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State Law and the Federal Courts

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STATE LAW AND THE FEDERAL COURTS.

The origin of the word government is at least significant. It comes from the Latin word *gubernaculum,* meaning *rudder.* The Romans compared the state to a vessel and under this metaphorical conception government became the rudder of the ship of state. The people of the United States are in the position of having a rather dependable society or ship but are in the very unhappy plight of having two rudders designed for the same vessel. It is true that the design seemed practical. Such rudders were to be employed for different sea-faring conditions. The Federal rudder, it was contemplated, would direct the ship while sailing the waters of national affairs. The State rudder, on the other hand, was to guide the ship when cruising the seas of local concern. Unfortunately, we find both frequently being operated at the same time, under the same conditions and very often at cross-purposes. The attending confusion is both evident and deplorable.

One of the major reasons for this state of confusion is the doctrine of *Swift* v. *Tyson.*[1] Never was this more convincingly illustrated than in the decision of the case of *Black & White Taxicab & Transfer Co* v. *Brown & Yellow Taxicab & Transfer Co.,*[2] in which the State of Kentucky saw the firm hand of the Supreme Court immolate the public policy of the state upon the altar of a misconceived and doubtful doctrine.

The facts of the case, briefly stated, are as follows: The stockholders of a taxicab corporation organized in Kentucky wished to enter into a contract with a Kentucky railway corporation for the exclusive privilege of maintaining a cab stand on the railway property in a certain locality. Realizing that the Kentucky Court of Appeals holds such exclusive contracts void as monopolistic and contrary to public policy,[3] the stockholders in the taxicab corporation dissolved the company and reincorporated in Tennessee. The Tennessee corporation entered into such a contract with the Kentucky railway corporation. The

[1] 16 Pet. 1 (1842).
[2] 48 Sup. Ct. Rep. 404 (1928).
[3] *McConnel* v. *Pedigo,* 92 Ky. 465 (1892).

defendant, a rival taxicab company, persisted in occupying a portion of the railway property devoted to taxicab purposes and the Tennessee corporation instituted injunction proceedings in the federal district court to enjoin the defendant company from using the space. The injunction was granted and was ultimately affirmed in the Supreme Court of the United States, which held that the question was one of general law and that the Court was not bound by the decisions of the Kentucky Court of Appeals.

Mr. Justice Holmes vigorously dissented from the decision and the dissent had the concurrence of Mr. Justice Brandeis and Mr. Justice Stone. There have been registered many dissenting opinions in the frequent application of the Story doctrine of independent federal judicial determination,[4] while its constant extension has been the occasion for recurring criticism on the part of legal writers. The writers could hardly hope to add greatly to the literature on this subject. The source of the law applied by the federal courts in diversity of citizenship cases, however, is a vital question of such vital import as to justify an inquiry into the constitutional pedigree of this juridical progeny of Mr. Justice Story.

The Constitution of the United States provides:[5]

"The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . "

It has been argued that this diversity of citizenship jurisdiction was conferred upon the federal courts to protect a citizen of one state against the legal tender and stay laws of another state.[6] Hamilton, in the Federalist papers, also asserts that the

[4] *Town of Venice* v. *Murdock*, 92 U. S. 494 (1875), Justices Miller, Davis, Field; *Town of Genoa* v. *Woodruff*, 92 U. S. 502 (1875), Justices Davis, Field; *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U. S. 368 (1892), Justices Fuller, Field; *Muhlker* v. *N. Y. & Harlem R. R.*, 197 U. S. 544 (1904), Justices Fuller, Holmes, White, Peckham; *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349 (1909), Justices Holmes, White, McKenna; *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182 (1924), Justices Holmes and Brandeis concurred on grounds opposed to the doctrine; *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 48 Sup. Ct. Rep. 404 (1928), Justices Holmes, Brandeis, Stone.

[5] Art. III, Sec. 2.

[6] Warren, 37 Harv. L. Rev. 82.

purpose was to vitalze the Privileges and Immunities Clause of the Constitution.[7] He says:[8]

"And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that in order to the invoidable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its Citizens are opposed to another State or its Citizens."

