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UNIFORMITY RUN RIOT—EXTENSIONS OF THE ERIE CASE

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In a former article,¹ we considered the fundamental tenet of the *Erie* case² as a constitutional decision and concluded that it was unsound, both historically and as a question of jurisprudence. The purpose of this article is to consider certain extensions of the doctrine of the *Erie* case in the light of those conclusions.

For two years after the decision of the *Erie* case, no case was presented to the Supreme Court which either involved or required an extension of the principle of that decision. But in the course of 1940 and 1941, at least seven cases³ reached the Supreme Court which were decided on the basis of that case. All involved an extension of its doctrine and therefore necessarily resulted in its broader application.

The seven cases readily group themselves into three distinct types or classes, and may be discussed separately by group. In one group of cases,⁴ the question presented was whether the fed-

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eral courts must, under the *Erie* decision, follow the common law or statutory decisions of intermediate and *mutus praeus* courts of the state in which the federal court sits. The second group turns on the question whether decisions of the state courts on matters of conflict of laws are the law of the state and rules of decision within the *Erie* case and the Rules of Decision Act. The Court held that they were and consequently that they were binding on the federal courts. In still a third group, involving a single case, the Court held that the decision of a federal court in a diversity of citizenship case must conform to the decisions of the state courts at the time the federal decision is rendered. In other words, though the federal courts follow the law of the state as expressed in the decisions of its courts, if that law should change as the result of the overruling of earlier decisions, pending an appeal or at any time while the federal judgment is still *sub judice*, the federal court must change its decision to conform to the state law as newly announced.

If the decision in the *Erie* case be unsound, then the foundation of the decisions which extend its principle likewise collapses, and there would be little occasion to consider the later cases any further. But, as we observed in the former article, the actual decision or result in the *Erie* case can perhaps be justified on statutory grounds. Also, as we observed in that article, the decision can perhaps be justified on grounds of judicial policy alone, apart from any requirements of the Constitution or statutes. The underlying theory of the *Erie* case is that litigants

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5 In the *Erie* case, Mr. Justice Brandeis said, 304 U. S. at 78: "** 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." (Italics supplied.) From this statement it was generally assumed that the doctrine of the *Erie* case applied only to decisions of the state's highest tribunal.


8 Reference should perhaps be made to still a fourth class, involving suits in equity. *Russell v. Todd*, 309 U. S. 280 (1940), *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202 (1938) Although the Court pointed out that the Rules of Decision Act does not apply to suits in equity, the Court held that the principle of the *Erie* case governs such suits. In this respect, however, the *Erie* case effected no change with respect to suits in equity since prior to that case the Court had held that in equity cases the Federal court should follow the state law. *Mason v. United States*, 260 U. S. 545 (1923).

9 See article in 30 Ky. Law Journal 3 and next preceding note.
should not enjoy the benefits and suffer the burdens of decisions that differ from those of the state courts merely because one of the litigants happens to be a non-resident of the state where the federal court sits. And any judicial policy which eliminates this disparity of decision and apparent injustice must be deemed sound at this time, even though it runs contrary to the ostensible purpose of the framers of the Constitution and the federal judiciary.

The *Erie* decision is, therefore, sound in principle. But does it follow that its extensions are equally sound? This question can best be answered by a review of those cases and the three classes into which they fall.

**Lower and Intermediate State Court Decisions**

In *West v. American Telephone & Telegraph Co.* 10 the court held that federal courts sitting in Ohio are bound to follow the law of the State of Ohio as enunciated by a decision of one of the Courts of Appeals of Ohio. The Circuit Court of Appeals had declined to follow the decision of an Ohio intermediate appellate court on the ground that the decision was based upon an erroneous interpretation and application of one of its own former decisions in which the writer of the opinion in the *West* case had handed down the opinion of the court. The Supreme Court held that the decision of the Ohio Court of Appeals was binding on the Circuit Court of Appeals and that it represented the law of Ohio in the absence of convincing evidence to the contrary.

In order to grasp the import of the *West* case and to assign it a proper place in the development of the doctrine of the *Erie* case, it is necessary to consider the effect of a decision of an Ohio Court of Appeals.

Ohio is divided into nine appellate districts, in each of which a court of appeals has appellate jurisdiction, either mediate or intermediate, over all inferior courts of record in the district, such as the Common Pleas Courts, the Probate Courts, and the Municipal Courts. It has no appellate jurisdiction or supervisory power over the inferior courts of any other appellate district. Its decisions need not be, and often are not, followed by the inferior courts of other appellate districts. They are not binding.

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10 Notes 3 and 4, supra.
upon the courts of appeals of other appellate districts. And they are reviewable by the Supreme Court of Ohio. They are final only to the extent that decisions of the Circuit Courts of Appeals are final. That is to say, they are reviewable by the Supreme Court of Ohio only as a matter of grace and privilege and not as a matter of right.\textsuperscript{11} If the decisions of the courts of appeals of two appellate districts are in direct conflict, they may be certified to the Ohio Supreme Court, and thus may be said to be entitled to review as of right in the particular instance.\textsuperscript{12}

When the status of these intermediate courts and the effect of their judgments are borne in mind, it at once becomes apparent that the import of the West case is not to apply or follow the principle of the Erie case but, in fact, to distort it. The Erie case places the federal courts on a par with the state courts in matters of state law. It requires federal courts to render the same decisions in cases involving non-residents that the state courts would render in the case of residents. It means that in A v B, one or both of whom are non-residents of Ohio, the federal court will render precisely the same judgment as the Supreme Court of Ohio has already rendered in the case of X v. Y, both residents of Ohio, on a parallel state of facts.

