

courts. 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. In the absence of any contrary showing, the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

Reversed.

SIX COMPANIES OF CALIFORNIA ET AL. *v.* JOINT HIGHWAY DISTRICT NO. 13 OF CALIFORNIA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 267. Argued November 13, 14, 1940.—Decided December 9, 1940.

1. An announcement of state law by an intermediate state appellate court, in the absence of a contrary ruling by the highest state court or of other convincing evidence that the state law is otherwise, should be followed by federal courts. P. 188.
2. An intermediate appellate court of California had ruled that, in that State, a stipulation in a construction contract for liquidated damages in case of delay in completion was inapplicable after abandonment of the work. This, apparently, had not been disapproved, and there was no convincing evidence that the law of the State was otherwise. *Held*, that the ruling should have been followed by the federal courts in a case involving the same questions, in California. P. 188.

110 F. 2d 620, reversed.

CERTIORARI, *post*, p. 631, to review the affirmance of a judgment for damages awarded on a cross-complaint, against a building contractor for delay in completing

a building. Jurisdiction was based on diversity of citizenship.

Mr. Paul S. Marrin, with whom *Messrs. Max Thelen, DeLancey C. Smith, and Jewel Alexander* were on the brief, for petitioners.

The Circuit Court of Appeals should have followed the decision of the District Court of Appeal of California in *Sinnott v. Schumacher*, 45 Cal. App. 46.

The question involved is: What is the law of California? Under the reasoning of the *Erie Railroad Co.* case, 304 U. S. 64, it makes little difference what state court has declared the law so long as it is the rule of decision in the State. In the *Erie* case this Court referred to the law of the State as declared by its highest court in a decision, but it did not say that the law of the State might not be established by the decision of an intermediate appellate court. And where the decision of such court does in fact announce a rule of law which other state courts are bound to follow, it establishes the law of the State even though another court of the State has the power to overrule its decision.

Had this case been tried in any superior (trial) court of California, such court would have been bound by *Sinnott v. Schumacher*, and the result would have been the opposite of that announced by the Circuit Court of Appeals. If, therefore, the state law is to be determined just as it would be in a case tried in the state courts, we can not escape the conclusion that the decisions of the California District Courts of Appeal are binding on the federal courts.

The power of the Supreme Court of California to overrule decisions of the District Courts of Appeal has little bearing on the solution of the problem. The Supreme Court has the power to overrule its own decisions, but its prior decisions, as well as prior decisions of the

District Courts of Appeal, are the law of the State unless and until overruled.

The decision of one District Court of Appeal in California binds the others, particularly when a petition for hearing by the Supreme Court of the earlier case has been denied. *Skaggs v. Taylor*, 77 Cal. App. 519; *Clover v. Jackson*, 81 Cal. App. 55; *Bridges v. Fisk*, 53 Cal. App. 117, 122; *People v. Whitaker*, 68 Cal. App. 7, 11; *Masonic Mines Assn. v. Superior Court*, 136 Cal. App. 298, 300. Distinguishing *People v. Brunwin*, 2 Cal. App. 2d 287.

Decisions of the District Courts of Appeal are of state-wide scope and application. A rule of law announced in one district will be followed in all others and must be followed by all trial courts.

The decision below perpetuates the evils condemned in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. There are many propositions of state law in California which have never been decided by its Supreme Court, but which have been decided by a District Court of Appeal on which the Supreme Court has denied a hearing. These decisions of the District Courts of Appeal are accepted as the law throughout the State and the rules announced by them are applied in litigation in its courts. Many of the rules of law announced by the District Courts of Appeal of the State have never been decided by its Supreme Court and probably never will be, because, under the enlarged jurisdiction conferred upon the District Courts of Appeal by the 1928 amendment to Art. VI, § 4, of the California Constitution, most appeals are taken directly to these courts, and it is unlikely that the Supreme Court would order any case in which it believes the District Courts of Appeal have properly applied the law to be transferred to it for hearing. We earnestly contend that the decisions of these courts are the law of the State when there is no decision of the Supreme Court which conflicts with them. If the federal courts refuse to follow them we may have, for

long and indefinite periods of time, one rule in the federal courts and another in the state courts, a condition substantially the same as that brought about by the rule announced in *Swift v. Tyson*, 16 Pet. 1.

