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A CENTURY OLD PROBLEM: FEDERAL OR STATE LAW AS DETERMINATIVE OF A DIRECTED VERDICT IN A FEDERAL COURT

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"THE laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." [1] So states the commandment by the Congress of the United States which governs the applicability of state law in all federal civil actions wherein jurisdiction is founded upon diversity of citizenship.

During the past one hundred years there has been more difficulty in interpreting this commandment than any other in the field of federal jurisprudence.[2] Characteristic is the particular problem of whether the federal court should be guided by a state or federal standard in ruling upon a motion for a directed verdict.

Policy of Federal Jurisdiction

In 1870 there was a little doubt about the relative positions of federal and state law in a federal trial based on diversity jurisdiction. Twenty-eight years earlier, in *Swift v. Tyson*,[3] the United States Supreme Court declared that "the laws of the several states" did not mean that federal courts, in matters of general jurisprudence, need apply the unwritten law of the state as declared by its highest court, and that federal courts were free to exercise an independent judgment as to what the common law of the state is, or should be. The court went on to say that "the laws of the several states" meant:

> . . . 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

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1 28 U.S.C. § 1652 (1964). The statute is a revision of the Judiciary Act of 1789 in that the phrase "civil actions" was substituted for "trials at common law." *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92.

2 C. Wright, Federal Courts, § 54, at 187 (1963).

3 41 U.S. (16 Pet.) 1 (1842).

> as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It has never 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 usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts 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 just rule furnished by the principles of commercial law to govern the case.[4]

In accordance with its stated views, the Court refused to be governed by New York decisions and reached a conclusion adverse to the conclusion demanded from the highest court in New York.

The opinion in *Swift v. Tyson* was a summation of attitudes and expressions that had been felt on the Supreme Court for some thirty years prior to the date of decision. It is said to have expressed a doctrine that was "congenial to the jurisprudential climate of the time." [5]

It was soon apparent that although *Swift v. Tyson* concerned itself with the question of commercial law, the philosophy of federal jurisprudence announced by Mr. Justice Story would govern the distribution of power between federal and state courts. Indeed, the federal courts in their views concerning the nature of the law exhibited an impulse to freedom from the rules that controlled state courts regarding state-created rights.[6]

The "general law" spoken of in *Swift v. Tyson* was later

> held to include the obligations under contracts entered into and to be performed within the State, the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.[7]

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[4] *Id.* at 18-19.

[5] Guaranty Trust Co. v. York, 326 U.S. 99, 102-03 (1945).

[6] *Id.*

[7] Erie R.R. v. Tompkins, 304 U.S. 64, 75-76 (1938).

Criticism of the doctrine was scattered[8] until the Supreme Court decided *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Tansfer Co.*[9] Brown & Yellow, a Kentucky corporation owned by Kentuckians, had contracted with a railroad for the exclusive right of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station. It wanted to enjoin Black & White, a competing Kentucky corporation, from interfering with that right. Brown & Yellow knew that such a contract would be declared void under the common law of Kentucky, so it arranged to dissolve its Kentucky charter and reincorporate in Tennessee. With its new found diverse citizenship with Black & White, Brown & Yellow won its suit for injunctive relief in the federal court. Thereafter, criticism of the *Swift v. Tyson* doctrine was widespread.[10]

The criticism mounted until *Erie Railroad Co. v. Tompkins*[11] was decided. Here, the Court reconsidered its stated policy of *Swift v. Tyson* in deciding whether the law of Pennsylvania or the "general law" should apply to the claim for damages of Tompkins against the Erie Railroad Company.

It was noted that experience had revealed the defects, political and social, in applying the doctrine of *Swift v. Tyson.* The "mischievous results of the doctrine had become apparent." [12] Discrimination was available to non-citizens against citizens because of the choice of two forums. "In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State." [13]

Against such a background it was declared that thereafter, the law to be applied by the federal courts in any case where jurisdiction was based upon diversity of citizenship was the law of the state. Whether the law of the state was announced by a statute or by a decision from

[8] *See* Baltimore & O. R.R. v. Baugh, 149 U.S. 368, 403 (1893) (dissenting opinion of Field, J.); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (dissenting opinion of Holmes, J.); Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion of Holmes, J.).