The West case, on the other hand, renders the federal courts subordinate to the intermediate state appellate courts and places the federal litigant at a distinct disadvantage \textit{vis-a-vis} the state court litigants. The theory of the decision is, first, that the federal court is bound by the state law in so far as it can be ascertained from decisions of the intermediate appellate courts of the state, and, second, that it must follow those decisions in the absence of convincing evidence that they do not represent the law of the state.

But when resident litigants appear before an intermediate appellate court, they are not faced with the necessity of these dual duties with respect to the decisions of other intermediate

\textsuperscript{11} The Supreme Court of Ohio has constitutional jurisdiction to review decisions of the intermediate appellate courts in matters of public and great general interest. The looseness and ambiguity of the term "public and great general interest" render the right of review uncertain and of indefinite and unlimited extent, depending largely upon the manner in which the question is presented and the attitude of the Court at the time of presentation.

\textsuperscript{12} The Supreme Court of Ohio has certain other limited obligatory jurisdiction which is rarely exercised.
appellate courts of the same state. Let us say, e. g., that in the case of A v. B, the court of appeals of the sixth Ohio appellate district has decided that \( x = y \). Does the court of appeals of the seventh appellate district regard that decision as either the law of Ohio or as binding upon it? The answer to this query is a most emphatic negative. It never occurs to litigants (and would be most emphatically repudiated by the court, if it did) to refer to the decision of the sixth appellate court as the law of Ohio. Nor will it be cited as binding upon the seventh appellate court. To be sure, litigants will refer to the decision as persuasive and as right or wrong. And the court will treat the decision with the respect due the decision of any court of equal and coordinate jurisdiction. But the question paramount in the mind of the court is and always will be whether the decision is right or wrong, sound or unsound. It has no more influence or persuasive effect than a decision of an English court or a court of another state.

And this is true also of even inferior courts within the seventh district. They are no more bound by nor will they give any more deference to a decision of the sixth appellate court than they will to decisions of inferior courts in the seventh district or to the decisions of the courts of other jurisdictions. In fact, the court of one district will occasionally deliberately reject a decision of the court of appeals of another district simply because it dislikes it and feels that if the law were as pronounced by that decision, it should be changed. Or the court of appeals of one district may render an adverse decision in order to certify its own decision to the Supreme Court of Ohio and thereby obtain a pronouncement as to what the law of Ohio really is.

The whole matter may perhaps be stated colloquially in this manner: When a non-resident goes into the federal court, either voluntarily or by compulsion, and is confronted by an adverse

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\(^{13}\) It is an open secret in Ohio that the Supreme Court rarely, if ever, relies upon or even gives deference to the opinions and decisions of intermediate appellate courts. Members of the Bar, in seeking to obtain review of the decisions of such courts or in seeking to convince the Supreme Court of the rectitude of their cause once they have obtained review, sedulously avoid the citation of intermediate appellate court opinions in their briefs as well as arguments before the Court. It is, therefore, more than passing strange that the federal courts should be required to abide by decisions of courts which the state's highest court completely ignores and to which it does not even give persuasive, to say nothing of binding, effect.
decision (of which he may not even have any knowledge at the time) of an intermediate appellate court of the state whose law is controlling, he has, under the doctrine of the West case, two and three quarters strikes against him. When a resident appears before a coordinate intermediate appellate court or even lower court of the same state under similar circumstances, he does so with a clean record and with no strikes against him. If the decision of the other appellate court is favorable to him, perhaps it may be said he has one ball called on him—a very trivial advantage.

Thus, far from placing the resident and non-resident, the federal and state courts, on a par, as the Erie case contemplates, the West case actually places the non-resident and the federal court in a distinctly inferior position vis-a-vis residents and the state courts. The resident argues to the seventh appellate court what its decision should be, irrespective of decisions in another appellate district. But the non-resident in the federal court must accept the decision of a single intermediate appellate court as the law of Ohio, in the absence of strong evidence that the decision does not represent that law. And where is the federal court?

In the Field case, 311 U. S. at 180, the Court said: "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before federal courts owing to the circumstances of diversity of citizenship."

An excellent illustration of the result of the rule in the West case can be seen in a recent Ohio decision involving the effect of a widow's election under the law on her right to intestate property as an heir of her deceased husband. In 1927 the Court of Appeals of one district, in Zizelman v Mayer, 27 O. App. 512 (Cuyahoga App.), held that in electing against the will the widow was barred from inheriting as heir. This was the sole decision in Ohio bearing upon that question, which, apparently, did not arise again until 1940. During the interim, if the question had been presented in the federal courts of Ohio, they would have been bound by the Zizelman decision, although it is apparent from a reading of the opinion that the case was not well argued and that the point was not thoroughly considered by the Court.

In 1940 the question arose again in the courts of Ohio where the litigants were not bound by a decision of a Court of Appeals of another district, even though of some thirteen years' standing. In Goodfellow v. Wilson, 32 Ohio Law Abs. (Clark App., 1940) the Court of Appeals of another appellate district refused to follow the Zizelman case, decided that the rule there enunciated was erroneous and certified the decision in the Goodfellow case to the Supreme Court. The case was settled and dismissed by the parties before the Supreme Court had an opportunity to pass upon the question. What is the law of Ohio under these circumstances? It may be that if the Supreme Court had passed upon the question it would have affirmed...
court to find such evidence? Obviously, none exists, or the intermediate appellate court would not have rendered the decision it did.

