where the points were not stated "in numerical order" as required by the rule, a motion to dismiss was denied as the court was able to understand the theory of the appeal.[25] The St. Louis Court of Appeals has considered an assignment of error where no mention of points or citation of authorities was made.[26]

Both of the instant cases are in line with the weight of authority—the appellant being held strictly to the rule in the case of a defective statement while a deviation was permitted in the manner of presenting "points and authorities." It is recognized that the rules of court have been laid down to achieve an efficient and time-saving method of expediting appellate procedure.[27] However, it should be remembered that justice for the litigants is the desired end of court proceedings. Accordingly they should not be penalized for lack of skill of counsel unless reasonably necessary. It is submitted, therefore, that it might be well to permit amendments of the "statement" at the discretion of the court even after the respondent has filed a motion to dismiss.[28] This would be to the advantage of the court in permitting a strict enforcement of the rule for clear and concise statements without unfairly subjecting the appellant to dismissal or to continuance at the option of the respondent.

J. M. F.

CONSTITUTIONAL LAW—COURTS—THE DOCTRINE OF SWIFT V. TYSON—[Federal].—Tompkins, a citizen of Pennsylvania, brought suit in federal court against appellant for injuries received while walking beside appellant's tracks in Pennsylvania. Following the long-settled doctrine of *Swift v. Tyson*,[1] the circuit court of appeals[2] affirmed the district court's action in declining to inquire into the Pennsylvania decisions with regard to the duty owed by a railroad to licensees.[3] Having granted certiorari, the Supreme Court, speaking through Mr. Justice Brandeis, disapproved the doctrine of *Swift v. Tyson*, holding it an unconstitutional assumption of power by the courts of the United States.[4]

Litho. Co. v. Linda Vista Golf and Country Club (Kansas City Ct. of App. 1928) 1 S. W. (2d) 851.

25. Neff v. Sovereign Camp Woodmen of the World (Kansas City Ct. of App. 1931) 226 Mo. App. 899, 48 S. W. (2d) 564.

26. Grubb v. Curry (St. Louis Ct. of App. 1934) 72 S. W. (2d) 863.

27. Williams v. Jenkins (Springfield Ct. of App. 1937) 107 S. W. (2d) 938.

28. A possible analogy might be drawn from cases in which the appellant was permitted to present a supplemental abstract after the respondent had filed a motion to dismiss. Davis v. Camp (Springfield Ct. of App. 1909) 139 Mo. App. 650, 123 S. W. 1009. Contra as to amending "statement": Fuenfgeld v. Holt (Kansas City Ct. of App. 1934) 70 S. W. (2d) 143.

1. (1842) 41 U. S. 7, 10 L. ed. 865.

2. Erie Railroad Co. v. Tompkins (C. C. A. 2, 1937) 90 F. (2d) 603.

3. The Erie Co. desired to show that Pennsylvania decisions held that railroads owed to those using longitudinal pathways alongside their tracks, as distinguished from a crossing, only the duty owed trespassers.

4. Erie Railroad Co. v. Tompkins (1938) 303 U. S. —, 58 S. Ct. 817, 82 L. ed. 787, Mr. Justice Butler and Mr. Justice McReynolds dissenting. Mr. Justice Reed concurred in part.

The principle that where questions of "general law" and "commercial law" are involved the federal courts are not bound by the decisions of state courts but are free to exercise their own independent judgment as to what the law is, has been vigorously attacked in recent years.[5] Despite statements that there is no federal common law,[6] the federal courts steadily extended the area in which they might exert an independent judgment by defining the concepts of "commercial law" and "general law" to include construction of an insurance policy,[7] a will,[8] and a deed;[9] determination of what constitutes negligence,[10] a dedication of land to public uses,[11] and a public purpose for municipal taxation;[12] of liability of common carriers for injuries to passengers;[13] interpretation of contracts for carriage of goods;[14] responsibility of a railroad to employees for personal injuries;[15] determination of who are fellow servants under the fellow servant doctrine;[16] and the right to exemplary or punitive damages.[17] Even questions involving such local matters as real property have been made the subject of independent federal jurisprudence.[18]

As pointed out in the majority opinion the anticipated benefit of the doctrine, namely, uniformity of law throughout the nation, was never realized.[19] On the contrary the ill-effects of the doctrine have been far reaching. Included among these are: (1) lack of uniformity of law within a single state;[20] (2) use of the doctrine by litigants desiring to avoid unfa-

5. See the dissenting opinions of Mr. Justice Holmes in Kuhn v. Fairmont Coal Co. (1910) 215 U. S. 349, 370, 30 S. Ct. 140, 54 L. ed. 228, and in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co. (1928) 276 U. S. 518, 530, 48 S. Ct. 404, 72 L. ed. 681, 57 A. L. R. 426; see also, Dobie, Seven Implications of Swift v. Tyson (1930) 16 Va. L. Rev. 225; Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49.