It would seem that protection of the foregoing rights would be fully accorded through a writ of error from the Supreme Court to the State Court and that a positive invasion of a constitutional provision could thus be adequately controlled without the necessity for the diversity of citizenship jurisdiction. As a matter of fact the real reason for the jurisdiction in question, according to the weight of contemporaneous opinion, was to afford a court in which the citizen of one state might have the laws of another state administered to him in a manner free from local bias, passion and prejudice. These local influences might enter into the administration of the state law in an insidious manner that would be a distinct disadvantage to a non-resident without having the appearance of the invasion of any positive provision of the Constitution.

That such was the true purpose of the diversity of citizenship jurisdiction is evidenced by the federal judicial opinions in a number of cases extending down through the entire history of the federal government. In the *Bank of the United States* v. *Deveaux*,[9] Chief Justice Marshall says:

"The judicial department was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."

In the case of *Dodge* v. *Woolsey*[10] it was remarked by Mr. Justice Wayne:

"It was a suit between citizens of different states, brought by plaintiff in the United States Cir. Ct. of Ohio; and the motive for seeking

[7] Art. IV, Sec. 2.
[8] Federalist, LXXX.
[9] 5 Cranch. 61, 87 (1809).
[10] 18 How. 331, 354 (1855).

that tribunal was, that his rights might be tried in one not subject either to State or local influences. It places both parties under an equality, in fact and in appearances; and whatever might have been the result, neither could complain of the disinterestedness of the court which adjudged their rights."

This view was reiterated by Mr. Justice Curtis in the famous Dred Scott case.[11] Then again in the case of *Lankford* v. *Platte Iron Works*,[12] Mr. Justice Pitney in a dissenting opinion said:

"For this plaintiff-appellee is entitled to the enforcement of its contract as it was made; and it invokes a Federal jurisdiction that was established for the very purpose of avoiding the influence of local opinion."

That the essential purpose in providing for the diversity of citizenship jurisdiction was to remove the possibility of local bias and prejudice in the administration of the law of the state to a non-resident seems beyond question. At the time of the framing and adoption of the Constitution and for half a century afterwards there appears to have been no thought that the federal courts would apply a *different* law in a State to a non-resident than the State Court would apply to one of its own citizens. When John Marshall was questioned in the Virginia ratifying convention:[13]

"In what court and by what law in cases arising under the Citizenship Clause, the case would be tried?"

He answered:

"By the law of the place where the contract was made."

In order that there might be no question but that the federal courts were to apply *State* law in such a case, the 34th section of the Judiciary Act of 1789, passed by the first Congress, provided:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

That the principle of this section flows from the constitutional provision relative to diversity of citizenship jurisdiction and that the enactment was a pure legislative *declaration* of fun-

[11] 19 How. 393, 580 (1856).
[12] 235 U. S. 461, 478 (1914).
[13] Elliotts' Debates III, 551, 556, 557.

damental constitutional principle has been constantly reiterated by federal judicial opinion down to the present day. The enactment of this statute neither added to nor detracted from the duty of the federal courts to apply the law of the states in such cases.

In fact, the view that the 34th section of the original Judiciary Act was purely declaratory is evidenced by the opinion of Mr. Justice Story, himself, rendered in the case of *Ex parte Biddle*[14] in the Federal Circuit Court for the District of Massachusetts in 1822. He said:

"The process used in these courts is, in general, the same as in the State courts; and the laws of the states are expressly declared to be the rules of decision in trials at common law in cases where they apply. *And the same doctrine must have been held without this express provision,* and must now be implied in all suits, where the lex loci is to regulate the rights or remedies of the parties." (Italics ours).

Again, in the *Bank of Hamilton* v. *Dudley,*[15] decided in 1829, Chief Justice Marshall declared:

"It has been said that the occupant law of Ohio, must, in conformity with the 34th section of the judicial act, be regarded as a rule of decision in the courts of the United States. The laws of the states, and the occupant law, like others, *would be so regarded independent of that special enactment.*" (Italics ours).