The Stoner\textsuperscript{16} and Six Companies\textsuperscript{17} cases merely present variations of the facts and decision in the West case. The Stoner case is practically identical to the West case, in that in both cases the decisions of the intermediate appellate courts involved the same parties as those who sought to have their rights determined in the federal courts.\textsuperscript{18} And in both cases, the state supreme courts had refused to review the decisions of the intermediate appellate courts\textsuperscript{19}. The latter feature was also present in the Six Companies case;\textsuperscript{20} but the former feature was absent. Not only were the parties in the federal and intermediate appellate court cases not the same, but the question at issue arose differently in the two cases. In the state court case, the building contractor sought to offset a claim for liquidated damages provided by the contract against the owner’s right to damages for abandonment of the contract without cause, whereas, in the Six Companies case, the owner claimed liquidated damages in addition to damages for breach of contract in the abandonment of construction.

These similarities and minor variations in the three cases were, however, regarded as immaterial by the Supreme Court. All three cases were decided upon the basic principle that in diversity of citizenship cases federal courts must follow the decisions of intermediate appellate courts of the state whose law is applicable in the absence of convincing evidence that those decisions do not represent the applicable law of the state. And

the Goodfellow decision, in which case federal decisions following the Zizelman case during the thirteen-year interim would have been palpably erroneous and prejudicial to the rights of the litigants in the federal forum.

\textsuperscript{14} Notes 3 and 4, supra.
\textsuperscript{15} Notes 3 and 4, supra.
\textsuperscript{16} The Court did not regard this fact as involving the application of the doctrine of res adjudicata. Professor Corbin points out, however, that this fact made the issues in the federal court on the question of state law res adjudicata, without any regard whatever to the rank of the state court that decided them or the laws of the several states. The Laws of the Several States (1941) 50 Yale Law Journal 762, 770.
\textsuperscript{17} The denial of a motion to certify or right of appeal in Ohio constitutes no affirmation or approval of the decision of the lower court; nor does it establish a precedent.
\textsuperscript{18} See next preceding note.
the *ratio decidendi* of the three decisions is that "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."21

As pointed out above in the discussion of the *West* case, the purpose of the decisions is thwarted at the outset by the very nature of the structure and jurisdictional limitations of the state intermediate appellate courts. The effect of the decisions is the direct opposite of the avowed purpose of the Supreme Court in deciding them. Non-residents, whether voluntarily or involuntarily in the federal court because of diversity of citizenship, are placed at a serious disadvantage *vis-a-vis* residents in the state courts, and the federal courts themselves are summarily subordinated to the decisions of intermediate state appellate courts. They are bound by decisions of the latter, although litigants in the state courts and the courts themselves of other appellate districts are compelled to give them no such binding effect. In other words, within the state, a decision of one of its intermediate appellate courts, except within its own appellate district, has no binding effect whatever. In the federal courts, that decision is, for all practical purposes, the law of the state which the federal court must follow. This is stretching the doctrine of the *Erie* case to unreasonable limits, and undoubtedly goes far beyond what the writer of the opinion in that case intended.22

If these three decisions are out of harmony and in conflict with the avowed purpose and intent of the *Erie* case, the case of *Fidelity Union Trust Co. v Field*23 is an even more striking illustration of what can happen once a court embarks upon a course of judicial legislation or what we have called in the former article Constitutional Amendment by Decision. In that case, the Supreme Court held that the federal courts must follow the decision of a vice-chancellor in a *nisi prius* court in New Jersey, whose decisions are reviewable by the highest court of that state, not as a matter of privilege, as in the decisions involved in the *West, Stoner* and *Six Companies* cases, but as a matter of right. The case involved the application of a New Jersey statute to a

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21 311 U. S. at 180.
22 See note 5, *supra*.
23 See Notes 3 and 4, *supra*.
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savings bank trust. The vice-chancellor had held that the statute was confused and ambiguous and did not change the common law of the state which denied validity to such "trusts." As a majority of the Circuit Court of Appeals in the Field case pointed out, the construction of the statute by the vice-chancellor was plainly erroneous and was not the law of New Jersey. Nevertheless, the Supreme Court held that the vice-chancellor's decision was binding on the federal court, even though it obviously frustrated the purpose of the legislature in attempting to change the common law and nullified the statute, and even though it had no similar binding effect upon other courts in New Jersey.

OVERRULING DECISION

A still more shocking illustration of the extent to which the Court has carried the rule of the Erie case is furnished by the decision in Vandenbark v. Owens-Illinois Glass Co. The Court there held that when the highest court of a state, pending an appeal to the Circuit Court of Appeals, overrules earlier decisions upon which the District Court has relied in rendering a judgment that was concededly correct at the time of entry, the appellate court must reverse the judgment and conform its decision to the subsequent state decision or state law at the time of the entry of the judgment on appeal. The vice of this decision is not, so much as in the other cases, that it places non-residents in a difficult position.

The Court has, in effect, created a rule that the federal court must follow the decision of the highest court of the state at the time the judgment is entered, even though this decision is contrary to the decision of the same court at an earlier time. This is particularly true in cases where the federal court has relied upon the earlier decision in rendering its own decision.

