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THE APPLICATION OF THE DOCTRINE OF SWIFT V. TYSON SINCE 1900

H. PARKER SHARP and JOSEPH B. BRENNAN*

INTRODUCTION

It was enacted by the Thirty-fourth Section of the Judiciary Act of 1789 that the laws of the several states, except where the Constitution, treaties or statutes of the United States should otherwise require or provide, should be regarded as rules of decision in trials at the common law in the courts of the United States, in cases where they apply.¹ This is now Section 725 of Title 28 of the United States Code. The requirement of this section does not by its terms extend to suits in equity. The United States Supreme Court, however, has said that Section 725 merely declares a principle which would exist in the absence of such a statute.² Consequently, the federal courts apply the laws of the several states even in equity.³

Suits in admiralty likewise fall without the express provisions of Section 725.⁴ Since the substantive maritime law is not state law,⁵ the general principle behind Section 725 is inapplicable in admiralty litigation. It is true that rights arising under state

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¹ See p. 400 for biographical notes.
² See Mason v. United States, 260 U. S. 545, 558, 559 (1923).
statutes are sometimes enforced in admiralty. But this is done only in so far as state statutes are permitted to alter the substantive maritime law. How far state statutes may affect substantive maritime law is a question beyond the scope of this paper.

Section 725 does not apply to criminal prosecutions by the federal government in its own courts. Since there are no federal common law crimes, these prosecutions must rest entirely on federal statutes. No question of following state criminal laws can, therefore, arise.

It has been said that Section 725 refers only to substantive law, and not to procedure. Which party has the burden of proof may be a matter of substantive law. But most questions in the field of evidence are procedural, and it has been held that Section 725 requires the federal courts to follow the state laws on matters of evidence.

There are now many federal statutes prescribing rules of evidence for the federal courts. These include the competency of witnesses, admissibility of records, etc. In so far as these statutes are pertinent they have supplanted Section 725.

In determining how far Section 725 is applicable to trials at the common law in the federal courts, the problem arises as

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6 The Hamilton, 207 U. S. 398 (1907).
7 See Southern Pacific Co. v. Jensen, 244 U. S. 205, 216 (1917).
8 See (1927) 40 Harv. L. Rev. 485.
10 United States v. Hudson & Goodwin, 7 Cranch (U. S.) 32 (1812).
13 M'Niel v. Holbrook, 12 Pet. (U. S.) 84 (1838); Vance v. Campbell, 1 Black (U. S.) 427 (1862); Wright v. Bales, 2 Black (U. S.) 535 (1863); Ryan v. Bindley, 1 Wall. (U. S.) 66 (1864).
to what are "laws of the several states" within the meaning of that section. It has never been doubted that the statutory enactments of the states are "laws" which will control the decisions of federal courts. Decisions of state courts construing state statutes or declaring their legal effect are likewise binding on the federal courts. However, when state courts, purporting to interpret state statutes, really read in provisions which cannot be found by any reasonable rules of construction, their decisions will not be binding on the federal courts. And when state decisions are rested upon the common law rather than upon construction of a statute on which they might have been based, the federal courts are not bound by such decisions and may form their own opinion as to the meaning of the statute.

In a large number of cases in the federal courts questions are involved which do not depend on any statute, but do fall within principles established by state decisions. The United States Supreme Court, speaking through Mr. Justice Story in the now-famous case of Swift v. Tyson, held that on matters of general commercial law the federal courts were not bound by Section 725 to follow state decisions. The application of this section was

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20 In cases in which federal courts refuse to follow the construction of state statutes by state courts because rights have accrued before the state decisions were rendered are not within the scope of this paper. See Stanly County v. Coler & Co., 190 U. S. 437 (1903); Great. So. Fireproof Hotel Co. v. Jones, 193 U. S. 532 (1904); Ware County v. National Surety Co., 17 F. (2d) 444 (S. D. Ga. 1927).
22 16 Pet. (U. S.) 1 (1842).
said to be limited to the positive statutes of the several states, to the construction thereof by the state courts, and to local usages concerning rights in, and titles to, immovable property. It is not the purpose of this paper to criticise the doctrine of *Swift v. Tyson*, but rather to see how the doctrine has been applied by the federal courts in cases decided by them since 1900.