In the case of *Bergman* v. *Bly,*[16] Caldwell, Circuit Judge, remarked:

"The general rule is that the laws of the several states shall be regarded as rules of decision in the Courts of the United States in cases to which they apply. The judicial act requires this, *and it would be the law independently of that enactment.* Under this rule, the first question which confronts a federal appellate court is, what is the local law applicable to the case? The local law which furnishes the rule of decision may consist of a statute, or of the decisions of its supreme court, or both." (Italics ours).

That the "Rule of Decision" statute is unquestionably declaratory is still more convincingly established by the decision of the Supreme Court in the case of *Mason* v. *United States,*[17] where the Court applied the principle to a suit in *Equity* while the statute in question, in express terms, is restricted to trials at *Common Law.* Mr. Justice Sutherland, delivering the opinion of the Court, said:

[14] 3 Fed. Cas. No. 1391 (1822).
[15] 2 Pet. 492, 525 (1929).
[16] 66 Fed. 40, 43 (1895).
[17] 260 U. S. 545, 558 (1923).

"It was urged upon the argument that the statute which provides that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, by implication excludes such laws as rules of decision in equity suits. The statute, however, is merely declarative of the rule which would exist in the absence of the statute."

Since the 34th section of the Judiciary Act is merely declaratory it follows that the real basis for the limitation upon the federal courts in the law which they apply under the Diverse Citizenship Clause of the Constitution is the provision which confers jurisdiction in such cases. Only by applying the same law to a non-resident of a state as that state would apply to one of its own citizens can the federal courts carry out the basic purpose underlying their constitutional source of authority. This limitation binds a federal court of equity to the same extent that it does a federal court in a common law case, if the question involved is one of substantive law. In fact, the Kentucky Taxicab case under discussion was a suit in equity for an injunction and the failure of the federal court to apply the proper law was just as much a violation of the constitutional limitation of the court as it would have been had the suit been one at common law.

That the purpose Congress had in view in enacting the 34th section of the Judiciary Act was merely by legislative pronouncement to emphasize the limitation placed upon the federal courts by the Constitution and to silence the very argument that is employed to support the Story doctrine of independent federal judicial determination in matters of commercial and general law, is evidenced by the recent investigation of the original documents connected with this enactment.[18] For half a century federal judicial opinion recognized this fact or, at least, rendered no opinion that was inconsistent with this view.

Then in 1842 Mr. Justice Story closed his eyes to the history of the Convention period, ignored the judicial tradition that was as old as the government itself and launched the doctrine of *Swift* v. *Tyson;*[19] a doctrine that seems to grow in stature and develop in power by feeding on the fruits of its own aggrandizement.

The question involved in the case was whether the plaintiff was a holder in due course of a commercial paper, a bill of ex-

[18] Warren, 37 Harv. L. Rev. 84.
[19] *Supra*, note 1.

change accepted in New York and later endorsed to the plaintiff for a preexisting debt. While the Supreme Court did not think the question had been definitely settled by the New York decisions yet it assumed that the courts of the state did not regard a preexisting debt as a good consideration to support the endorsement. In delivering the opinion of the Court, Mr. Justice Story said:

"But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this Court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold, that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws. They are often reexmained, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usage of a fixed and permanent operation, as, for example, to the construction of ordinary contract or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not the slightest difficulty in holding, and this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the

local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke* v. *Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world."

That the opinion of Mr. Justice Story in this case is based upon a misconception of the 34th section of the Judiciary Act has been irrefutably demonstrated by the investigations of Mr. Warren, previously referred to,[20] which disclose that the word "laws" as used therein was intended to cover judicial decisions of the state courts.[21] In addition, the opinion rests upon the more treacherous fallacy of supposing that the court is bound by a Congressional enactment that is construed in such fashion as to violate the fundamental purpose of the very constitutional provision that confers jurisdiction upon the court in diversity of citizenship cases. Either objection is fatal to the asserted right of the federal courts to exercise an independent judgment in the determination of matters relating to so-called commercial and general jurisprudence. The only answer need be given to the statement in the opinion, that,