See Notes 3 and 7, supra. It was strenuously urged upon the Court in this case that the Erie case was not a constitutional decision but a statutory decision or perhaps merely one of general judicial policy and that as the mandate of the Rules of Decision Act did not in express terms apply to appeals but only to trials at common law, the case should be decided independently of either the Erie case or the Rules of Decision Act. The Court in its opinion does not allude to the constitutional issue; and in fact the opinion was written by Mr. Justice Reed, who merely concurred in the judgment in the Erie case and in fact dissented from the constitutional decision. Query has the court in this manner abandoned the constitutional decision in the Erie case? See remarks of Professor Cook on this point. Federal Courts and the Conflict of Laws (1942) Ill. L. Rev. 493, 521 et seq.

The Vandenbark case is confusing in that in one place, 311 U. S. at 540, the Court says: "There is nothing in the Rules of Decision section to point the way to a solution," whereas at the end of the opinion, 311 U. S. at 543, the Court apparently rests the decision squarely upon the Rules of Decision Act, saying, "the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court."
in the federal courts at a disadvantage in not affording them the opportunities which litigants in the state courts have, although the decision does have that effect. Its principal vice lies in completely subordinating the federal courts to the state courts, rather than placing them on a par with the latter in accord with the spirit and obvious intent of the *Erie* case.

The first of these defects of the decision can be illustrated in the following manner. At the time the District Court enters judgment, the applicable state law, as announced by the highest court of the state, is that $x = y$. While the federal cause is pending on appeal in the Circuit Court of Appeals, the Supreme Court of the state overrules its earlier decisions, and the pertinent state law thereby becomes $x = z$. If the parties to the suit in the federal court were litigants in the state courts, they would, at least theoretically, have an opportunity to pursue the matter to the state’s highest court and to contend and perhaps convince the court that the pertinent law was not $x = z$ but $x = y$. In other words, the opportunity is afforded to them to question the soundness of the overruling decision and urge upon the court a reversion to its former view.

To be sure, this opportunity, which litigants in the state courts possess, might not prove a very valuable asset, inasmuch as the state court is not apt, within the course of time occupied by an appeal, to overrule a decision in which it has but recently overruled earlier decisions. But the very history of decision indicates that such action on the part of courts is not a non-existent figment of the imagination. If a court can overrule its decisions once, it can likewise overrule the overruling decision and revert to its former decisions. But the *Vandenbark* case

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25 Under the West and kindred decisions, note 4, *supra*, litigants in the state courts would have ample opportunity to obtain in higher state courts a review of right or at least of grace of the decisions by which litigants in the federal courts are bound. Nevertheless, under those cases this right is denied to litigants in the federal courts.

It should also be observed that under the West and kindred decisions the rule of the *Vandenbark* case should likewise apply to decisions of state intermediate appellate and even *mer prius* courts which overrule their own earlier decisions.

26 Many overruling decisions are the result of elections and a change in the personnel of the court. This was true of the Ohio decision which the Supreme Court of the United States held required the reversal of the judgment in the *Vandenbark* case. And it may be that another election and change in personnel of the court will
forecloses all inquiry in the federal courts into the soundness or stability of the overruling state decision. And the mere fact that litigants in the state courts possess the opportunity to attack the overruling decision should have given the Supreme Court pause before depriving them of this right in the federal courts. Even though the possession of this opportunity might not warrant very sanguine expectations as to the outcome of such an attack, the opportunity is a substantial right which should not be disregarded.

More serious even than its vice in thus placing federal litigants at a disadvantage *v* *v* *v* those in the state courts is the fact that the Vandenbark case ignores the dual nature of our judicial system and the constitutional independence of the federal courts. It subordinates the federal courts to the courts of the state in matters of state law. It makes the federal court the football of every passing fancy of the state courts which may result in the overruling of established precedents pending an appeal. It enlarges the scope of the Rules of Decision Act and gives it an effect which was probably not within the intent of the framers of that act.

The state supreme court has determined that the law of the state on a certain set of facts is that $x=y$. When the federal district court entertain an action involving similar facts, it must, under the Rules of Decision Act, decide that $x=y$ and render cause the Ohio court to revert to the rule of the decisions which it overruled when the Vandenbark case was pending on appeal.

A particularly striking illustration of the instability of decisions is furnished by the early case of Pennsylvania Coal Company v. Sanderson, 6 Atl. 453 (Pa., 1886). The case involved injury resulting from pollution of a stream in the process of coal mining. The question was whether the defendant was liable in the absence of negligence. The case was twice appealed to the Supreme Court of Pennsylvania which affirmed the judgment of the trial court awarding damages to the plaintiff. On both appeals the case was thoroughly argued and the court held that the defendant was liable without a showing of negligence. The first trial and the first appeal occurred in 1878. Dissatisfied with the second appeal the plaintiff brought a second writ of error involving the measure of damages and the judgment was reversed for a third trial, which was held in 1885. On judgment for the plaintiff the case was again appealed. In the interim the court had suffered a change of personnel. On the third appeal the court overruled its two earlier decisions and held that the defendant was not liable without a showing of negligence. See also the amazing background and judicial acrobatics in Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4 (1949) and Great Northern Railway v. Sunburst Oil & Ref. Co., 287 U. S. 358 (1932).
judgment accordingly. It has no choice in the matter since the enactment of that act and its construction in the Erie case. Subsequently, when the cause is pending on appeal, whether in the Circuit Court of Appeals or the Supreme Court, the state court decides that \( x = z \), and that becomes the pertinent state law from that point on. Now, if the Circuit Court of Appeals or Supreme Court must reverse the judgment of the district court, which correctly applied the applicable state decisions, and decide that \( x = z \), the federal courts are directly subject to every change of decision in the state courts and become subordinate to those courts.\(^{27}\) If the state court can overrule its decisions while the federal case is pending in the Circuit Court of Appeals, it can do so again if the federal case should happen to reach the Supreme Court on certiorari.\(^ {28} \) And if the federal case goes back to the district court for retrial, as happened in the Vandenbark case, the state court can again overrule itself. This same process can be repeated during further appeals in the federal courts. Under the Vandenbark case, the federal courts would be required to set aside their judgments each time the state court overruled itself, and this kaleidoscopic process might go on endlessly and ad nauseam.\(^ {29} \)

