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Robert C. Berring*

Choosing one’s “favorite” case is a daunting task. Should one look to the great cases that transformed the social face of the United States? Should one seek out the opinions of master wordsmiths such as Holmes or Cardozo? It could be that one of those occasional ventures into popular culture, some rhymed opinion found lurking in the annals of the National Reporter System or one of those surreal criminal opinions so loved by first-year law students should be chosen. But somehow none of those methods feels right.

Instead, I am guided by Admiral James Stockdale’s immortal question, posed during the 1992 Vice-Presidential Debate, “Who Am I and Why Am I Here?” I am a librarian. My interest lies in observing the flow of legal information and the ways in which people use legal authority. I research the process through which statutes and the common law are interpreted and become part of the legal structure. In keeping with this mission, I must be certain that at least one good, workmanlike attempt to wrestle with questions of interpretation and authority makes it into this compilation.

Despite the endless academic wailing over whether judges make new law—the dreaded “judicial activism versus judicial review” controversy—day to day reality consistently demonstrates that judges, faced with murky statutory language, Kafkaesque administrative regulations, and a universe of common law, are bound only by the need to build a majority opinion on a multi-judge panel. Whether one is a formalist, a realist, a crit, or a Posnerian, it ought to be clear that a judge can use, abuse, modify, and ignore virtually any materials as she drafts the court’s decision. Thus, I hunted to find a masterpiece of the “justify my opinion” court case. My winner: *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*

I love this opinion. The issue appears straightforward. Does Wisconsin Statute Section 401.207, a local variant of Uniform Commercial

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1. 341 N.W.2d 655 (Wis. 1984).
Code Section 1-207 addressing the common-law principle of accord and satisfaction, allow full payment checks to settle a disputed claim? Yes or no?

The judge is Shirley Abrahamson, a former law professor turned Wisconsin Supreme Court justice. This able jurist finds herself adrift in uncharted waters, dependent upon her own abilities to resolve this question. "Yes or no" questions send us on an odyssey besieged with peril before we can find a safe shore. As she grapples with a full range of sources in her quest to find the answer, Justice Abrahamson writes an opinion that illustrates the exercise of an able judicial mind. We can watch her journey to "Yes" or "No."

I. The Opinion

Justice Abrahamson begins her journey by turning to the common law, which supported the use of full payment checks. From there, she must wrestle with a Cyclops, the Uniform Commercial Code (UCC), which may (or may not) have changed the common law. Let the voyage begin!

The "true" meaning of the UCC should be self-evident. It is not the product of a state legislature, filled with gaps and pork barrel compromises. No. The UCC is the product of the best legal minds in the country. It was drafted to bring clarity and uniformity to an area of the law that cried out for it. It is a legislative success story, the saga of legal sagacity and political acumen from the private sector forging agreement among the various states. If anything should be clear, this is it.

Reality Check. Parts of the UCC read like the hieroglyphs before the Rosetta Stone was discovered. Of course, UCC Section 1-207 addresses accord and satisfaction. But as Justice Abrahamson judiciously notes, "It is generally conceded that the scope and meaning of the UCC section 1-207 is unclear."

Our Navigator wisely turns to the Official Comments to the UCC in search of resolution. The drafters of the UCC recognized that the text was not always clear. Thus, they provided Official Comments to enlarge upon and explain what they had done. Not only does the UCC tell one the law, it explains what it was trying to say. How could anything be clearer? Alas, even a careful reading of the Comments leaves Justice Abrahamson unclear as to how (or if) the UCC addresses our issue.

Having failed in reading the Code and Comments, Justice Abrahamson dips into secondary authority to find answers. She turns to two worthy

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2. Flambeau had attempted to pay off Honeywell by sending a check, marked "in full payment to you for equipment," which Honeywell had deposited prior to commencing the suit. Id. at 657.
3. Id. at 659.
scholars, Professors Hawkland and Rosenthal,\(^4\) who both conclude that the UCC does not apply to full payment checks, but arrive at the conclusion from completely different analytical viewpoints. With all this in hand, Justice Abrahamson acknowledges that both the Official Comment and the Wisconsin Commercial Code Committee's commentary "indicate" that Section 401.207 should not apply to full payment checks, but moves on as "they do not conclusively settle" the issue.\(^5\)