**The Application of the Doctrine of Swift v. Tyson**

I. Commercial Paper

In *Swift v. Tyson* it was held that the federal circuit court in New York was not bound by what appeared to be the holding of the New York cases, that the surrender of an antecedent debt is not value for the transfer of negotiable instruments. It has subsequently been held that whether a provision in a promissory note for payment of attorney's fees in case of default renders the note non-negotiable is a question of general jurisprudence on which the federal courts will exercise an independent judgment. In *Bank of Saginaw v. Title & Trust Co.*, the federal circuit court held, contrary to the state decisions, that certificates of deposit are negotiable instruments. The court in this case said that the parties did not contract with reference to the state or federal decisions, but with reference to the general commercial law. The application of the doctrine of *Swift v. Tyson* has resulted in many states in two different conceptions as to what the general commercial law is. But business men contract on the basis of one or the other of these conceptions.

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24 Since the doctrine of *Swift v. Tyson* has been extended to many cases not involving commercial law, the federal courts have adopted the phrase "general jurisprudence" to denote questions on which they will not be bound by state decisions. See infra.


26 105 Fed. 491 (W. D. Pa. 1900).
It is not reasonable to believe that any business man would contract on the basis of a general commercial law in the abstract.

The main purpose of the rule in *Swift v. Tyson* is to secure uniformity in those fields in which the federal courts deem it most necessary. Uniformity is especially desirable in the case of negotiable instruments. They are intended to circulate freely from state to state. It would greatly impede their marketability if prospective purchasers were bound to ascertain whether the instruments had become subject to any peculiar local rules.

How far has the doctrine of *Swift v. Tyson* in regard to commercial paper been supplanted by the adoption of the Negotiable Instruments Law? The general rule, as pointed out above,27 is that federal courts are bound by state decisions construing state statutes. But there has been an indication that the federal courts will not follow state decisions construing the Negotiable Instruments Law.28 The theory of these cases is that, since the Negotiable Instruments Act is merely declaratory of the general commercial law, the federal courts have not been deprived by its enactment of the right to form their own opinion as to what this general commercial law is. The courts have been helped in reaching this result by the consideration that the Negotiable Instruments Law was designed to create a uniform law throughout the United States. The same motive which was responsible for the doctrine of *Swift v. Tyson* may lead federal courts to disregard state decisions construing the Negotiable Instruments Law when they think these decisions contrary to the general trend.

But if federal courts are right in saying that the Negotiable Instruments Act is merely declaratory of the common law, it is only reasonable to believe that the legislature of the state enacting it intended thereby to codify the law as declared by its own courts.29 On this hypothesis the rules established by state decisions are as much a part of the statute as the express provisions thereof and should be equally binding on the federal courts. If, however, the Negotiable Instruments Law was intended to change the common law, then the state court

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27 See p. 367, n. 4, supra.
decisions interpreting this statute should be binding on the federal courts just as decisions interpreting any other state statute which has worked a change in the common law.30

Questions as to the nature of the transaction in the deposit of commercial paper are questions of general jurisprudence. The federal courts apply their own rules in determining whether a trust, an agency for collection or a debtor-creditor relationship arises.31 Consequently, the federal courts reach their own conclusion as to the liability of the depositary and the collecting banks to the depositor.

II. Simple Contracts

The proper interpretation of a contract is a matter of general law.32 When a person authorizes a broker to sell his land, the question whether there is a promise not to revoke the authority which becomes binding upon the broker’s undertaking performance has been held a question of interpretation on which the federal courts will not be bound by state decisions.33 Likewise, the federal courts will form their own judgment as to what rights were intended to be created by a c. i. f. contract.34 In an action against a commercial surety company on a statutory contractor’s bond the question whether the usual rule of strictissimi juris favoring sureties should be applied in interpreting the bond is a matter of general law.35 The federal courts will also form their own opinion as to whether in a contract of guarantee it was intended that the obligee should exhaust all his remedies against the principal debtor before striking the guarantor.36


33 Shawver v. Ewing, 1 F. (2d) 423 (C. C. A. 8th, 1924).


There are three views as to the right of a third person not a party to a contract to sue thereon in the federal courts. It has been held that the federal courts will apply their own rule denying the beneficiary of a contract to which he is not a party a direct right at law, regardless of the decisions of the state where the contract was made or to be performed, and regardless of the decisions of the state in which the federal court sits. A second view is that a third party may maintain a direct action at law in a federal court on a contract made for his benefit when such a right is recognized by the decisions of the state court in the state where the contract was made. Still another view is that the right of a third party to sue on a contract is dependent upon whether such relief is afforded by the state courts of the state in which the federal court sits. Sometimes a contract for the benefit of a third party is made and performable in the same state where the third party later sues in the federal court. In this situation the federal court may refuse to apply an independent federal rule without deciding whether it is following the decisions of a state because the contract was made there or because the federal court is sitting in that state.