The jurisdiction of the District Courts of Appeal is state-wide. They have jurisdiction of appeals from any superior court in the State and their jurisdiction is not limited to hearing appeals from superior courts in their own districts.

The question of the power of the federal courts to disregard decisions of lower state courts was not involved in *Wichita Royalty Co. v. City National Bank*, 306 U. S. 103.

Messrs. Archibald B. Tinning and Theodore P. Witt-schen for respondent.

Denial by the State Supreme Court of a petition for hearing therein after decision by a District Court of Appeal does not mean approval of the opinion and decision of the lower court. *People v. Davis*, 147 Cal. 346, 350; *Bohn v. Bohn*, 164 Cal. 532, 537; *In re Stevens*, 197 Cal. 408, 423; *People v. Rabe*, 202 Cal. 409, 418; *Seney v. Pickwick Stages*, 206 Cal. 389, 391; *Shelton v. Los Angeles*, 206 Cal. 544, 550; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. 2d 156, 167.

The California District Courts of Appeal have held, and the California Supreme Court recognizes, that the decision of a District Court of Appeal in one district is not binding on another. *Danley v. Superior Court*, 64 Cal. App. 594, 599; *McMillan v. Greer*, 85 Cal. App. 558, 563; *Stone v. San Francisco*; 27 Cal. App. 2d 34; *Raynor v. City of Arcata*, 11 Cal. 2d 113, 120.

That being so, then clearly neither the Circuit Court of Appeals nor this Court is so bound.

The California District Courts of Appeal are courts of limited and not state-wide jurisdiction. But even if jurisdiction were state-wide, in view of the express limita-

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tions which have been placed upon their decisions by the Supreme Court of the State, their decisions, even when the Supreme Court refuses a hearing, are not those of the highest court of the State, which the federal courts are required to follow.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Six Companies of California, a contractor, brought this suit against respondent, Joint Highway District No. 13, to recover the reasonable value of materials and labor furnished under a contract. The contractor had undertaken to rescind for alleged breach by respondent and had stopped work. Respondent answered, alleging wrongful abandonment of the contract and by cross-complaint sought damages against the contractor and its sureties.

There was a clause in the contract for liquidated damages in the amount of \$500 a day in case of delay in completion.¹ The District Court found against the con-

¹ That clause provided:

"(d) Damages for Delay.—The Parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor."

tractor and its sureties and on the cross-complaint awarded damages which included \$142,000 as liquidated damages for delay. The Circuit Court of Appeals affirmed the judgment. 110 F. 2d 620.

Petitioners contended that under the law of California the clause providing for liquidated damages did not apply to delay which occurred after the abandonment of the work by the contractor. This contention was overruled. The Circuit Court of Appeals expressly recognized that its decision in that respect was contrary to the decision of the District Court of Appeal in California in the case of *Sinnott v. Schumacher*, 45 Cal. App. 46; 187 P. 105. But the Circuit Court of Appeals thought that decision wrong and refused to follow it. We granted certiorari limited to the question whether there was error in that ruling. October 14, 1940.

In *Sinnott v. Schumacher, supra*, the suit was brought to recover the value of labor and materials furnished under a building contract. After part performance the contractor gave notice of rescission and abandoned work because of failure to receive the first installment of the agreed payment. Defendants denied that the installment was due and filed a cross-complaint against the contractor and his surety asking damages because of the abandonment of the work. The trial court found against the plaintiff on his complaint and in favor of the defendants on their cross-complaint, and entered judgment for damages. The District Court of Appeal affirmed the judgment. The Supreme Court of the State denied a petition for hearing in that court.