\(^{27}\) The course of litigation in the federal courts even on the question of state law cannot be analogized to the course of litigation in the state courts on the same question. The lower state courts are, of course, bound by intervening overruling decisions of the state's highest court or even an intermediate court of higher jurisdiction than the court deciding the particular question. This is because the state courts are part of an integrated system of courts, whereas the federal courts are part of an equally integrated but nevertheless coordinate system of courts having as much constitutional jurisdiction of state questions as the state courts themselves possess. Consequently, their judgment should not be subject to changes in the decisions of the state courts, at least as a matter of compulsion. Moreover, as pointed out in the text and in Note 25, supra, litigants in the lower state courts which are bound by intervening overruling decisions of a higher state court can always seek and often obtain a review of the soundness of the overruling decision.

\(^{28}\) Cf. Carpenter v. Wabash Railway, 309 U. S. 23 (1940) In that case a remedial amendment of the Bankruptcy Act enacted after a decision by the Circuit Court of Appeals was held to require a reversal of the judgment.

\(^{29}\) In the Vandenbark case the Supreme Court apparently limited its effect to the period during which the federal case was sub judice. The Court did not define this term. If it means only until a judgment has been rendered, and until the time for further appeal has expired, obvious injustices may result. A lower court, e. g., or the Circuit Court of Appeals, may have rendered a judgment in accord with a particular state decision. Although the time for appeal may have expired, the court may still have control over the judgment.
It is, of course, no answer to such judicial gyrations to say, as the Court did in the Vandenbark case, that we are "not insensible to possible complications" and that this judicial kaleidoscope has never existed and cannot exist. The mere fact that the Vandenbark case places the federal courts in a position where they would be compelled to reverse, overrule, vacate and restate judgments every time the state courts decide to change the law of the state must give pause to all who have any sense of judicial propriety and the stability of decision. Under such a rule the judgment of a federal court becomes like a ship buffeted about by the waves of state court decisions. This is not the characteristic of independent courts of coordinate jurisdiction. It is the mark of dependence and servility.

If the Rules of Decision Act compelled the federal courts to submit to such judicial acrobatics, no fault could be found with the Vandenbark decision. Criticism of the result would have to be directed to Congress. But the Rules of Decision Act does not compel this result, and, in fact, does not even "point the way to a solution" \(^\text{30}\) of the problem involved in the Vandenbark case.

The Rules of Decision section requires the federal courts to during the term of court. During such term, and after the time for appeal has expired, the state court may overrule its earlier decisions. Should the federal court set aside a judgment based upon earlier overruled state decisions? It is difficult to see why the federal court should not do this if the Vandenbark case is sound. Nevertheless if the case is sound, the instability of decision becomes even more apparent.

Furthermore, it is the rule that a court has complete control over its judgments during the term and that it may vacate or set them aside in the exercise of its discretion. Suppose a court should refuse to exercise its discretion to vacate its judgment because of a subsequent overruling state decision. Would that be deemed an abuse of discretion? In other words, could the federal court be compelled to exercise its discretion in a certain manner? It then ceases to be a matter of discretion.

Again, a state court may overrule earlier decisions after the Circuit Court of Appeals has decided in accordance with prior state decisions. In order to bring the federal judgment into harmony with the subsequent state decisions, a litigant must bring a petition for certiorari to the Supreme Court. Certiorari, however, is a matter of privilege and not of right. Why, in such a situation, should a litigant be compelled to rely upon the grace of the Supreme Court rather than upon his rights which the Court in the Vandenbark case held that he possessed? To be sure, in the Carpenter case, Note 28, \(\text{infra}\), the Court did grant certiorari in view of the statutory amendment. But there is no guarantee of the Courts granting it every time such a case is presented.

\(^{311}\) U. S. at 540.
regard the laws of the several states as rules of decision only “in the trials at common law.” As we have seen, the section does not apply to admiralty, criminal cases or equity. It applies only to trials at common law. It was not intended to cover appeals, writs of error and all the other supervisory writs. If the first Congress in framing the first Judiciary Act and the Rules of Decision section had intended that the section should govern the action of federal appellate courts they could well have said so, just as they might also have provided that it should apply to equity. They could have said that the laws of the several states shall be regarded as rules of decision “in the trials at common law and in any writ of error taken from a judgment rendered therein,” or something to that effect. But the section is singularly silent as to the effect of the laws of the several states on writs of error and the like in federal appellate courts.