"the law respecting negotiable instruments may be truly declared to be in a great measure, not the law of a single Country only, but the law of the commercial world,"

is that the law of the commercial world *is* not and *cannot* be the law of a state except insofar as such law is incorporated in the Constitution, declared by the statutes, or adopted by the courts of the state. As was said by Mr. Justice Holmes in his dissenting opinion in the Kentucky Taxicab case:[22]

"It is hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. . . . Law in the sense in which courts speak of it today does not exist without some definite authority behind it. . . . Whether and how far and in what sense a rule shall be adopted, whether called common law or Kentucky law, is for the state alone to decide."

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[20] *Supra*, notes 6, 18.
[21] 37 Harv. L. Rev. 49.
[22] *Supra*, note 2.

In the same opinion Mr. Justice Holmes makes the following observation:[23]

> " . . . the prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

This spirited attack on the fundamental principle underlying the doctrine is what one would expect from the keenly analytical mind of the venerable Justice, which makes it all the more surprising that after sweeping the constitutional props from under this imposing idol with feet of clay, he should gather up the broken fragments of the demolished diety and replace them on the pedestal of his own consent—by saying:

> "I should leave *Swift* v. *Tyson*[24] undisturbed but I would not allow it to spread the assumed dominion into new fields."

This is the only instance in which the attention of the writer has been called to the unhappy spectacle of Mr. Justice Holmes beating an intellectual retreat.

The one basic error that runs through the numerous decisions supporting the doctrine of *Swift* v. *Tyson*[25] is the utter reliance on the binding effect of the 34th section of the Judiciary Act. According to federal judicial opinion itself, this section is simply declaratory of the principle that flows from the constitutional grant of jurisdiction in diversity of citizenship cases. When the federal courts, however, construe this enactment in such a way as to allow for independent federal judicial determination, it ceases to be declaratory and becomes the vehicle for the assertion of a power that is contrary to constitutional principle. While it is true that the Supreme Court is provided for in the Constitution, yet all of the lower federal courts are the creations of Congress. Uusally this would imply the right of Congress to regulate these courts at its discretion and to provide for the rules of decision by which their judgments should be rendered. It cannot be forgotten, however; that ours is a dual form of government and that all federal power, whether legislative, executive, or judicial, must justify its existence under the Constitution of the United States. A limited and delegated sov-

[23] *Supra*, note 2.
[24] *Supra*, note 1.
[25] *Supra*, note 1.

ereignty can not claim resort to the analogies furnished by a complete and unlimited sovereignty. However logical the science of government may be it cannot be resorted to for the purpose of evading the manifest spirit of our fundamental law.

This being true, it is idle for the federal courts to quibble over the phraseology of the "Rule of Decision" statute. That the courts have gone unchecked in the error of their way by the passive consent of Congress has been advanced as a weighty argument for the correctness of their view. Mr. Justice Brewer, in rendering the opinion of the Supreme Court in the case of *Baltimore & Ohio Ry. Co. v. Baugh*,[26] advanced such an argument:

> "Notwithstanding the interpretation placed by this decision (*Swift* v. *Tyson*)[27] upon the 34th section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government."

Such reasoning is so obviously unimpressive as to require no refutation. Mr. Justice Field, in a dissenting opinion in the same case,[28] however, entered this devastating response:

> "The doctrine that the application of the so-called general and unwritten law of the country to control a state law, as expressed by its courts, in conflict with it, has the sanction of Congress by its supposed knowledge of the decisions of this Court to that effect, and its subsequent silence respecting them, does not strike me as having any persuasive force. The silence of Congress against judicial encroachment upon the authority of the States cannot be held to estop them from asserting the sovereign rights reserved to them by the 10th Amendment of the Constitution. Such silence can neither augment the powers of the general government nor impair those of the States. Silence by one or both will not change the Constitution and convert the national government from one of delegated and limited powers, or dwarf the States into subservient dependencies. Acquiescence in or silence under unauthorized power can never give legality to its exercise under our form of government."