In deciding which of successive assignees of a chose in action is to prevail, the federal courts are not bound by state decisions.

An action for an anticipatory breach of contract can be brought in a federal court, although under state decisions no cause of action has yet accrued. Whether a carrier's stipulation against liability for negligent injury to a passenger or an employee is valid and enforceable is a question of general jurisprudence on which state decisions are not controlling. But it has been held that the validity of

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40 Smith & Co. v. Wilson, 9 F. (2d) 51 (C. C. A. 8th, 1925).
a stipulation in a lease by a railroad of a strip on its right-of-way for a storage warehouse by which the railroad company was exempted from liability for damage by fire caused by the negligence of its servants, was a matter of local law and governed by state decisions. A distinguishing element in this case may be that it involved liability for injury to real property.

Whether an arbitration clause is contrary to public policy, as being an attempt to oust the courts of jurisdiction, will be determined by the federal courts on principles of general jurisprudence, although a different rule prevails under the state decisions in the state where the agreement was made and in the state where the suit is brought.

The federal courts will form their own opinion as to the legality of a contract made by a railroad granting to a taxicab company exclusive privileges on its premises.

III. Insurance

Whether the assignee of an insurance policy must have an insurable interest will be determined by the federal courts independently of state decisions.

It has been held that when a blanket policy and a specific insurance policy both cover the same property, there will be a prorating of the loss suffered, although a contrary rule has been announced by the state court. But the federal court in the same district later decided that it was bound to follow the state rule requiring the specific policy to be exhausted before resort could be had to the blanket policy.

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45 See infra, pp. 377, 378.
Whether the parol evidence rule prevents proof of an estoppel or waiver of an insurance company is a matter of general law. So also the federal courts will not be bound by state decisions denying an insurance company a defense for failure to file notice of loss within a specified time, although such requirement was expressed as a condition precedent in the policy. For the same reason a provision in a policy that no action should be brought more than one year after the insured's death was upheld, although there had been a state decision to the contrary.

IV. Corporations

Since many of the questions of corporation law involve statutory construction, the doctrine of Swift v. Tyson cannot be applied to them. It has, accordingly, been held in suits against municipal corporations for injuries caused by negligence that their liability is a question of local law, upon which the decisions of the supreme court of the state are authoritative in the national courts. But whether a municipality is liable for bonds which have been irregularly issued is said to be a question of general commercial law on which the state decisions are not controlling. It seems, however, that the capacity of a municipal corporation to incur obligations on bonds irregularly issued is a matter of statutory construction on which the state decisions should be conclusive. The different view taken by the federal courts can probably be explained by the fact that they are here dealing with negotiable instruments. For when simple contract obligations of municipalities are before a federal court it will

follow state decisions holding such contracts unauthorized and void.\textsuperscript{58}

\textbf{V. Torts}

For the most part, in negligence cases federal courts are not bound by state decisions.\textsuperscript{59} But it has been indicated that judicial comity might require a federal court “to bow to a line of decisions so uniform and well settled and extending through so long a time as to establish a rule of conduct which it would be wrong to disturb”.\textsuperscript{60}

The mere fact that an action is brought under a state statute is not sufficient to put the obligation on a federal court to follow state decisions on questions of contributory negligence which are not peculiar to that kind of action.\textsuperscript{61} But it is interesting to compare such a holding with the admirality cases under state wrongful death acts. In these cases, contrary to the general admiralty rule, the courts hold contributory negligence a bar, since it would be such under the state decisions.\textsuperscript{62}

The meaning and extent of the doctrine of the last clear chance has been held to be a part of the negligence law of a state which a federal court will follow.\textsuperscript{63}

On the other hand, the federal courts have held that they need not follow state decisions in cases involving the doctrine of attractive nuisances.\textsuperscript{64} But, as pointed out above, the state decisions may have established such a settled rule of conduct that the federal courts will follow them in attractive nuisance cases.\textsuperscript{65} Even here it has been indicated that only a statutory

\textsuperscript{58} Greenburg Iron Co. v. City of Abbeville, 2 F. (2d) 559 (C. C. A. 5th, 1924).


