time by means of their discoveries and inventions. But if there is no hope of the discovery of such an ideal system, or if we are unwilling to wait the length of time probably required for its discovery, and prefer not to abandon altogether the common-law theories on which the law that we have is founded, then we must seek to organize our courts in a way which will develop instead of destroying the common-law system which we tried to adopt. Clearly we must have either a new system of law or a new system of courts if we are to escape from our present condition of no law at all. Only by establishing common law courts can we have a real common law.

In searching for a remedy for our present evils the first thought that naturally arises is that if our present federal courts were federal in fact, instead of in name only, they might provide a way of escape from some of our difficulties. The doctrine of *Swift v. Tyson*<sup>1</sup> shows at least a recognition of the fact that the federal courts ought to do all they can to create on some subjects a general common law for the whole country. But while the federal courts have sought to do this in some

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<sup>1</sup> (1842, U. S.) 16 Pet. 1.

cases, in most cases they strive only to follow the law of the particular states within whose territory they exercise jurisdiction. So far, therefore, as the development of law is concerned, their peculiar function appears to be to assist in the creation of a conflict of laws. It may be speaking too strongly to say that our present federal courts, so far as the development of a common law is concerned, are worse than useless. But it may fairly be urged that the statement is too strong only because, as individual courts, the federal courts are in many instances better courts than the state courts which otherwise might do their work as well, and not at all because they serve today any need of the community in the development of the law which ought not to be served by the state courts just as well. And so far as the federal courts are better courts they benefit only the few whose cases fortunately, and more or less accidentally, come within their jurisdiction.

There can be no doubt that the jurisdiction of our federal courts is for the most part artificial, and is not based on any substantial or fundamental need of the whole community today. In so far as their tendency is to create two theories of law in each state, they are a positive injury to the development of any consistent body of law, and serve rather to increase litigation and destroy respect for the law by reason of the resulting conflict in decisions. The way in which the federal courts thus serve to increase litigation, and to weaken respect for the law, was shown in a striking way by a case that occurred a few years ago. The case is all the better as an illustration because the issues involved were what are sometimes, perhaps not always properly, called technical ones, and did not arouse popular concern.

Under what was known as the Hewitt law in Kentucky, certain banks in that state claimed irrevocable contracts with the state on the subject of taxation which could not, under the federal constitution, be impaired by subsequent state legislation. This contract right was sustained by a lower state court in Kentucky in an action between the State and the Deposit Bank of Frankfort. An appeal was taken by the State from this judgment to the Kentucky Court of Appeals, which reversed the judgment on the ground that no such contract right was created, and, in another case, the United States Supreme Court reached the same conclusion. Before the judgment of the lower court of Kentucky was reversed, however, the Deposit Bank brought a suit in the federal circuit court, based upon the existence of a federal question, to enjoin the state officials from collecting taxes for any future years under a statute subsequent to the alleged contract, and pleaded the judgment of the lower court of Kentucky as a final adjudication of that question. The federal court sustained this contention and entered a decree in accordance therewith, and this decree was sustained, on appeal to the United States Supreme Court, by a divided court. In the meantime, as already stated, the judgment of the lower state court had been reversed and the cause remanded to that court for a new trial. The Bank there-

upon filed a supplemental answer setting up as a bar the decree of the federal circuit court. It was held by the Kentucky courts that that decree was not a bar, but this decision was reversed by the United States Supreme Court.<sup>2</sup> That court thus held that the decree was an absolute bar to any suits by the State against the Deposit Bank for taxes in subsequent years, although it had already held in another case, which presented the merits of the question, that there was in fact no contract right created by the Hewitt law. The Supreme Court conceded that the result was not a desirable one, but emphasized the fact, and properly, that the result in the particular case was not so important as the strict adherence by the court to the rules which governed its action. In other words, if the result is to be quarreled with, fault should be found with the relation of federal and state courts and not with the decision of the court in the particular case.

This case is merely an illustration of the many complications which result from the existence of the two systems of courts. Any lawyer familiar with the practice of the federal courts, and with the questions constantly arising as to their jurisdiction, knows of the complicated situations which frequently arise on account of the concurrent jurisdiction of state and federal courts. There has been an enormous amount of litigation involving merely the right of removing a suit from a state to a federal court, and questions regarding the construction of the federal statute governing the right of removal were debated in lower federal courts for years before being finally settled in the United States Supreme Court. The question, for instance, as to whether a suit could be removed if the plaintiff and the defendant were residents of different states, but if neither was a resident of the federal district in the state in which the suit was brought, was only settled about twenty years after the removal act of 1888 was passed, and only after a great number of conflicting decisions by the lower federal courts. Even then two cases had to be taken to the United States Supreme Court before that court expressly decided that both parties might waive the question as to the district, but that both parties must do so to confer jurisdiction. It was not a matter of great consequence which way this particular question was decided, but an enormous amount of expensive litigation occurred before it was settled at all.<sup>3</sup>

It is no doubt true that in some situations the federal courts do occupy a more independent position than do those of the states, because of the fact that federal judges are appointed for life, and not elected for short terms only, as are the judges in most of the states, and therefore are in a position, when local influences are strong, to enforce the existing or settled law more fearlessly than the state judges.

