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CHANGE OF VENUE AND THE CONFLICT OF LAWS: A RETRACTION

BRAINERD CURRIE*

FIVE YEARS ago there appeared in the pages of this *Review* a lengthy article discussing the problems of choice of law consequent upon the introduction of a statutory provision for change of venue¹ into a federal court system committed by the *Erie* case² to the principle that there is no general federal common law, and that a United States district court, in adjudicating state-created rights, is bound to apply state law.³ The article was not without merit; it was a conscientious analysis of the problems and of various proposed solutions. Indeed, there is only one reason for regretting the article or offering apologies for it: The conclusion reached was wrong—not just plain wrong, but fundamentally and impossibly wrong. I began to realize this some time ago, and inconspicuously abandoned the article's thesis, at first guardedly⁴ and later without reservation.⁵ A retraction, of course, cannot be a complete defense; but by analogy to the law of libel, it should, even to operate in mitigation, be unequivocal and should be given the same publicity and prominence as the offending publication.⁶ This, I take it, does not mean that the retraction must be as long as the original publication; but it should be published in such a way that a user of the *Index to Legal Periodicals* who might be referred to the original is given a fair chance of being referred to the retraction also.

The problem may be restated briefly by means of an illustration. A citizen of Missouri is injured in California by the alleged negligence of a railroad incorporated in Kansas. Settlement negotiations delay the filing of suit until the period allowed by the California statute of limitations has expired. The action is thereupon filed in New Mexico, where it is not barred. The defendant removes to the United States district court and there moves for transfer to a district court in California. If the motion is granted, which statute of limitations will apply after transfer: New Mexico's or California's?⁷

* Professor of Law, The University of Chicago Law School.

¹ 28 U.S.C. § 1404(a) (1948).

² *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

³ Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955). A condensed version appeared as *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353 (1955).

⁴ Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 266 (1958).

⁵ Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 84 n.333 (1958).

⁶ PROSSER, TORTS 632-33 (2d ed. 1955).

⁷ *Cf. Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950).

Three possible solutions of the problem had been suggested:

1. The transferee court will apply the law of the state in which it sits, just as if the action had been originally filed in that court;
2. The transferee court will apply the law of the state in which the action was originally filed, just as if it were a federal court sitting in that state, but without regard to the state law concerning *forum non conveniens*;
3. The transferee court will apply the law of the transferee state if the action was subject to dismissal on the ground of *forum non conveniens* under the law of the state in which it was originally filed, but will apply the law of the state of filing if it was not thus subject to dismissal.

The article found varying degrees of fault with all three of these solutions; none of them would fully accomplish all the objectives attributable to the procedural reform represented by the transfer provision, and some of them in addition would produce positively undesirable results. The solution proposed in the article was that the federal courts must be freed from the necessity to apply state conflict-of-laws rules, and must independently develop their own rules for choice of law on a rational basis.

This argument was most convincing in the context of the federal interpleader proceeding, as illustrated by that most vexing decision, *Griffin v. McCoach*.⁸ Here the choice of forum was not within the control of either claimant, but of the usually disinterested stakeholder; here the district court sat in some sense as a distinctively national court rather than a court of the state, exercising by virtue of national power a jurisdiction which, it was thought,⁹ could not be exercised by a state court. Here, also, a purpose might be attributed to Congress to bring about a total result different from that which would be reached in the courts of the states (*i.e.*, the double recovery that often resulted from the inability of a state court to bind a nonresident claimant by its judgment, coupled with the fact that two states might, by invoking different choice-of-law rules, apply different laws). The congressional purpose might arguably be one not only of providing a single court whose judgment would bind claimants anywhere in the country, but also of enabling that court to ascertain and apply the appropriately applicable law.

With the interpleader case as a starting point, the argument was broadened; since the new transfer section could not be administered in such a way as to realize its full potential as a procedural reform without freedom on the part of the federal courts to select the applicable state law, an alternative to state conflict-of-laws rules was required by federal policy, at least where the action was transferred. Transfer gave rise to the problem of what law was to govern thereafter; the federal courts must have the power to administer the transfer section in such a way as to realize its potential and control the result; that is, they

⁸ 313 U.S. 498 (1941), discussed in 22 U. CHI. L. REV. at 491 *et seq.*

⁹ *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). *But cf.* *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957).

must have power to decide where the case should be tried, and on what terms. Beyond this, since the federal courts would already have ventured far into the construction of independent conflict-of-laws rules, they might just as well do so even when the motion for transfer is denied, and, indeed, when no motion for transfer is involved. Not only must *Griffin v. McCoach* be abandoned; so also must *Klaxon Co. v. Stentor Elect. Mfg. Co.*,¹⁰ and with it the whole obligation of the federal courts to follow state rules of conflict of laws. Only the *Erie* doctrine proper was left.