\textsuperscript{65} See Snare & Triest Co. v. Friedman, supra, at 14; Chesko v. Delaware & Hudson Co., supra, at 806.
enactment by competent authority would justify a federal court in departing from the doctrine of attractive nuisances as laid down by the Supreme Court of the United States.\textsuperscript{66}

The liability of a master for personal injuries to a servant is, in the absence of a state statute, a matter of general law.\textsuperscript{67} Federal courts will not be bound by state decisions to whether a man is a vice principal or a fellow servant.\textsuperscript{68}

Whether a lessor railway company is liable for the negligence of the lessee is a matter of general law on which state decisions are not controlling.\textsuperscript{69} A federal court has also refused to follow the state rule exempting a railroad from liability to a shipper's employee for injuries resulting from defective car brakes while a freight car was in the possession of the shipper.\textsuperscript{70} But the liability of a landlord for personal injuries caused by a failure to maintain a common entrance free of snow has been held to be governed by the state rule.\textsuperscript{71}

VI. Real Property

In announcing the doctrine of Swift v. Tyson, Mr. Justice Story said that in cases involving rights and titles to real estate the federal courts were bound by Section 725 to follow local usages.\textsuperscript{72} It is difficult to see how a local usage of a state in regard to realty is a "law" within the meaning of this section, when a similar local usage in regard to a chose in action is not so considered. The courts have, however, always shown a conservative tendency in dealing with real property. The application of the doctrine of Swift v. Tyson must have been recognized by Mr. Justice Story as involving the possibility of a different rule in the federal courts from that prevailing in the state

\textsuperscript{66} See \textit{N. Y., N. H. & H. R. Co. v. Fruchter}, supra, at 421.


\textsuperscript{70} \textit{Waldron v. Director General}, 266 Fed. 197 (C. C. A. 4th, 1920).

\textsuperscript{71} \textit{United Shoe Machinery Corp. v. Paine}, 26 F. (2d) 594 (C. C. A. 1st, 1928).

\textsuperscript{72} 16 Pet. (U. S.) at 18.
courts. Such a conflict would be especially undesirable in the field of real property, where predictability has always been the desideratum. Moreover, matters in regard to real property have been considered as of primarily local concern. The federal courts have, therefore, generally followed state decisions on the ground that they established rules of property. But it has been said that a single state decision does not establish such a rule of property and may, consequently, be disregarded by the federal courts.\textsuperscript{73} Another reason given by the federal courts for their refusal to follow state decisions on questions of real property is that the decisions were rendered after rights had accrued, and hence were not rules of property when the transaction occurred.\textsuperscript{74}

The determination of the legal effect of a will or deed may involve the question whether a remainder sought to be created is vested or contingent, or whether a charitable trust was validly established. Such questions will be controlled when they arise in the federal courts by state decisions construing similar provisions in wills or deeds.\textsuperscript{75} So also will a federal court follow state decisions construing a clause in a mortgage assigning rents and profits to the mortgagee as operating only after the mortgagee has taken possession on default.\textsuperscript{76} Indeed, all questions of construction of deeds or wills, in so far as they affect interests in land, are to be determined in accordance with the state rule.\textsuperscript{77}

Although a contract of insurance does not affect interests in land, it may be necessary in construing the contract to deter-


\textsuperscript{75} Lucas v. M'Neill, 231 Fed. 672 (C. C. A. 8th, 1916); Sutherland v. Selling, supra; Smith v. Sweetser, 19 F. (2d) 974 (C. C. A. 7th, 1927).