Obviously, it did not occur to the first Congress that the law of the state might be changed by decision after a trial at common law in the federal court and that the federal appellate courts should then conform their decision in the case to the new state law. And when it is remembered that the federal courts constitute a separate, integrated judiciary, it cannot be supposed that Congress would have made the federal courts a shifting weathervane for the changing winds of state decision. In fact, an abundance of evidence leads to the conclusion that the framers of the Constitution, and therefore the first Congress, mistrusted the state courts, particularly when they changed their decisions, and would probably have disclaimed the necessity of giving effect to an overruling state decision in a federal appeal if they had conceived the possibility of such a situation as occurred in the Vandenbark case.

The Rules of Decision section provides that federal courts,

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30 Ky. Law Journal 3, 11 et seq.
31 Mr. Justice Story and the Court in Swift v. Tyson, 16 Pet. 1 (1842), did not at that time regard state decisions as the law of the state which the federal court was required to follow.
32 30 Ky. Law Journal 3, passim.
33 Id.
34 Id. 6, 16.
35 Id. 40, especially Note 63.
in trials at common law, shall be bound by the “laws of the several states.” It does not require federal courts to follow the decisions of state courts, but the laws of the states. In so far, however, as a court decision establishes the law of the state, the federal courts are, under the Erie case, bound by the decision. But does a court decision establish the state law within the intention of the Rules of Decision section?

Court decisions are either declaratory or legislative in character. They either ferret out the law and declare it, or they make the law. Perhaps, at times, they are both, or they may be declaratory at one time and legislative at another. If decisions were never overruled, we could say quite simply that it is immaterial in what manner we analyze them for purposes of logic, that is, whether we regard them as declaratory or legislative. All decisions could be deemed declaratory and would be binding upon the federal courts under the Rules of Decision Act. But when we are confronted with the fact that there are overruling decisions, the nature of decisions, that is, whether declaratory or legislative, becomes a matter of prime importance and a pertinent subject of inquiry, since federal courts are not bound by state decisions but by state laws.

If we say that decisions are declaratory, we face this paradox. The state supreme court in 1930 holds that \( x = y \). In 1940, it overrules the earlier decision and holds that \( x = z \). From 1930 to the decision in 1940, the law of the state is that \( x = y \), and the federal courts must abide by that law. In 1940, the state court ascertains that it has erred in declaring the law, that \( x = y \) was never in fact the law but that the law is and always has been that \( x = z \). From that point on, the federal court must hold that \( x = z \). But what about a clairvoyant federal court in the depressing decade from 1930 to 1940? Should it not be permitted to hold that \( x = z \)? It is not bound by the decisions of the state courts, but by the laws of the state. Certainly, in the absence of any decision by the state court during that decade, the federal court may hold that \( x = z \). It is as competent to determine and declare the law of the state as a nisi præs, intermediate or supreme court of the state; and, in fact, in view of the instability

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37 They are bound by state decisions by reason of the Rules of Decision Act and its interpretation in the Erie case. As has been observed in 30 Ky. Law Journal 3, there is no constitutional question involved.
of tenure of state courts and their more or less conscious attent-
tion to the next election, it is far more competent. And, if the
federal court can declare the state law in the absence of a state
decision, then obviously, under the Rules of Decision section, it
can, during the decade from 1930 to 1940, hold that $x=z$, since
when the state court overrules itself, the state law becomes $x=z$,
and the state court tells us that it has always been such. The
federal court must, therefore, even prior to 1940, hold that $x=z$;
for that is the law of the state which the federal court must
follow.

Suppose again that $x=y$ when a diversity of citizenship case comes into the federal court. Before the court has rendered
a decision in the matter, it learns that the state supreme court
has granted certiorari or something of the sort on a parallel set
of facts in order to test the soundness of its former decision that
$x=y$. Must the federal court withhold its judgment until the
state court, perhaps a year later, has heard the parallel case and
either affirmed or overruled its earlier decision? Such a course
would lay the federal courts open to grave and merited censure.
It would make a mockery of the federal court's power to hear
and determine causes in diversity cases. It would render idle
the mandate of the Rules of Decision Act that it regard the law
of the state as its rule of decision, that is, in the normal course of
adjudication and without unreasonable delay

Again, suppose that under the *West* case, the law of the
state has been established by a decision of an intermediate state
court that $x=y$. In a casual statement that hardly approaches
the dignity of dictum, the supreme court of the state intimates
that $x=z$, without, however, disapproving or even referring to the
appellate decision. A parallel matter then comes into the fed-
eral court. Does the statement or dictum furnish the convincing
evidence of state law, which, under the *West* case, would entitle

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*Under the Erie case, when the law of the state is that $x=y$, the federal court must hold that $x=y$. Under the Rules of Decision Act, however, the federal court is bound to follow the law of the state and not decisions of the state courts. Hence, if the state court subsequently overrules its earlier decisions and determines that $x=z$ and that the law of the state always has been that $x=z$—prior to the overruling of the state decisions, the federal court would under the Erie case be bound to hold that $x=y$ whereas under the Rules of Decision Act the federal court is bound to hold that $x=z$ in accordance with what the state court subsequently finds the law of the state to be. See *Stimson, Swift v. Tyson, What Remains?* (1938) 24 Corn. L. Q. 54.*
the federal court to disregard the appellate decision? It would seem so, since the state supreme court has gone out of its way to indicate what it regards as the law of the state on a certain set of facts. So the federal court holds that x=z. Subsequently, the state supreme court repudiates its dictum and holds that x=y. If the federal case is pending on appeal, the judgment would be reversed, and rightly so, because the Rules of Decision Act requires the federal courts to abide by the law of the state and not by dicta in decisions.