One begins to sense that Justice Abrahamson is resisting the obvious, but she plows on. The Justice turns next to legislative history. Did the Wisconsin Legislature leave tracks as to what it was thinking about when it enacted the Section? Legislative history is the current bad dog of legal research, drawing criticism from Justice Scalia and others who argue that legislative history is filled with useless and misguiding offal. (After all, most legislative intent is the intent to get re-elected.) After finding very little, the Justice quotes Professor Rosenthal, who "wisely explains, 'Any assertion of the "intention" of one legislature, much less that of all the enacting legislatures [of the UCC, namely the American Law Institute and the National Conference of Commissioners on Uniform State Laws] collectively in such circumstances requires wondrous confidence.'"\(^6\)

Still questing, Justice Abrahamson returns to the UCC drafting process to use some of the legerdemain of statutory interpretation. Originally, the UCC had two sections addressing accord and satisfaction, 1-207 and 3-802(3). The latter explicitly upheld the common-law acceptance of full payment checks. Although 3-802(3) was never adopted, the fact that it coexisted with 1-207 can be used to infer that 1-207 was not meant to address the check issue.

Yet Justice Abrahamson's safe passage is blocked by a formidable document, the Report of the New York Commission on Uniform State Laws.\(^7\) One of the grand traditions of the state courts has been to turn to the authority of other states in writing an opinion. Much facilitated by the National Reporter System, courts have long been able to study the way in which other jurisdictions have handled novel or complex matters. At times, in certain areas (e.g., Delaware on corporate law), one state court or another has emerged as the preeminent court. In the case of the UCC,

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4. The fact that Professors Hawkland and Rosenthal have participated in the drafting and revising process, as well as in providing interpretive commentary, demonstrates how delightful legal interpretation really is. Even the folks who write and work with text cannot agree on what it means. Sometimes interpreting legal texts puts me in mind of throwing joss sticks and consulting the I Ching.
5. Id. at 661.
6. Flambeau, 341 N.W.2d at 660 n.5 (additions in original) (quoting Albert J. Rosenthal, Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code, 78 COLUM. L. REV. 48, 58 (1978)).
7. Id. at 662 (citing REPORT OF THE NEW YORK COMMISSION ON UNIFORM STATE LAWS (1961)).
it was a Commission of the New York Legislature that emerged. The New York Commission worked with the UCC drafters, and the Report contains a section by section comparison between the UCC and existing common-law rules. New York interpretation has come to exercise enormous influence in the resolution of UCC-related questions. Moreover, the Report discusses the check issue. Its conclusion? The sun has set on the era of the Full Payment Check. No longer will it be valid as accord and satisfaction. At last, a definitive conclusion. The court may anchor its opinion in New York's legal harbor.

But the plot thickens. After explaining how useful the Report is in interpreting the UCC, Justice Abrahamson resists the call of its Siren's song. This is a New York report, not a Wisconsin report. It lacks authority. She is not bound by its decision. She quickly concludes that legislative history has too many conflicting inferences and does not aid her in interpreting Section 1-207 as adopted in Wisconsin. One might suspect that the Justice had found answer enough, but she fights off the helping hands. One begins to suspect how this story is going to end.

Having dismissed the language of the UCC, the Official Comments, secondary authority, the legislative history, the UCC drafting history, and the New York Commission, Justice Abrahamson seizes upon the UCC's Rules of Construction, Section 1-102. The Section states that the UCC should be used to simplify, clarify, and modernize the law regarding commercial transactions. In addition, one must look to the purpose and policy of the rule in question. Using this interpretive wedge, Justice Abrahamson decides that the common-law acceptance of full payment checks, long-standing in both contract and public policy doctrine, best serves the intent established by the UCC's general rules of construction. Since a perfectly clear answer seemed to be begging for recognition, this seems a bit disingenuous. But, having set up the rules, the Justice carefully works through Wisconsin case law and concludes that in this case, the full payment check written by Flambeau became binding on Honeywell when it was cashed.

II. Conclusion

This exercise is not intended to criticize Justice Abrahamson, our Odysseus. As I said, I love this opinion. The Justice is clear and skilled at what she does. Her use of authority is deft and sophisticated.

The point is that judges retain enormous power to make and interpret law. In an era seemingly deluged with opinions, statutes, and

8. Id. (citing REPORT OF THE NEW YORK COMMISSION ON UNIFORM STATE LAWS (1961)).
9. Id.
administrative enactments intended to define what the law "is," judges can still determine what the law "will be" from their benches. Somewhere in the hundreds of thousands of cases, the millions of statutes, the piles of secondary authority, and the morass of legislative records, there will always be a thread of a counter argument, an answer to every thrust. The more skilled the judge, the more difficult it is to pin her down with authority. No matter how we wish to justify it or explain it, judges still make law. They do it all the time. As a greater array of authority appears, they will do it even more. *Flambeau* is merely the perfect encapsulation of this entire process.