\textsuperscript{76} In re Israelson, 230 Fed. 1000 (S. D. N. Y. 1916).

mine what are the incidents and nature of the assured's interest in the land. Thus, where a policy of insurance is conditioned upon the assured's sole and unconditional ownership, state decisions will be referred to in order to discover whether a husband holding as tenant by the entirety has such incidents of ownership as comply with the fair meaning of the clause as found by the federal court.\(^7\)

Whether an oil and gas lease of riparian land carries the right to drill in land formed by accretion is a question on which the federal courts will be bound by state decisions.\(^9\) And a rule of property established by state decisions that a riparian owner on a non-navigable lake owns to the center is controlling in the federal courts.\(^8\) Likewise, they will follow state decisions defining the right to purchase tide land granted by the state to upland owners as real, rather than personal, property.\(^8\)

Other matters in regard to which local decisions are rules of property include the character of fixtures as real or personal property,\(^8\) the nature of adverse possession necessary for the acquisition of title,\(^8\) and whether a grantor's lien is to be recognized.\(^8\) So also whether a conveyance of land is fraudulent will be determined in accordance with state decisions.\(^8\) And a federal court will follow a state rule recognizing legal title to a corporation's real property as vesting in the stockholders after the expiration of the corporation's charter.\(^8\)

**VII. Personal Property**

The rule of conformity to state decisions concerning real property which was laid down for the federal courts by Mr. Justice Story in Swift v. Tyson has been extended to state deci-

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\(^9\) Thurlow v. Waite Phillips, Co., supra.


sions establishing rules of property for interests in chattels. Federal courts will follow a rule of property established by state decisions holding that retention of possession by the vendor renders the sale of goods void as against his creditors. The validity and effect of chattel mortgages, conditional sales, and trust receipts will also be governed by state decisions.

The question as to whether the federal courts will depart from state decisions interpreting that part of the Uniform Sales Act which is a codification of the common law, is not so likely to be raised as in the case of state decisions interpreting the Negotiable Instruments Law. Most of the provisions in the Uniform Sales Act concern interests in chattels, and on these matters state decisions would be controlling, even in the absence of a statute.

VIII. Measure of Damages

In an action by a lessee for breach of a covenant of quiet enjoyment, it has been held that the state rule in regard to damages should be followed. But it has been held that in an action for breach of contract to sell land the federal court will not be bound by the state rule giving as damages the price paid, plus interest. The difference in result in the two cases may be explained by the fact that the former dealt with the law of real property, and the latter with the law of contracts. As might be expected, the measure of damages when no rule of property

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THE APPLICATION OF THE DOCTRINE

is involved is treated as a matter of general jurisprudence. But the federal courts are not in agreement as to whether the allowance of interest on a cause of action is a question of general jurisprudence. They have held that they were bound by state decisions establishing the rate of interest.

IX. Conflict of Laws

The rule seems well established that in questions of the conflict of laws, the federal courts are not bound by state decisions. The right of access to the federal courts is a matter which goes to their jurisdiction and which, therefore, cannot be controlled even by state statutes. Thus, an Ohio statute denying the right to sue in Ohio under a wrongful death act of another state under certain circumstances, was held ineffective to prevent a suit in the federal court in Ohio. And the federal court in Wisconsin has enforced the liability of stockholders in a Minnesota corporation, although no such suit could be brought in the Wisconsin state courts. It has likewise been held that the federal courts will determine for themselves whether the essential validity of a contract is governed by the law of the place of making or the law of the place of performance.

X. Evidence

It has been pointed out above that there is an uncertainty in the modern federal cases as to whether matters of evidence fall within the Conformity Act or Section 725 of Title 28 of the United States Code. The purpose of this paper is to consider


97 Converse v. Mears, 162 Fed. 767 (W. D. Wis. 1908).


99 See p. 367, n. 2, supra.
the cases only in so far as they treat points of evidence as coming under Section 725.

There is a conflict as to whether federal courts will follow state rules as to the burden of proof.\(^{100}\) It has been held that the federal courts will form their own opinion concerning the extent and application of the doctrine of res ipsa loquitur.\(^{101}\) There is also a conflict as to whether federal courts will follow state decisions allowing truth and veracity evidence to be used to rehabilitate the testimony of a witness whose character has not been attacked.\(^{102}\) The application of the parol evidence rule is a matter of general commercial law on which decisions of the Supreme Court of the United States will control in the federal courts.\(^{103}\)

### XI. Miscellaneous

The liability of a principal for the deceit of his agent has been held a question of general jurisprudence.\(^{104}\) So also the question whether a charitable institution will be liable under the doctrine of respondeat superior is one on which the state decisions will not control in the federal courts.\(^{105}\)

Whether priority of a state's claim is a prerogative right or a rule of administration is a matter of local law. Consequently, when state decisions hold it to be the former, the state's priority will be recognized in the federal courts.\(^{106}\)


\(^{105}\) Paterniti v. Memorial Hospital, 229 Fed. 838 (W. D. Pa. 1915).