[9] 276 U.S. 518 (1928).

[10] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 73 (1938); Shelton, *Concurrent Jurisdiction–Its Necessity and its Dangers,* 15 VA. L. REV. 137 (1928); Frankfurter, *Distribution of Judicial Power between Federal and State Courts,* 13 CONN. L. Q. 499, 524-30 (1928); Campbell, *Is Swift v. Tyson an Argument For or Against Abolishing Diversity of Citizenship Jurisdiction?,* 18 A.B.A.J. 809 (1932).

[11] 304 U.S. 64 (1938).

[12] *Id.* at 74.

[13] *Id.* at 75.

the state's highest court was said not to be a matter of federal concern. In expressly overruling *Swift v. Tyson*, the Court stated:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[14]

Thus, the doctrine "congenial to the jurisprudential climate of the time" of *Swift v. Tyson* was dramatically changed. No longer was there to be "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute . . . ." [15] Instead, substantive rules of law indicating state policy were to control the rights of citizens of different states in federal jurisprudence. Of obvious importance in the dramatic change of thinking was the problem of forum-shopping so graphically displayed in the *Taxicab* case.

A redefinition of the *Erie* principle was stated six years later in *Guaranty Trust Co. v. York*.[16] Mr. Justice Frankfurter, speaking for the Court, recognized the difficulty of distinguishing between matters of "substance" and matters of "procedure." However, he stated that "*Erie Railroad Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between state and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of a diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court. The nub of the policy that underlies *Erie Railroad Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." [17]

Thus, it might be said that in the context of determining the dis-

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[14] *Id.* at 78.

[15] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532, 533 (1928) (dissenting opinion).

[16] 326 U.S. 99 (1945).

[17] *Id.* at 109.

tribution of powers between state and federal courts, matters of "substance" are those matters that bear "on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." [18]

In *Guaranty Trust Co. v. York* the Court emphasized that in diversity cases the federal court is but another court of the state. The federal court was to be another tribunal, not another body of law.[19]

The proper distribution of powers between the state and federal court again reached the Court in 1958 in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[20] Under consideration was the defense in a negligence action that the plaintiff was the defendant's employee for purposes of the South Carolina Workmen's Compensation Act, and that the plaintiff's exclusive remedy was under the Act. A decision from the highest court of South Carolina had held that the judge and not the jury should decide the validity of such a defense, even in light of conflicting evidence. The Supreme Court ruled that in federal actions based on diversity of citizenship, a jury must decide conflicting evidence, notwithstanding the decision of South Carolina's highest court.

The inquiry of the Court was to the question of ". . . whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." [21] The Court's answer in favor of the "federal policy" considers two major premises. First, state rules will not be allowed to hinder the distribution of trial functions between judge and jury in the federal courts because of the influence of the seventh amendment.[22] Secondly, there is no certainty or even strong possibility that a different result would follow by having a disputed fact question decided by the jury rather than the judge. The likelihood of a difference was not thought to be so strong as to require the "federal policy" to yield to the state rule.

If there was any question, it was decided in *Simler v. Conner*[23] that

[18] *Id.* at 110.

[19] *Id.* at 112. *See* Angel v. Bullington, 330 U.S. 183 (1947).

[20] 356 U.S. 525 (1958).

[21] *Id.* at 538.

[22] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law". U.S. CONST. amend. VII.