The uncertainty in which the federal court is placed by such decisions as the West and Vandenbark cases makes it highly improbable that Congress intended in the Rules of Decision section to require the federal courts to abide by every decision of the state courts which purports to pronounce the law of the state. It is equally improbable that the federal courts should be compelled to change their judgment in accordance with each change in decision made by the state courts. The question is not whether in a particular instance a federal decision should be corrected in order to conform to the applicable state law. The question is whether the burden of hesitation, delay, uncertainty and constant vacillation should be placed upon the federal courts, or, at least, whether it was the intent of Congress to restrict their exercise of judicial power in this manner.

If decisions are legislative in character, there is even less basis for the Vandenbark decision. Legislation is normally prospective where it affects substantive rights. If decisions were frankly recognized as legislative, they would not affect judgments of courts even in an integrated system of courts in which the decision in question was rendered. A fortiori, they would have no effect upon the judgment of a coordinate but equally integrated system of courts such as the federal courts. And, of

39 As we have seen (Note 37, supra), the question is entirely one of statutory construction or judicial policy rather than a constitutional question.

40 If the Vandenbark case involved merely a remedial question, there could be no objection to the application of an overruling state decision to a judgment of the federal court. Cf. Carpenter v. Wabash Railway (Note 28, supra). But even in purely remedial questions some courts have refused, despite intervening overruling decisions, to reverse judgments which were correct at the time they were rendered. Gilday v. Smith Bros., 226 Mo. App. 1246, 50 S. W (2d) 191 (1932) In that case the court said "The prescience of the trial judge is not his guide, but his duty and perogative is to declare the existing law and administer it without regard to clairvoyance"
course, the same objections which have been made to the rule of the Vandenbark case if decisions be deemed declaratory apply with equal force to the effect of legislative decisions on federal judgments.

Moreover, if decisions are legislative in character, the query is pertinent whether the federal courts should abide by them under any circumstance. Though courts do in fact legislate, legislation by decision is an usurpation of power and indeed a violation of the doctrine of separation of powers. If the state court erroneously assumes jurisdiction over a particular subject matter over which it clearly has none, the federal courts are not bound to recognize a judgment rendered in such case. Why should they be compelled slavishly to abide by a not so erroneous but deliberate usurpation of the power and functions of the legislature? The answer is that Congress has not seen fit in express language to provide that they should give slavish recognition to such usurpation.

Conflict of Laws

In Klaxon Co. v. Stentor Electric Mfg. Co., the court held that in a case involving questions of conflict of laws, the federal court must follow the rule of conflict of laws of the state in which the federal court sits. Strictly speaking, the rule of this case is merely an application of the doctrine of the Erie case, and not an extension of it as in the other cases discussed above. And, in general, it should be said that if the Erie case is sound, its application to matters of conflict of laws is natural and abundantly justified. If the federal court must hold that $x = y$ because in a suit between $A$ and $B$ the state courts have so held, then it is difficult to find any ground for prescribing a different rule of decision when the state courts have held that in matters of conflict of laws the law of $Q$ rather than $R$ governs the relations of $A$ and $B$. The rules of conflict of laws are, to a certain extent, local rules of law. They may vary from state to state; but within a state, they are part of its common or local law. $A$ commits a tort against $B$ in state $X$. The state law governs their legal rights, and the federal courts must follow it. If, then, $A$ commits a tort against $B$ in state $Y$ and the courts of $X$ hold

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that the law of Y governs as to the tort but the law of X as to the statute of limitations, it is difficult, on purely logical grounds, to discern why the federal courts should not regard this as the law of X and the rule of decision in a parallel case.

Perhaps historically, there may be some basis for questioning the application of the *Erie* case to matters of conflict of laws. The rules of conflict of laws grow out of the law of nations and principles of comity. They are in reality not local rules at all. In many systems of jurisprudence they are called private international law, to distinguish them from public international law or what is truly the law of nations. If a contract is made in X, to be performed in Y, the courts of X may hold that the law of X, the place of execution, governs, while the courts of Y may hold that the law of Y, the place of performance, governs. There is no means of resolving the conflict of decision that may result from this disparity of view. By hypothesis, principles of comity do not help, since the courts of X and Y differ as to the applicable law.\(^4\)

Such a matter then comes before the federal courts in X and Y. Under the *Klaxon* case they must follow the laws of the respective forums, and thus on the same state of facts, they will reach diametrically opposed results. This is, of course, as outrageous as it is absurd. Yet, under the *Klaxon* case no other result is possible. Can it be that the first Congress in enacting the Rules of Decision section contemplated this result or even envisaged the difficulties that might arise out of the *Klaxon* case?\(^5\)

There is an utter absence of evidence as to what the first Congress intended with respect to the application of that section to matters of conflict of laws. But there is some indication of what the framers of the Constitution and their contemporaries thought of these matters in relation to the powers conferred upon the federal courts by the Judiciary Article of the Constitution.

Hamilton\(^6\) infers that the framers of the Constitution feared that the state courts would not apply the law of the place of conduct in matters involving foreigners. Hence, he says, they

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\(^5\) *The Federalist* (Lodge ed. 1888) No. LXXX, 496.
committed these matters to the federal judiciary. Hamilton approves this provision of the Judiciary Article and categorizes such matters as belonging to the "general law of nations," or what in other systems of jurisprudence is called private international law. Hamilton even goes so far as to suggest that if controversies involving foreigners had not been committed to the federal judiciary and the state courts refused to apply the lex loci in such matters, it might be deemed an aggression on the foreigner's sovereign and a cause of war. He therefore infers and suggests that the federal courts are not, in such controversies, bound by the pertinent state decisions but will apply their own rules of conflict of laws, at least in cases involving foreigners.