<sup>2</sup> *Deposit Bank v. Frankfort* (1903) 191 U. S. 499, 24 Sup. Ct. 154.

<sup>3</sup> There are other questions in regard to the district to which a case may be removed which are still unsettled. See COMMENTS (1918) 27 YALE LAW JOURNAL, 935.

It is just for this reason that property interests frequently prefer the federal to the state courts, and, where possible, remove litigated cases from the state to the federal court. This sometimes involves a conflict between the existing law and the law as a part of the community would like to have it. The fact that the courts have power to make and to change the law in a very real sense, and that this is better recognized than it once was, has made certain people, especially the labor element, more insistent that the law shall from time to time be made by the courts as they would like to have it. The controversy in regard to the issuance of injunctions in the case of labor troubles has illustrated this. But all such controversies, when they demonstrate the uncertainties of the law and show that the result is sometimes dependent upon the particular court which obtains jurisdiction, serve again to weaken respect for the law.

It is certainly unfortunate that the federal courts are not better fitted to serve the needs of the whole country in the making of the law. As at present organized they not only do not determine the law of the whole country, but they do not determine the law of any state or of any territory. Too often they serve instead only to unsettle the law of the states and to make it more difficult to determine what the law of a particular state may be. Yet the crying need of the whole country, in the case of many legal questions, is a settled law which shall be the same in all the states. In recent years this need has been so generally recognized that there have been several attempts to make the law uniform on some subjects through the adoption of the same legislative act in many of the states. But these efforts at uniform legislation have served only to emphasize again the impossibility of obtaining the desired result without courts having jurisdiction to interpret such legislative enactments for all of the states which adopt them. As the independent courts of forty-eight states are not capable of creating a single common law for the whole country, so the independent courts of two or more states are not fitted to interpret the same legislative act in such a way that it will continue to be the same law in all the states. There is no better illustration of the fact that the courts, and not the legislatures, finally determine what the law is, than the results which have followed from these efforts at uniform law by means of uniform legislation. As the law is interpreted by the courts in each of the states in which the statute is adopted, so is the law enforced. The legislatures pass the statute, but the courts make the law, and, as time goes on, the greater become the differences in the law of the states which have adopted the same statute.

But the adoption of uniform legislative acts serves at least to show that there is no prejudice on the part of the people of the different states in favor of a law which is all their own and different from the law of all the other states. The people of Ohio are perfectly willing, in fact anxious, that the law of their state on negotiable instruments shall be the same as the law of Illinois. After they have both taken the trouble to

adopt the same statute, it is not probable that they would object to having the statute interpreted in the same way by the courts of each state. The only way, however, in which uniform interpretation can be secured is by having one court whose decisions shall be final for both states. Would the people of the two states have any objection to such a court? If the federal courts, which now spend so much of their time in creating uncertainties and conflicts in the law of the states, could be so organized as to devote their energies to the maintenance of uniform law on some subjects in some of the states at least, a great deal of good would be accomplished and a great deal of harm avoided. If, for instance, the United States courts of appeal, situated in the nine federal circuits, could serve as courts of appeal for the different states situated in their districts, for the purpose of interpreting uniform legislative enactments in those states, and also for the purpose of interpreting questions dependent upon a determination of the common law adopted in such states, the gain to the law would be obvious to every one. The states in such federal districts could still be as independent as they desired. No state would be required to adopt legislation similar to that of another state, and each state could, if and as it desired, modify the common law as declared by the federal court and have its modification of such law interpreted solely by the highest state court. The federal court would maintain uniformity in the law only in the case of the common law and the uniform acts of legislation.

If the federal courts in the nine federal circuits could be employed for the purpose suggested, it might be possible to organize another court of appeal to review the decisions of the nine federal courts of appeal and thus secure a uniform common law throughout the country. The jurisdiction of the present Supreme Court could be confined, if desired, to the determination of constitutional questions.