[23] 372 U.S. 221 (1963).

federal law determined whether a litigant was entitled to a jury trial in a federal diversity action, notwithstanding the fact that Oklahoma decisions had declared that for the subject matter presented, the plaintiff was not entitled to a jury trial. The Court declared that the federal law must apply if the seventh amendment is to have any effect. However, it was again recognized that the "substantive dimension of the claim asserted finds its source in state law. . . ." [24]

Hanna v. Plumer,[25] decided in 1965, fully considers the principles enunciated in *Erie*, *York*, and *Byrd*. The Court was confronted with the question of whether Massachusetts law or rule 4(d)(1) of the Federal Rules of Civil Procedure controlled in a federal court whose jurisdiction was based upon diversity of citizenship. Massachusetts law required service of process to be made upon an executor by "delivery in hand," while rule 4(d)(1) was satisfied by leaving with the executor's wife at his residence copies of the summons and complaint. If the law of Massachusetts were followed, the suit would be dismissed. It was argued that the application of rule 4(d)(1) would "abridge, enlarge, or modify" a substantive right which was prohibited under the Rules Enabling Act.[26] In deciding that rule 4(d)(1) was controlling, the Court discussed the proper relationship of *Erie Railroad Co. v. Tompkins* to *Guaranty Trust Co. v. New York*. The "outcome-determinative" test of *York* must be considered with the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." [27] Thus, even though the "outcome-determinative" test would find Massachusetts law controlling, so would every procedural variation taken to its ultimate extreme. Therefore, whether or not the variation between the federal rule and state law would tend to produce forum-shopping was of primary consideration to the Court.[28] The conclusion was reached that even though

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[24] *Id.* at 222.

[25] 380 U.S. 460 (1965).

[26] "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury. . . ." 28 U.S.C. § 2072 (1964).

[27] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[28] *See* Horowitz, *Erie R. R. v. Tompkins—A Test to Determine those Rules of State Law to which Its Doctrine Applies*, 23 S. CAL. L. REV. 204, 214-15 (1950), suggesting that the prime consideration for application of the *Erie* doctrine was whether adoption of the "federal rule" would more likely than not lead to or encourage forum-shopping.

at some stage the variation in procedural rules between federal and state courts may have some bearing on the outcome, such variation would not bar or grant a recovery. It was also of signifiance that the mode of service of process permitted by the Federal Rules of Civil Procedure did not alter "the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." [29]

The Court's ultimate decision, however, was based on the philosophy that the Federal Rules of Civil Procedure should govern federal diversity cases. It was said that:

> *Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules (citation omitted). "When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic" (citations omitted). Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts (citation omitted), it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.[30]

As was pointed out in the concurring opinion by Mr. Justice Harlan,[31] the Court could have reached the same result solely on *Erie* and *York* principles. Indeed, according to *Erie* and *York* principles as stated by the Court, rule 4(d)(1) should have been the standard rather than the law of Massachusetts.

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[29] Hanna v. Plumer, 380 U.S. 460, 469 (1965).

[30] *Id.* at 473-74.

[31] *Id.* at 474-77.

State or Federal Standard to Determine the Sufficiency of a Litigant's Evidence

The seventh amendment guarantee of a jury trial in federal diversity cases "was designed to preserve the basic institution of jury trial in its most fundamental elements." It has been repeatedly held that the seventh amendment does not deprive federal courts of the power to direct a verdict for insufficiency of the evidence and the practice was approved in the promulgation of rule 50 of the Federal Rules of Civil Procedure.[32]

During the typical diversity trial the presiding judge must decide at the conclusion of one litigant's evidence, upon motion properly made, whether or not that evidence is sufficient to tend to prove the facts alleged. In making his decision, should the judge resort to the federal standard or to the state standard? The appellate courts are divided on the question,[33] and there has been no controlling decision from the Supreme Court.[34]

Some courts which have decided that the federal standard is appropriate lean heavily on reasoning that the seventh amendment provides for jury trials, and, therefore, because a motion for a directed verdict has to do with the right of jury trial, federal rather than state law should be applied.[35] Other courts lean on the desire for "perpetuation of an independent federal juridical system" coupled with the finding that "[a] choice of a rule as to the quantum of proof necessary to support the submission of a case to a jury plays no role in the orderly affairs of anyone." [36] These views are favored by most of the commentators.[37]

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[32] Galloway v. United States, 319 U.S. 372, 392 (1943).