On the appeal to the District Court of Appeal, the plaintiff-appellant contended that the trial court erred as to the amount of the damages awarded, basing his contention upon the clause in the contract which provided for liquidated damages in a stipulated amount per day

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in case of delay in completion.² The District Court of Appeal held that the clause had no application to a case where the contract had been abandoned without sufficient cause. The court said:

"As to the appellants' contention that the court was in error in its finding and conclusion as to the amount of damages sustained by the defendants and cross-complainants by reason of the plaintiff's unjustified abandonment of work upon said building, and his failure, neglect, and refusal to complete the same, it may be stated that this contention is based upon the clause in the contract which relates to the matter of delay in the time of completion of said building and which purports to fix a penalty of

² The clause for liquidated damages in the contract in the *Sinnott* case was as follows:

"Should the Contractor fail to complete this contract and the work provided for within the time set for completion as aforesaid, due allowance being made for the contingencies provided for herein, he shall then become liable to the Owner for all loss and damages which the Owner may suffer on account thereof, in the sum of Ten Dollars per day, which the Contractor hereby agrees to deduct from his contract price, for each day that the work shall remain unfinished beyond such time for completion, and the Owner agrees to pay to the Contractor a bonus of Ten Dollars (\$10) for each day that the work may be completed before the time aforesaid for the completion.

"The agreement in this paragraph made for damages is made as herein set forth for the reason that the actual damage which will be sustained by the Owner by reason of the Contractor's breach of the covenant to complete this contract within the time stated is from the nature of the case impractical and extremely difficult to fix; and one of the considerations moving the Owner to enter into this contract with the Contractor is the agreement of the Contractor to complete his said contract within the time herein stated and the liquidated damages herein above stated for his failure to do so."

The plaintiff's contention under this clause was that the delay in completion was not more than five days the damage for which under the contract would amount to \$50.

fifty dollars per day for such delay; but this provision of the contract has no application to a condition wherein the contractor is shown to have abandoned his contract without sufficient cause, in which case the right of the defendants to damages as a result of the plaintiff's breach of said contract could not be affected or limited by said provision of the contract for a penalty for delay in the completion of the structure beyond the stipulated time for such completion.”³

Respondent urges that what was said by the District Court of Appeal in the *Sinnott* case with respect to the liquidated damage clause was a mere dictum. We do not so regard it. This part of the opinion of the court was its answer to the appellants' insistence that the judgment on appeal was erroneous because the liquidated damage clause had been disregarded and damages had been awarded in excess of the amount for which the contract provided. What the court said as to this was a statement of the ground of its decision. It was a statement of the law of California as applied to the facts before the court. It is said that there is a difference between the two cases. That difference appears to be that in the instant case the owner is seeking to apply the liquidated damage clause in order to recover from the contractor, while in the *Sinnott* case the contractor was seeking to limit the damage recoverable against him to the amount agreed upon. But, so far as the question concerns the applicability of the liquidated damage clause, the difference would not seem to be material, as by the terms of the clause in each case it appears to be intended to bind both parties when applicable. The ruling as to the law of California as

³ Compare *Bacigalupi v. Phoenix Building Co.*, 14 Cal. App. 632, 639; 112 P. 892. See Williston on Contracts, Rev. Ed., Vol. 3, § 785, pp. 2210, 2211.

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applied by the state court was that the stipulation in the contract as to the amount of damages in case of delay in completion was not applicable to delay after the contractor had abandoned the work. As the Circuit Court of Appeals said, that decision "is adverse to ours."

The decision in the *Sinnott* case was made in 1919. We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise. We have fully discussed the principle involved in the cases of *West v. American Telephone & Telegraph Co.*, *post*, p. 223, and *Fidelity Union Trust Co. v. Field*, *ante*, p. 169, and further amplification is unnecessary. See, also, *Ridge Co. v. Los Angeles*, 262 U. S. 700, 708; *Tipton v. Atchison, T. & S. F. Ry. Co.*, 298 U. S. 141, 151. The Circuit Court of Appeals should have followed the decision of the state court in *Sinnott v. Schumacher* with respect to the inapplicability of the liquidated damage clause in the event of the abandonment of work under the contract, and its judgment to the contrary is reversed. The cause is remanded for further proceedings in conformity with this opinion.

Reversed.