There is no intention now to suggest an elaborate scheme for the reorganization of the courts in this country which will abolish all existing difficulties in the determination and administration of the law. The intention is in particular to emphasize the reason for our existing difficulties, and make it clear that no escape from those difficulties and problems is possible except through some reorganization of our courts. No reforms in the procedure of the courts which we now have will solve the problem of making the law which we need. We cannot secure the law we need merely by having better independent state and federal courts. If we could begin all over again, in the light of the experience we now have, we could no doubt establish a system of courts which would give us a common law entitled to be called by that name. That is not possible now. The suggestion now made is no more than an attempt to point out the most obvious method of escape from some of our present difficulties, using some of the courts which we now have for the purpose of securing gradually the kind of law, in the case of some subjects at least, which we so much need. Even to secure such

a change as that suggested, co-operation would be required on the part of the state and federal governments. It may be too much to hope for such co-operation. But as many of the states have already shown a willingness to co-operate for the purpose of passing uniform legislative acts, they may now be willing to co-operate further, for the purpose of making such uniform legislative acts into true uniform law by means of the creation of courts competent to accomplish that result.

No doubt it will be necessary to secure a constitutional amendment to enlarge the jurisdiction of the federal courts, so that, with the consent of the states, the federal courts of appeal may decide cases, whether between citizens of different states or not, which involve questions of common law or questions arising under uniform statutes. Agreements or arrangements between several states creating a single court of appeal for such states would not avoid the possibility of conflicting decisions by the federal courts. The jurisdiction of the federal courts must be enlarged, and the states must make use of the federal courts as courts of appeal in order to secure the desired result. It is necessary, therefore, to face the fact that an amendment to the federal constitution is essential to the establishment of federal courts having the required jurisdiction. That does not mean that we can never hope to have the courts we need. We have found that it is by no means impossible to amend the federal constitution, and an amendment which merely makes possible the enlargement of the jurisdiction of the federal courts, when the states are willing to co-operate to confer such jurisdiction, ought not to be difficult to secure. The amendment should be broad enough, however, to make it possible, with the co-operation of the states, to convert all courts into federal courts, if that should at any time be thought desirable. At any rate, whatever constitutional or legislative changes, federal or state, may be required, it is time to recognize that there is only one general course of procedure which will accomplish the desired result—the creation of the courts required to give us the law we need. When that is fully appreciated it will be time to discuss in detail the necessary constitutional and statutory changes.

The suggestion which is now made does not mean an increase in litigation because of the creation of new courts. On the contrary, it means that less litigation will be required for the purpose of establishing the law for the whole, or a large part, of the country. It will not be necessary to have similar suits on all subjects in all the states in the country before the law for the whole country is settled, with the expectation that when that number of suits has been litigated the result will be a different law in many states on many of the subjects. So far, of course, as the law of the states is concerned, it would be impossible now to give federal courts of appeal the power to re-examine all the common-law questions which have already been passed upon and finally determined in the separate state courts. The federal court of appeal

would necessarily have to follow the law of the separate states so far as that law had been finally determined by cases already decided. It would continue to do what the federal courts do now in the exercise of their co-ordinate jurisdiction, so far as following the settled law of the states is concerned. Only by means of legislation could the future law of the states be made uniform on questions already decided by the separate state courts; but the existence of the federal court of appeal would, for the first time, make it possible to legislate with the hope that such a uniform law would be finally established. Uniform legislation would no longer be a futile thing. The legislatures and the courts could work together for the creation of a law which should be truly a law of the United States, instead of a confusion and conflict of laws such as exists in this country today.

That the organization of our courts in such a way as to make possible this development of a common law for the whole country would greatly increase the respect for the law in the whole community there can be no doubt. It is difficult for the common man to have a great amount of respect for a system of law which does not have the respect of the legal profession, and it is difficult for any lawyer who will stop long enough seriously to consider present conditions to regard the present system of law in this country as anything but a monstrous absurdity. It is not a system of law at all; it is a very complicated system for the creation of conflicts in the law. Lawyers spend an enormous amount of time over difficult problems which ought not to exist in any rational system. Lawyers realize this, and their knowledge of the situation is readily conveyed to clients who have to be told the necessity for spending their money to pay for the settlement of some of the absurd difficulties in our legal system. All this has naturally served to lower the standing of the legal profession and to lessen respect for the law in this country. Litigation appears only to lead to more litigation; nothing ever really seems to be settled. There is no remedy for such a situation except the creation of courts competent to determine the law for more than one state at a time.