[33] *See* 5 J. Moore, Federal Practice ¶ 50.06, at 2348-49 (2d ed. 1969) and cases cited therein; 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 871.1 nn. 14.16, 14.17, 14.19 (Wright ed. 1961).

[34] Dick v. New York Life Ins. Co., 359 U.S. 437 (1959). The court said: "Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. . . . But the question is not properly here for decision. . . . A decision as to which standard should be applied can well be left to another case. . . ." *Id.* at 444-45. Mercer v. Theriot, 377 U.S. 152 (1964). *But see* Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 540 n. 15 (1958), where Stover v. New York Life Ins. Co., 311 U.S. 464 (1940) was said to have "held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established."

[35] *See, e.g.*, Lowry v. Seaboard Airline R.R., 171 F.2d 625 (5th Cir. 1948).

[36] Wratchford v. S. J. Groves & Sons Co., 405 F.2d 1061, 1065-66 (4th Cir. 1969).

[37] *See* 5 J. Moore, *supra* note 33, ¶ 31.10, at 102 (2d ed. 1969); W. Barron & A.

Those courts which have decided that the state standard is appropriate have generally been guided by a finding that the sufficiency of the evidence goes to the maintenance of the substantive right and is, therefore, to be tested by state law.[38]

A typical example of the problem is shown in *Wratchford v. S. J. Groves & Sons Co.*[39] Wratchford was found at the bottom of an open highway drainage hole. He was severely injured and could recall none of the circumstances which led him there. The evidence indicated that the night before, he was to purchase some groceries on his way home. His car was found on the side of the road, opposite a motel office where groceries could be purchased. The drainage hole was approximately on a line between the motel office and his parked car. His car keys were found at the bottom of the hole. S. J. Groves & Sons Co. was the general contractor responsible for the construction of drainage inlets at the place of Wratchford's accident. The hole had been cut and Groves was to supply a grate to be installed by his subcontractor. The grate had not been been placed when Wratchford fell into the hole.

The accident happened in Maryland but because of Wratchford's diverse citizenship with Groves, suit was brought in the federal court. The law of Maryland, which created Wratchford's cause of action, required that from circumstantial evidence, the jury should not be allowed to draw any inference if one is as probable as the other. The federal standard for jury submission is that the jury is to resolve conflicting inferences from circumstantial evidence.[40] The district court judge applied the Maryland standard and directed a verdict for Groves. The Fourth Circuit Court of Appeals reversed, declaring that the federal law was the correct standard.

No comment is here made as to the relative merits of the separate standards. The fact is, however, that because of the accident of diversity, Wratchford's position was materially changed.

The philosophy prevailing under the doctrine of *Swift v. Tyson*—

HOLTZOFF, *supra* note 33, § 871.1, at 18-19; Note, *State Trial Procedures and the Federal Courts: Evidence, Juries, and Directed Verdicts under the Erie Doctrine*, 66 HARV. L. REV. 1516 (1953); Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 TEXAS L. REV. 1053 (1964). *But see Symposium—Federal Trials and the Erie Doctrine*, 51 NW. U.L. Rev. 338 (1956); Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944). The literature dealing in some measure with this subject is voluminous. Therefore, no attempt was or will hereafter be made to cite all publications.

[38] *See, e.g.*, Gilreath v. Southern Ry., 323 F.2d 158, 162 n. 4 (6th Cir. 1963).

[39] 405 F.2d 1061 (4th Cir. 1969).

[40] *Id.* at 1066.

that the federal judiciary has the power to reach that result which appeals to it as just regardless of what the state may say—would dictate a disregard of state standards in determining the sufficiency of a litigant's evidence. However, *Erie Railroad Co. v. Tompkins* and its progeny have cast grave doubt as to the propriety of applying a federal standard.

It must be remembered that whether the evidence is sufficient for jury submission is quite another matter from whether a disputed question of fact should be tried before the judge or to a jury. To test the sufficiency of the evidence is to decide or determine whether there is a disputed question of fact. If, indeed, there is found to be a disputed question of fact, *Byrd* and *Simler* demand that the question be submitted to a jury for resolution. However, these cases are by no means determinative in deciding whether a federal or state standard should apply to resolve whether or not there is a disputed question of fact.

