

Behrens, 47 Ohio St. 323, 25 N.E. 209 (1890); 3 Wigmore, Evidence (2d ed. 1923), § 1736; *contra*, *Throckmorton v. Holt*, 180 U.S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663 (1900). These are now regarded as a separate class. *In re Shelton's Will*, 143 N.C. 218, 55 S.E. 705 (1906); Hutchins and Slesinger, Some Observations on the Law of Evidence—State of Mind to Prove an Act, 38 Yale L. Jour. 283 (1929); Maguire, The Hillmon Case Thirty-three Years After, 38 Harv. L. Rev. 709, 715 n. 22 (1925). The statement, "Dr. Shepard poisoned me," on analysis means, "I believe that Dr. Shepard poisoned me." Hinton, States of Mind and the Hearsay Rule, 1 Univ. Chi. L. Rev. 394 (1934). This is using a hearsay statement to prove a state of mind, which is permissible according to *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706 (1892), and cases following it. *State v. Journey*, 115 Conn. 344, 161 Atl. 515 (1932); *State v. White*, 52 Nev. 235, 285 Pac. 503 (1930); *Commonwealth v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1926). The next step in the analysis is that since the deceased believed that Dr. Shepard poisoned her, it follows circumstantially that she believed that she did not poison herself. But the following step is that if she believed that she did not poison herself, then as a matter of fact she did not. This step, involving the element of memory and possibly perception, clearly conflicts with the hearsay rule. It is just this step which the courts refuse to take in excluding evidence of overt acts to show belief as to a state of facts to prove the state of facts believed. *State v. Piernot*, 167 Iowa 353, 149 N.W. 446 (1914); *Wright v. Doe d. Talham*, 7 Ad. & Ell. 313 (1837); 1 Wigmore, Evidence (2d ed. 1923) § 267.

The language of the opinion in refusing to accept the evidence was, nevertheless, unfortunate, for it was said simply that "the testimony now offered faced backward not forward." If the statement were used to show a present state of mind as the basis for an argument that that state of mind probably extended into the past, there would be no objection to it. *State v. Hudspeth*, 159 Mo. 178, 60 S.W. 136 (1900); *Rawson v. Haigh*, 2 Bing. 99 (1824). Only when the argument is from past belief to the truth of the facts believed is it to be condemned.

The argument has been made that if declarations are admissible to a show state of mind in order to prove a future act, then logically they should be admissible to show a state of mind in order to prove a past act. Seligman, An Exception to the Hearsay Rule, 26 Harv. L. Rev. 146 (1912). The present case is an excellent example of the answer thereto made by Professor Chafee, that when a declaration as to state of mind is used to prove a past act, it is apt to be in a testimonial form so that it is practically impossible for the jury to consider it as anything but a direct statement of the fact to be proved. Chafee, Review of Wigmore: Evidence, 37 Harv. L. Rev. 513, 519 (1924). Thus in this case the statement is sought to be used simply to prove that Mrs. Shepard did not commit suicide. It would be impossible for the jury to use the statement for this purpose alone and to overlook the fact that it is a direct statement of the ultimate issue in the case. No such difficulty arises when a declaration of a state of mind is used to prove a future act, because the only use that the jury can make of the evidence is purely circumstantial.

BRIMSON GROW

Federal Jurisdiction—Construction of Uniform Laws in the Federal Courts—[Federal].—A suit was brought in federal court on a note executed in Florida, bearing interest on the principal amount and on overdue interest payments. *Held*, the note was non-negotiable under the Florida Negotiable Instruments Law, in spite of decisions

to the contrary by the Supreme Court of Florida. *Burns Mortgage Co. v. Fried*, 67 F. (2d) 352 (C.C.A. 3d 1933).

The provisions of Judicial Code § 34, as amended [1 Stat. 92 (1789), 28 U.S.C.A. § 725 (1928)], make it obligatory on the federal courts to regard as "rules of decisions in trials at common law" the "laws of the several states." In *Swift v. Tyson*, 16 Pet (U.S.) 1, 10 L. Ed. 865 (1842), the term "laws of the several states" was construed to exclude the decisions of state tribunals on questions of "general commercial law"; on such matters the state court decisions are merely evidence of the law, and the federal courts will decide for themselves what the law is. But cf. Holmes, J., dissenting in *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, 532-535, 48 Sup. Ct. 404, 72 L. Ed. 681 (1928); Gray, *The Nature and Sources of the Law* (2d ed. 1921) 249-259. The federal courts have since shown a marked tendency to extend this sphere of independent construction; the phrase "general commercial law" has been replaced successively by "general jurisprudence" in *Lake Shore R.R. v. Prentice*, 147 U.S. 101, 106, 13 Sup. Ct. 261, 37 L. Ed. 97 (1892), "general rules of the common law" in *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772 (1893), and "general law" in *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, 530, 48 Sup. Ct. 404, 72 L. Ed. 681 (1928). But see *Cole v. Pennsylvania R.R.*, 43 F. (2d) 953, 956-57 (C.C.A. 2d 1930).