Respect for the law would be still further increased if the possibility of conflicts in the decisions of our courts on some of the fundamental questions of constitutional law could also be eliminated. There is the same necessity for the decision of constitutional questions by courts as for the decision of questions of common or statutory law that arise in the course of litigation. If we have a fundamental law which is binding upon the courts, the courts must decide questions arising under that law in litigated cases. But there is no reason for having more than one fundamental law on the same subject. It is sufficient, for instance, that the federal constitution provides that property shall not be taken by the states without due process of law, or that contracts shall not be impaired by state legislation; and only opportunity for a conflict in decisions is created by inserting similar provisions in the state con-

stitutions. It may not be possible or advisable for the states to give up their constitutions altogether, but it certainly cannot be necessary to re-prohibit in such constitutions matters which are already prohibited by the federal constitution. The states certainly ought to be satisfied with the decisions of the United States Supreme Court on matters involving the taking of property without due process of law, and subjects of a similar nature. A great deal of the recent criticism of the decisions of the courts on constitutional questions has been occasioned by the conflicting decisions of state and federal courts in such cases. But this criticism has never suggested that the states should continue to have the opportunity to give a stricter or less liberal construction to such constitutional provisions than is given them by the United States Supreme Court. There can be no doubt that the elimination of some of the provisions contained in our state constitutions would make possible a uniformity in the law on certain constitutional questions, which is much to be desired.

No doubt there might be objection in some states to the final determination of common and some statutory law by a federal court appointed by the President instead of by state courts elected by the people of the several states. But it should be remembered that the questions proposed to be decided by such a court are all subject to the control of the legislature in each state, so that the established law can be modified at any time as may be desired. And the importance of having an able and efficient court of appeal, capable of making and maintaining a consistent and certain body of law, ought to outweigh all other consideration. The importance of this would be more readily appreciated if each decision meant the determination of the law for the whole country, or even for several of the states. No one is more vitally interested than the common man in having the law clearly and consistently declared by the highest court of appeal. This is of more importance to him than the immediate result to the parties in any particular case. A court of appeal capable of doing such a work would be an inestimable boon to the law in this country. It would mean the creation of a body of law that could be taught and practiced intelligently. Gradually the conflict and uncertainty which now exist in our law would disappear, and we could hope in time for the creation of a true common law for the whole country.

It has been frequently suggested in recent years that the only escape from many of our legal difficulties is through the assumption by the federal government of many of the powers which are now exercised by the state governments; that, in the case of many subjects, a centralization of the legislative powers of the country is a necessity. This suggestion is most frequently made in connection with the organization and control of corporations. But our corporation law would not be in the unsatisfactory condition in which it now is, if it were not for the mass of conflicting decisions of our various state courts. It is not so

much a conflict in statutes as a conflict in state decisions which is responsible for the uncertainty and indefiniteness of our law in regard to corporations, and in regard to such subjects as contracts in restraint of trade and monopolies. And it is the conflict in the general law—the so-called common law—not in the statutory law, which causes most of our legal difficulties. This evil at any rate can be remedied without a surrender by the states of their independent legislative powers, and it may seriously be questioned how far a greater centralization of the legislative power is to be desired.

That it is desirable for our general law, which the courts are supposed to base upon principles which are applicable alike throughout the country, to be the same in all the states, there can be no doubt. And an organization of our courts which makes it possible for such a law, based on general or common-law principles, to be declared and enforced differently in different states, cannot but be unfortunate, and tend to lower the standing of our courts and to decrease respect for the law. But to continue to leave this general law at the mercy of the independent state courts, and at the same time attempt to escape from some of our legal difficulties by surrender by the states of some of their legislative powers to the federal government, is a much more debatable suggestion. If our courts were so organized as to make legislative co-operation by the states, when desired, effective, it might be better policy to leave the responsibility for legislative changes in our law with the separate states. Legislative freedom and responsibility should, certainly in the case of most subjects not already delegated to the control of the federal government, continue to belong to the separate states. But such independent legislative power should be exercised in connection with, and subject to, a general constitutional and common law which should always be the same in all the states. It would then be in the power of the separate states, by means of legislation, to accomplish such changes in the law as were desired. Uniform legislation would no longer be futile. The possibility of securing desirable changes in the law by means of such legislation would call to the attention of legislatures their responsibilities in such matters, and there can be little doubt that such a change in conditions would tend greatly to improve the character and quality of the legislation in the different states. Such an increase in the power and responsibility of the states in matters of legislation would be a great benefit to the whole country. Each state would be expected to have a part and share in developing the law of the country, and would be required to consider carefully those matters in which it preferred to develop a policy and law of its own. There is certainly much to be said in favor of preserving to the states their independent legislative powers, provided such powers are exercised in connection with a body of courts capable of preserving a uniformity of law in all matters in which some of the states do not deliberately prefer to adopt and pursue a policy of their own.