Herron v. Southern Pacific Co.,[41] a pre-*Erie* decision, held that the distribution of functions between judge and jury was a matter governed by the seventh amendment, unaffected by a state constitutional provision denying the right to take from the jury the issue of contributory negligence. There was significant doubt as to the weight which should be attributed *Herron* after *Erie Railroad Co. v. Tompkins*. Such doubt was resolved, however, when the Court in *Byrd* quoted from and relied upon the authority of *Herron*.

The *Herron* decision is precisely the converse of *Simler* and *Byrd*. *Herron* holds that when there is no disputed question of fact, a verdict shall be directed irrespective of state law to the contrary, while *Simler* and *Byrd* hold that where there is a disputed question of fact, there will be jury submission, irrespective of state law to the contrary.

As stated by the Court in *Byrd*, the fact that a jury rather than a judge will decide a disputed question of fact does not produce a strong likelihood of a different result in the litigation. There will always be a decision, whether by judge or jury, on the relative merits of any disputed question of fact. However, at first glance, it appears that the *Herron* decision would tend to produce the strong likelihood of a different result on the same set of facts in a federal court as opposed to a state court. Although the state court of Arizona could not direct a verdict, it could have set aside an unreasonable verdict. If the direction of a verdict would produce the same result as the setting aside of an unreasonable verdict, the same result would be reached in both the federal

[41] 283 U.S. 91 (1931).

and state courts, thereby satisfying the "outcome-determinative" requirement.[42] Difficulty arises here, however, when there is no limitation placed upon the number of new trials or the result of a third trial will convert, as a matter of law, an unreasonable verdict into one of reason. It has been suggested with great logic that no principle, standard or rule governing the creation of a right-duty relationship can ever be established by such a procedure. "The most that can be said is that the statute changes the allocation of functions between judge and jury. . . . [T]he considerations against the extraterritorial application of the legislation are obviously almost overwhelming; and certainly there is nothing . . . to require the federal judges to go through two useless trials in order to give a party the possible opportunity of persuading a third jury to set up a special standard of conduct and logic for his case." [43]

In the post-*Erie* decision of *Stoner v. New York Life Ins. Co.*,[44] the Court held that the federal court was bound by state court decisions which undertook to determine the sufficiency of the evidence to prove total disability. This case was not tried before a jury and it is not determinative of the question as to whether a state or federal standard applies in determining the sufficiency of evidence.[45] It is, however, some indication of the philosophy of federal jurisprudence at the time of decision.

If the *Herron* case were to come before the Court today, there is little room for argument as to its probable outcome. The Arizona constitutional provision requiring submission of the issue of contributory negligence to the jury, regardless of the evidence, if given effect in a federal diversity trial, would have the singular effect of removing rule 50 from the Federal Rules of Civil Procedure. Federal policy has been announced by Congress and the Supreme Court favoring the right of the trial judge to direct a verdict and no state law will be allowed to change the nature of the trial judge's duty. Perhaps the opinion would again pronounce the balancing theory expressed in *Byrd* and conclude that the federal interest—that right of the federal court to withhold jury submission when in the opinion of the court the evidence considered is a question of law—outweighs the desire for uniformity in decisions within the state. The opinion would probably add that the probability of difference in result was remote, thereby satisfying the "outcome-determinative" policy.

[42] *See* Note, *State Trial Procedure and the Federal Courts: Evidence, Juries and Directed Verdicts Under the Erie Doctrine*, 66 HARV. L. REV. 1516, 1524-25 (1953).

[43] Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 179-80 (1944).

[44] 311 U.S. 464 (1940).

[45] *See* note 34 *supra*.