In the opinion of the writer there are three fundamental objections to the soundness of the doctrine of independent federal judicial determination in diversity of citizenship cases:

I. That the doctrine is a violation of the principle of comity and is therefore contrary to sound judicial policy.

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[26] 149 U. S. 368, 372 (1893).
[27] *Supra*, note 1.
[28] *Supra*, note 26, at 399.

II. That the doctrine is predicated upon a misconception of the "Rule of Decision" statute and is therefore violative of its true intendment.

III. That the doctrine is a violation of the Diverse Citizenship Clause of the Constitution and is therefore an unconstitutional assumption of power.

With regard to the first objection it may be well to recall the principle upon which comity is founded. In the case of *Hilton* v. *Guyot*,[29] Mr. Justice Gray remarked:

"'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other."

It is, in fact, the willingness of one court to give judicial recognition to the decisions of a foreign court in the interest of substantive justice, insofar as such recognition is in accord with the sound policy of the forum. Whether based upon the idea of comity or the principle of conflict of laws, it would seem that the federal courts should apply the law of the state to a legal situation properly localized in the state. The ingenious assumption that the federal court is applying the law of the state while ignoring state judicial opinion is too ridiculous to require serious comment. No figment of theory can render acceptable the fruits of intellectual dishonesty. The name to apply to such law is purely an academic consideration. To apply one rule of substantive law in a case brought before the state court and a different rule where the identical case is in the federal court, under the assumption that the same law is being applied, is a rebuke to ordinary intelligence. A resort to the principle of comity by the federal courts would be manifestly fair and unquestionably just to all parties concerned. In addition, it would remove a decided obstacle from the pathway to judicial efficiency, as is attested to by the following report of a learned committee:[30]

"In those parts of the country in which resort to the federal courts in cases of diversity of citizenship is common the concurrent jurisdiction of the state and federal courts on the ground of diverse citizenship often causes much delay, expense, and uncertainty. . . . Moreover,

[29] 159 U. S. 113, 163 (1895).

[30] Charles W. Eliot, Louis D. Brandeis, Moorfield Storey, Adolph J. Rodenback, and Roscoe Pound, in Preliminary Report on Efficiency in the Administration of Justice (1914) 28. See further, Mr. Henry J. Friendly's treatment of the problem in 41 Harv. L. Rev. 483.

the difference in the view which state and federal courts respectively take as to the law applicable to the same case results in irritation which has somewhat impaired the usefulness of the federal courts in some localities."

While the application of the principle of comity might lead to a solution, it is well to bear in mind that this approach merely emphasizes what the federal courts *should* do, without raising any contention as to what they are *bound* to do in order to give effect to the purpose underlying diversity of citizenship jurisdiction as conferred by the Constitution.

In connection with the second objection that the doctrine of independent federal judicial determination is based upon a misconception of the "Rule of Decision" statute, the writer has already pointed out the investigation of Mr. Warren[31] which discloses that the word "laws" as used therein was intended to apply to judicial decisions as well as legislative enactments. All federal judicial opinion down to 1842 harmonizes with this view of the statute. Since, however, the statute has been misconstrued it has been suggested[32] that Congress amend the "Rule of Decision" statute so as to require the federal courts to follow state judicial decisions in diversity of citizenship cases. The writer is of the opinion that such an amendment to the statute would control the federal courts only because the statute would then be thoroughly and unquestionably declaratory of the correct constitutional principle contained in the Diverse Citizenship Clause of the Constitution. For the federal courts to be governed by such an amended statute simply because it is a Congressional enactment however, is to ignore the constitutional issue involved. According to the spirit of the constitutional provision the federal courts should be bound to follow state judicial opinion in such cases regardless of the Congressional pronouncement in this connection. It is putting the cart before the horse and declaratory detail above principle to force the states to rely upon Congressional protection against the exercise of unwarranted judicial power on the part of the federal courts.