6. Western Union Tel. Co. v. Call Publishing Co. (1901) 181 U. S. 92, 101, 21 S. Ct. 561, 45 L. ed. 765; United States v. Hudson (1812) 11 U. S. 32, 3 L. ed. 259.

7. Carpenter v. Providence Washington Insurance Co. (1842) 41 U. S. 495, 10 L. ed. 1044.

8. Lane v. Vick (1845) 44 U. S. 464, 11 L. ed. 681. The first dissenting opinion to the rule of Swift v. Tyson appeared in this case.

9. Foxcroft v. Mallett (1846) 45 U. S. 353, 379 L. ed. 1008.

10. Chicago v. Robbins (1862) 67 U. S. 418, 17 L. ed. 298.

11. Yates v. Milwaukee (1870) 77 U. S. 582, 19 L. ed. 984.

12. Olcott v. Fond du Lac County (1872) 83 U. S. 678, 21 L. ed. 382.

13. N. Y. Central R. Co. v. Lockwood (1872) 84 U. S. 357, 21 L. ed. 627.

14. Liverpool & G. W. Co. v. Phenix Ins. Co. (1888) 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788.

15. Baltimore and Ohio R. Co. v. Baugh (1892) 149 U. S. 368, 13 S. Ct. 914, 37 L. ed. 772.

16. Beutler v. Grand Trunk R. Co. (1911) 224 U. S. 85, 32 S. Ct. 402, 56 L. ed. 679.

17. Lake Shore & M. S. R. Co. v. Prentice (1892) 147 U. S. 101, 13 S. Ct. 261, 37 L. ed. 97.

18. Kuhn v. Fairmont Coal Co. (1910) 215 U. S. 349, 30 S. Ct. 140, 54 L. ed. 228 (mineral conveyances).

19. Erie R. Co. v. Tompkins (1938) 58 S. Ct. 817, 820, 82 L. ed. 787.

20. *Ibid.*

vorable state law or policy;[21] (3) discrimination between citizens and noncitizens.[22]

Although it is submitted that the result of the decision will have a salutory effect in giving to the states the right, contemplated by the framers of the Judiciary Act of 1789,[23] to have their own law applied in federal courts, yet it is believed that the gratuitous declaration that the prior course constituted an unconstitutional assumption of power by the United States courts was unnecessary. The instant case required only the disapproval of the interpretation given Section 34 of the Judiciary Act of 1789[24] in *Swift v. Tyson.* It might have been well to postpone the declaration, in effect, that Congress has not the power to provide by statute the rule laid down in *Swift v. Tyson,*[25] until the issue is directly presented.

L. H. B.

CONTRACTS—COLLECTIVE LABOR AGREEMENTS—RIGHTS OF NONUNION EMPLOYEE—[Oregon].—Defendant employer, operating a nonunion establishment, hired plaintiff under a contract containing no overtime or subsistence provisions. Thereafter defendant entered into a contract with a labor union which did contain such provisions. Neither plaintiff nor any other employee was then a member of the union or became such prior to suit. In a suit based upon the contract between the labor union and the employer, on agency and third party beneficiary theories, plaintiff contended that the employer was liable for overtime and subsistence under the trade agreement. *Held,* the contract was void for want of consideration, since no employee was a member of the union during the life of the contract.[1]

The court distinguished the instant case from *Yazoo & Mississippi Valley R. Co. v. Webb,*[2] in which case a nonunion employee was allowed to recover under a similar agreement, on two grounds: (1) the contract there had been entered into by the union while the relation of principal and agent

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21. Black & White Taxicab Co. v. Brown & Yellow Taxicab Co. (1928) 276 U. S. 518, 48 S. Ct. 404, 72 L. ed. 681, 57 A. L. R. 426.

22. Erie R. Co. v. Tompkins (1938) 58 S. Ct. 817, 820, 82 L. ed. 787.

23. Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49.

24. Federal Judiciary Act of 1789, 1 Stat. 92, (1928) 28 U. S. C. A. sec. 725. Section 34 is as follows: "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." In Swift v. Tyson the word "laws" embodied in this section was interpreted to mean the constitutions and statutes of the states and to exclude judicial decisions.

25. The instant case ignores the rule of construction that courts will not determine a constitutional question unless it is necessary to a decision in the case at hand. Both Mr. Justice Butler in his dissent and Mr. Justice Reed in his concurring opinion point out that such declaration was not necessary to the decision in this case.

1. Shelley v. Portland Tug & Barge Co. (Ore. 1938) 76 P. (2d) 477.

2. (C. C. A. 5, 1933) 64 F. (2d) 902.