United States courts will not be controlled by state decisions in determining who are bound by judgments.\textsuperscript{107} The federal courts do not recognize an attorney as having a lien on funds recovered as a result of his efforts when no such lien is recognized by the state courts.\textsuperscript{108} Perhaps the courts are influenced here by the idea that liens are matters of property law. But it is to be noted that often no tangible property is involved when an attorney's lien is asserted. And it is interesting to compare the refusal of the federal courts to follow state decisions in regard to successive assignments of choses in action.\textsuperscript{109}

How far courts will inquire into the validity of a church union is a matter of general jurisprudence upon which the federal courts will not follow state decisions.\textsuperscript{110} This is so even when the question of union is raised in a suit for the possession of real property.\textsuperscript{110}

What will excuse a plaintiff in a replevin action for the non-return of property when he fails to establish his title, is held a matter of general law, although personal property is involved.\textsuperscript{111}

Whether an obligation ex contractu arises upon the conversion of goods and is available in bankruptcy as an unliquidated claim, is determined by the federal courts according to their own view of the common law.\textsuperscript{112}

CONCLUSION

A technical reason for the doctrine of \textit{Swift v. Tyson} is that federal courts are of co-ordinate jurisdiction with the courts of the state in which they sit.\textsuperscript{113} Consequently, the federal courts are entitled to form their own opinion as to what the law of


\textsuperscript{109}Supra, p. 367, n. 3.


\textsuperscript{111}Three States Lumber Co. v. Blanks, 133 Fed. 479, 482 (C. C. A. 6th, 1904).

\textsuperscript{112}See Reynolds v. N. Y. Trust Co., 188 Fed. 611, 615 (C. C. A. 1st, 1911).

\textsuperscript{113}Beale, "Treatise on the Conflict of Laws" (1916) Sec. 112a.
the state is. But some cases have gone further. Where a cause of action has accrued in one state and suit has been brought in a federal court sitting in another, the federal court has decided the case upon principles of general jurisprudence, contrary to the decisions of the state where the cause of action arose.

This disregard of state decisions by a federal court in another state could be justified if the court adopted the law which is applied by the federal court sitting in the state where the alleged wrong occurred. But where there are no federal decisions in that state and there are no decisions on the point by the Supreme Court of the United States, it is hardly right for a federal court in another state to disregard decisions of the state courts in the state where the cause of action accrued. For these decisions are the only authoritative evidence of the law of that state. The federal courts which form their own opinion as to the law of a state in which they do not sit by calling the matter one of general jurisprudence, cannot, therefore, be defended under the technical reason suggested above. The position of these courts may possibly be explained by the theory that there is one system of general law existing in the states which have inherited the common law of England which the courts in any state are competent to expound. This theory, however, is based on the failure of the courts to perceive the double meaning of the word "law." And it is inconsistent

114 It is uncertain whether under the prevailing doctrine the federal courts would regard themselves as authorities upon the general law of Louisiana superior to those trained in the civil law system. See Holmes, J., dissenting in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., U. S. Sup. Ct., decided April 9, 1928. And cf. Jones v. Western Union Tel. Co., 18 F. (2d) 650 (W. D. La. 1926).


117 "Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally, but the law of that state, existing by the authority of that state without regard to what it may have been in England or anywhere else." See Holmes, J., dissenting in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., U. S. Sup. Ct., decided April 9, 1928.
with the idea that the courts of each state are the final arbiters of its law. It may be wondered if any federal court would ever apply this theory to a cause of action arising in England or any other common law country.

However difficult it may be to find a technical justification for the doctrine of Swift v. Tyson, and in spite of all the criticism which has been directed against it, the doctrine is firmly imbedded in our federal jurisprudence.\textsuperscript{118} The most that can be hoped for is that there will be greater unanimity among the federal courts in classifying the questions upon which they will exercise an independent judgment.

\textsuperscript{118} There seems to be no likelihood that Section 725 will be amended so as expressly to require the federal courts to follow state decisions as well as state statutes. But see Senate Resolution 4333, 69th Congress, 1st Session; \textit{U. S. Daily} May 4, 1928, page 585, column 4. (Bill introduced by Senator Walsh, Montana, providing that state decisions should govern federal courts in the ascertainment of the common law or general jurisprudence.)