The right of the federal court to withhold jury submission is not affected by the choice of standard to be applied. The effect of rule 50 remains regardless of whether the choice of standard is in favor of the state or federal law. Therefore, the obvious objection to the use of a state standard found in *Herron* is not present. The only federal policy consideration in favor of the use of a federal standard is the preservation of consistency within the federal system in application of the Federal Rules of Civil Procedure. Bound up in such a consideration is a desire for a proper distribution of functions between judge and jury.

A survey of those cases decided since *Erie* does not disclose any rational mandate for applying a federal standard rather than the state standard to determine the sufficiency of evidence. Because of the desire to prevent forum-shopping as it existed under the doctrine of *Swift v. Tyson*, it was stated that federal policy demanded the application of state law to matters of substance. Federal policy also demanded that if disregard of state law would materially affect the outcome of the litigation so as to produce the likelihood of a different result, state law should apply. If indeed these statements of federal policy are still true, it is difficult to see how anything other than a state standard should determine when evidence is sufficient to tend to prove the fact alleged.

Perhaps the thoughts expressed in *Hanna v. Plumer* are a true statement of current federal policy. If so, then "outcome-determinative" cannot be considered alone but must be weighed against the aims of the *Erie* doctrine to discourage forum-shopping and to achieve uniformity in decisions within the state. If it be found that either or both of the aims of the *Erie* doctrine will not be disturbed, then the federal law will apply, even if it may be said that to disregard the state law would in some way affect the ultimate outcome of the case. To determine whether the difference in result that might occur by disregarding the state law is really of importance, the inquiry can easily be made into whether such a difference would have encouraged forum-shopping at the commencement of the litigation. As stated by the Court in *Hanna*, the thought could not be seriously entertained "that one suing an estate would be led to choose the federal court because of a belief that adherence to rule 4(d)(1) is less likely to give the executor actual notice than § 9 (the Massachusetts law), and, therefore, more likely to produce a default judgment." [46]

[46] Hanna v. Plumer, 380 U.S. 460, 469 n. 11 (1965).

Because there is no federal general common law,[47] each suit brought in the federal court on the jurisdictional ground of diversity of citizenship must be decided by reference to state law. When the state makes available the remedy that a litigant attempts to perfect, the law of the state should determine the quantum of proof necessary for perfection. It is quite meaningless for the state merely to declare that a litigant must prove a certain legal principle without also defining the legal standards to measure the quality of the proof to create a question of fact. Indeed, if the state defines the permissible inferences to be drawn from a given state of facts, it is in the same breath defining the substantive rule of law applicable to those facts. Such a definition should be included in the remedy upon which the litigant bases his claim.

Should it be decided that the appropriate standard is federal rather than state, the number of cases affected will be quite smaller than those affected under the doctrine of *Swift v. Tyson.* However, to that class of cases, all of the objections to *Swift v. Tyson* sought to be remedied by *Erie Railroad Co. v. Tompkins* will return and indeed probably have returned in those circuits which follow the federal standard. It can be expected that a litigant will accomplish the necessary legal maneuverings to avail himself of the federal standard, if indeed the accident of diversity was not present when the cause of action arose. Certainly, the federal courts will swell with litigants, emulating *Brown & Yellow Taxicab & Transfer Co.*, anxious to obtain a result different from their next door neighbor whose case was tried on the same evidence in the state court. If the federal standard produces an issue of fact rather than an issue of law, or an issue of law rather than one of fact, there is a strong likelihood that the very discrimination sought to be avoided in *York* would continue. By having his case tried in the federal court "one block away" from the state court, the litigant would achieve a strong likelihood of a different result than if he had proceeded in the state court.

If the federal policy today is that which prompted the reversal of *Swift v. Tyson,* the state standard should be applied to determine the sufficiency of the evidence. For the class of cases affected, that is the only way to accomplish the desired result of discouraging forum-shopping and achieving uniformity in decisions within the state. If, however, a federal standard is applied irrespective of a different state stan-

[47] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

dard, it is contended that for that class of cases affected, the philosophy of federal jurisprudence announced in *Swift v. Tyson* and its progeny with all of its "mischievous results" [48] has returned.

[48] *Id.* at 74.