Thus, the third objection, that the doctrine is a violation of the Diverse Citizenship Clause of the Constitution, is the most basic approach to this controversy. True it is that many writers seem to accept the doctrine as definitely settled beyond all ques-

[31] *Supra*, note 21.
[32] 33 Yale L. J. 855, 859; Mills, 34 Am. L. Rev. 51, 68.

tion and appear content to merely point out its boundaries and criticise its application to a given case. Such an attitude is an unjustified condonation of a long-continued assumption of unconstitutional power. The extreme impracticability of the doctrine, its manifest unfairness, its tendency to confusion and its serious impediment to judicial efficiency, all lead to the hope that the Supreme Court may yet be brought to the view that it is unwise in practice, unsound in theory, and unconstitutional in principle. The number and character of the dissenting opinions on the part of members of the court might lead one to expect that a slight shifting of individual opinion or the inevitable infusion of new blood into the tribunal would rectify this error on the part of the federal courts and serve to bring them once more into line with the spirit of the constitutional provision and the letter of the "Rule of Decision" statute.

No attempt has here been made to classify the types of cases in which the federal courts have seen fit to exercise an independent judgment regardless of state judicial opinion. The list is long and wearisome. Included in the term, "commercial and general jurisprudence," in which complete independence is exercised on the part of the federal courts, may be mentioned: Contracts; commercial paper; insurance policies; the relation of master and servant; exemption by a carrier from responsibility for negligence; the construction of a will; the effect to be given to a contract of a person *non compos mentis;* estoppel; negligence; priority as between assignees; and a horde of other questions of the same general character. These are only a few taken from a long and detailed list.[33] Doubtless this list itself is very incomplete. The impossibility of an accurate classification was commented upon in the case of *Hartford Fire Ins. Co.* v. *Chicago, etc., Ry. Co.*[34] by Caldwell, Circuit Judge, who, after a scathing denunciation of the conditions prevailing under the doctrine, in his dissenting opinion, remarked:

"The general statement has been often made that the federal courts are not bound to follow the decisions of the state courts in questions of general jurisprudence, when unaffected by state legislation; but no exact enumeration has ever been made, or ever can be made, of the questions that come within this general definition. Moreover, the decisions of the supreme court relating to the subject are not uniform and harmonious."

[33] 25 Corpus Juris 847-49.
[34] 70 Fed. 201, 209 (1895).

The federal courts profess to follow the decisions of state courts only as to matters of a fixed local character, such as rules of real property or the interpretation of the Constitution or the statutes of the state.[35]

It is noteworthy that the opposition to the doctrine of *Swift* v. *Tyson*[36] is not confined to any so-called school of constitutional thought. The writer, like the great majority of others interested in this problem, feels that for the protection of those rights accorded to the federal government by the Constitution, no narrow construction of that instrument should restrain the legitimate exercise of federal authority. In the regulation of interstate commerce, the naturalization of aliens, the subject of bankruptcies, matters of national defense, the conduct of foreign affairs, and in all other matters that are the proper subjects of federal control, the general government should be accorded full and complete recognition. To allow independent federal judicial determination in cases involving matter of a non-federal nature, however, is wholly unnecessary to the protection of any federal right. Regardless of its name, it is nothing more than the capricious application of a federal common law to a non-federal situation. The jurisdiction was imposed for no such purpose and the sooner the Supreme Court recognizes this fact the sooner will it win additional respect from an already respectful people. Since 1842 the doctrine has had its sway, and instead of leading to uniformity of decisions as to matters of general law,[37] we find that it has merely served to create lack of uniformity of decisions within a given state through the operation of two distinct bodies of law to the same legal situation.

We find it the occasion for doubtful assignments of claims in order to justify federal jurisdiction under the diversity of citizenship requirements. We see it turn certainty of legal principle into uncertainty and make substantive justice depend upon jurisdictional chance and the skillful maneuvers of a legal game. Since *Swift* v. *Tyson*[38] for almost a century it has "on the dubious waves of error tost," it is time its fallacious and ground-

[35] Doble, Federal Procedure, 561 and 570.
[36] *Supra*, note 1.
[37] See Frankfurter, 13 Cornell L. Q. 529.
[38] *Supra*, note 1.

less doctrine should be repudiated in the interest of sound policy and constitutional principle.

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