In dealing with the "positive statutes of the state," however, the general rule is that the federal courts, as was indicated in *Swift v. Tyson*, will follow the construction of the highest tribunal of the state. *Elmendorf v. Taylor*, 10 Wheat. (U.S.) 152, 6 L. Ed. 289 (1825); *Bacon v. Insurance Co.*, 131 U.S. 258, 9 Sup. Ct. 787, 33 L. Ed. 128 (1889); cf. *Knights of Pythias v. Meyer*, 265 U.S. 30, 44 Sup. Ct. 432, 68 L. Ed. 885 (1924); *American Ry. Express Co. v. Royster Guano Co.*, 273 U.S. 274, 47 Sup. Ct. 355, 71 L. Ed. 642 (1927). Several qualifications to this general rule have been suggested: (1) The state court's decision must precede the trial in the federal court; *Burgess v. Seligman*, 107 U.S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359 (1883); but cf. *Bauserman v. Blunt*, 147 U.S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316 (1893); *Hartford Fire Ins. Co. v. C.M. & St.P.R.R.*, 175 U.S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84 (1899); *C.M.St.P. & Pac. R.R. v. Risty*, 276 U.S. 567, 48 Sup. Ct. 396, 72 L. Ed. 703 (1928); *Hawks v. Hamill*, 288 U.S. 52, 53 Sup. Ct. 240, 77 L. Ed. 610 (1933). (2) The construction must be one enunciated by a line of decisions by the state court; cf. *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228 (1910). (3) The construction must give conclusive evidence of the state law; cf. *Barber v. Pittsburgh Ry.*, 166 U.S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925 (1897). (4) The statute must be positive, and not merely re-enact the common law; *Capital City State Bank v. Swift*, 290 Fed. 505 (D.C.E.D.Okla. 1923); *Peterson v. Metropolitan Life Ins. Co.*, 19 F. (2d) 74 (D.C.S.D.Ia. 1926), affd. 19 F. (2d) 88 (C.C.A. 8th 1927). Whether the statute does re-enact the common law is a question normally to be settled by the federal court; *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276 (C.C.E.D.Ga. 1907), affd. *Alexander v. Lane*, 157 Fed. 1002 (C.C.A. 5th 1907), certiorari denied 208 U.S. 617, 28 Sup. Ct. 569, 52 L. Ed. 647 (1908); but cf. *Byrne v. Kansas City R.R. Co.*, 61 Fed. 605 (C.C.A. 6th 1894); *Babbitt v. Read*, 236 Fed. 42 (C.C.A. 2d 1916). (5) It has been further intimated, as a corollary of *Swift v. Tyson*, that any state statute dealing with the "general commercial law," even though "positive" in nature, should be interpreted independently by the federal courts; see *American Mfg. Co. v. U.S. Shipping Board*, 7 F. (2d) 565, 566 (C.C.A. 2d 1925).

Because the exceptions to the general rule that the federal courts will follow the state court's interpretation of state statutes are not yet crystallized, it is not surprising to find the lower federal courts differing as to the mode of handling Uniform Laws. One view is that inasmuch as the Uniform Laws do make certain substantial changes in the pre-existing law, the construction adopted by the state tribunal should prevail. *Savings Bank v. National Bank*, 3 F. (2d) 970 (C.C.A. 4th 1925); cf. *Niagara Fire Ins. Co. v. Raleigh Hardware Co.*, 62 F. (2d) 705 (C.C.A. 4th 1933). But the fact that Uniform Laws in the main merely codify pre-existing law has led one federal court to adopt an independent construction of the Negotiable Instruments Law. *Jockmus v. Claussen & Knight, Inc.*, 47 F. (2d) 766 (D.C.S.D.Fla. 1930). The present case aligns itself with that decision.

Since the main purpose of the Uniform Laws is to create uniformity between jurisdictions, it would seem that the desire for uniformity in the federal courts which led to the evolution of the doctrine of *Swift v. Tyson*, would also lead to the application of that doctrine to the construction of Uniform Laws. But in view of the insecure foundation of the rule of *Swift v. Tyson*, there is much to be said for restricting it wherever possible. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 81-88 (1923). Moreover, at least one court has interpreted "uniformity" in the Uniform Laws to mean uniformity between state and federal courts in a particular state. *Savings Bank of Richmond v. National Bank*, 3 F. (2d) 970 (C.C.A. 4th 1925); cf. Fordham, *Federal Courts and the Construction of Uniform State Laws*, 7 N.C.L.Rev. 423, 429-430 (1929). Finally, it may be doubted whether independent construction of Uniform Laws by the federal courts will actually lead to uniformity within the federal judicial system, in view of the recent stringent limitations on appeal as of right to the Supreme Court. Judicial Code §§ 239, 240 as amended [43 Stat. 938 (1925), 28 U.S.C.A. §§ 346, 347 (1928)]. This is indicated by the conflicting decisions of federal courts as to the proper mode of construing Uniform Laws, a point first raised almost a decade ago.

KARL HUBER

Insurance, Public Liability—Concealment—Extent of Duty of Disclosure—[Federal].—Defendant's application for public liability insurance on his automobile was made to a broker on October 16, 1930, and was sent by him to the Netherlands Insurance Company, who forwarded it to plaintiff insurance company. Plaintiff received the application on October 21, and on that same day issued the policy dated, in compliance with defendant's request, to take effect on October 18. On October 19, defendant negligently collided with another automobile. He notified the broker that afternoon, and the broker informed the Netherlands Company the next morning. Plaintiff did not receive the information from the Netherlands Company until one day after the policy was issued and brought this action to rescind. *Held*, decree for plaintiff affirmed. *Strangio v. Consolidated Indemnity and Insurance Co.*, 66 F. (2d) 330 (C.C.A. 9th 1933).

Two conflicting rules have been applied in those branches of insurance in which the issue of concealment has been adjudicated. Either there is (1) an absolute duty to disclose all facts which might reasonably influence the insurer in granting insurance, or (2) the insured's only obligation is to act bona fide. Vance, *Insurance* (2d ed. 1930), 344 ff. The absolute duty is consistently applied only in marine insurance. *Sun Mutual Insurance Co. v. Ocean Insurance Co.*, 107 U.S. 485, 27 L. Ed. 337 (1882); *Burritt v. Saratoga County Mutual Fire Insurance Co.*, 5 Hill 188 (N.Y. 1843); *Clinchfield Fuel Co.*