Winthrop states the common law rule of conflict of laws to the effect that the law of the place where the contract is made determines the legal relations of the parties growing out of the contract. But he infers or assumes that the federal courts will not regard themselves as bound by such rules.

This construction of the powers of the federal courts differs in no wise from the view then generally held of their powers with respect to all the rules of the common law. But, for the reasons assigned by Hamilton and Winthrop and, no doubt, by many others, the rules of conflict of laws were singled out for special remark, and the commitment of such matters to the independent determination of the federal courts was thought to be especially noteworthy and commendable. Can there be any doubt that the first Congress, composed as it was largely of members of the Constitutional Convention, had this distinction between the ordinary common law and conflict of laws in mind when they provided that the laws of the several states should

"Id. "* * * But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations."  

"Letters of Agrippa, Massachusetts Gazette, December 11, 14, 1787.

46 Winthrop says: "It is vain to tell us that a maxim of common law required contracts to be determined by a law existing where the contract was made; for it is also a maxim that the legislature has the right to alter the common law." In the same passage he says: "The court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in the state court. The rule which is to govern must therefore be made by the court itself.

30 Ky. Law Journal 3, passim.
govern the decisions of the federal courts. In other words, by “laws of the several states,” can it be doubted that they meant purely local law, ordinary common law, and not private international law or what Hamilton called the general law of nations? If that is so, then the Klaxon case extends the scope and intent of the Rules of Decision section.

Nevertheless, in the ordinary conflict of laws case, the decision is eminently sound as a question of judicial policy and is in fact but a natural application of the doctrine of the Erie case. But, it is submitted that when a conflict of decision might or would result or has resulted from the action of the courts of two states in applying different conflict of law rules to the same set of facts, the federal court, whether sitting in the one forum or the other, should be free either to resolve that conflict in favor of the one view or the other, or to adopt still a third view which it may prefer. Certainly no objection can be made to the federal court’s adopting the latter course if once its right is recognized to remain free and unfettered of the binding effect of decisions of the courts of either forum.48

Conclusion

The Erie case cannot be supported as a constitutional decision. But it can and perhaps should be justified on the ground of judicial policy. That policy is simply that judicial decision shall not vary or vacillate because of the fortuity of diversity of citizenship.

The subsequent decisions of the Supreme Court discussed in this article purport to enforce and apply that doctrine. In fact, they extend and distort it. The extensions raise many doubts and possibilities that are entirely out of harmony with the very policy which prompted the decision in the Erie case. In so far as they raise these doubts and possibilities, they are unsupported and cannot be justified by either reason or authority. They are at variance with the judicial policy which purportedly underlies them. And they place the federal courts in a position of subordination and subserviency to the state courts in a man-

48Professor Cook, in a recent article, has advanced very cogent arguments against the application of the Erie case to cases involving questions of conflict of laws. Federal Courts and the Conflict of Laws (1942) 36 Ill. Law Rev. 493.
ner which is within the intent of neither the Constitution nor the Rules of Decision section.

In many situations, no doubt, these extensions of the *Erie* case do in fact achieve the purpose of that decision. But the result is based upon an assumption that the federal courts must reach the results there pronounced. The cases rest upon determinations of the power of federal courts and not upon questions of judicial policy. In so far as they rely upon the *Erie* case, they are constitutional decisions, and therefore clearly erroneous. The *Vandenbark* case dodges the constitutional issue and is placed squarely upon the Rules of Decision section. The other cases likewise rest upon that section in so far as the court held in the *Erie* case that the section was merely declaratory of the power of the federal courts under the Constitution.

The Rules of Decision section clearly does not cover the situations presented in those cases. It requires the federal courts to abide by the law of the several states. It does not impose upon the federal courts the duty of abiding by every changing decision of the state courts, and it does not direct them to heed the reasoning and decision of any nisi praus or intermediate court judge no matter how ill conceived and out of harmony with what the law of the state really is. As the federal courts are constitutional courts and as the Constitution is the expression of the will of the people of the several states, the federal courts are as much an organ of the state through which its law is expressed as some vice-chancellor in New Jersey or district appellate court in Ohio or California. Certainly the Rules of Decision section does not deprive the federal courts of their constitutional power, as an organ of the state, to determine the law of the state in the same manner that it is determined by state courts of first instance, intermediate courts and even courts of last resort.40

In so far as the cases discussed in this article deprive the federal courts of the power which they constitutionally possess,

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*Professor Corbin has thoroughly examined the whole question and in an article permeated with tinges of humor has reached substantially the same conclusions as are advanced in this article. *The Laws of the Several States* (1941) 50 Yale Law Journal 762. In view of Professor Corbin's article it might be thought an act of supererogation to present the instant article on the same question. However, the writer of this article has sought to present the question from a different angle and with different emphasis than Professor Corbin's article.*
they are a distortion of the Rules of Decision section and the broader judicial policy upon which it is based. Hence, as decisions on the power of the courts under that section, they are unsound. It is to be hoped that they will be reconsidered in the light of further experience, and that the Supreme Court will restore to the federal courts the dignity and prestige which they have lost as a result of those decisions. This must inevitably happen when the difficulties and objections to those decisions, which we have pointed out, become realities.