This position assumes that it is possible to develop a rational system of conflict of laws in the abstract, independently of the policies and interests of the governments legitimately concerned, and independently of the construction and interpretation placed by the courts of a state upon its laws. This, I am now convinced, is an impossibility. Learned men have taught the contrary. Thus the late Professor Rabel flatly rejected the idea that the application of a law to cases having foreign aspects could be determined by construction or interpretation: Private law rules ordinarily do not direct which persons or movables they include. . . . They are simply neutral; the answer is not in them. Generally, therefore, what is needed, or even feasible, is not an interpretation of the statute but a rule of private international law to accompany and delimit the rule of private law.¹¹

Thus conceived, the law of conflict of laws is a thing apart, a detached science of how laws operate in space; so conceived, it is an international science, transcending local concerns for the most part, and the federal courts are as competent as the state courts to determine the true rule; indeed, they are better equipped to do so, being national courts detached from state concerns and prejudices. The concept is reflected by the following statement in my article: "The claim advanced in this paper is only that the federal courts must be free, at least in ordering transfers under section 1404(a), to determine what state law is applicable on transfer; not that they may construct independent principles of *municipal law*."¹² There you have it; the law of a state relating to the burden of proving contributory negligence is "municipal" law; the law regulating which state's law on burden of proof is applicable, or how a state's law is to be applied to cases having foreign aspects, is something else—something detached, and something not emanating from any very clearly defined source.

A series of studies has convinced me of the complete unsoundness and futility of this concept.¹³ Many familiar conflict-of-laws problems can and should be

¹⁰ 313 U.S. 487 (1941).

¹¹ 1 RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 95 (1945).

¹² 22 U. CHI. L. REV. at 483 n.186 (1955). (Emphasis added.)

¹³ In addition to the papers cited in notes 4 and 5, *supra*, see Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171; Currie, *The Constitution and the "Transitory" Cause of Action* (pts. 1-2), 73 HARV. L. REV. 36, 268 (1959); Currie & Lieber-

resolved by reference to the governmental policies of the states concerned,¹⁴ and to the interests of the respective states in the application of such policies. Another way of saying this is that many conflict-of-laws problems can and should be resolved through construction or interpretation of the laws in question.¹⁵ The applicability of a statute or common-law rule to a case having foreign aspects presents a question of construction or interpretation of the same kind as does the applicability of the same statute or rule to a marginal domestic situation, or a situation existing prior to the enactment of the statute. If this is true, it is clear that a federal court should be bound as firmly to apply the state court's construction of the law in its application to cases having foreign aspects as it is bound to apply the state court's construction of the law in its application to marginal domestic situations and pre-existing conditions.

The point may be dramatically though conversely illustrated by decisions of the United States Supreme Court concerning the applicability of the Jones Act¹⁶ to cases having foreign aspects. A statute better fitting Professor Rabel's description would be difficult to find. It does not bear on its face any indication of the persons or events to which it is addressed. The "literal catholicity of its terminology"¹⁷ would suggest that it applies to any seaman, in the service of any employer, injured anywhere on earth—an interpretation that must, of course, be rejected. But the statute itself gives no guide to the degree to which its operation is to be limited. It is "neutral" in that respect; "the answer is not in it." Yet the Supreme Court, called upon to determine the applicability of the statute to foreign seamen injured in the service of foreign employers, did not therefore resort to a detached, international science of law in space to determine the scope of the act; it *construed the act*, striving to ascertain the congressional policy and the circumstances in which the act must be applied to effectuate the policy, as well as the circumstances in which the policy requires no such application.¹⁸

It is surely evident that this construction is binding upon a state court trying a Jones Act case.¹⁹ The construction is parcel of the act, and is as authoritative

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man, *Purchase-Money Mortgages and States Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L. J. 1; Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959).

¹⁴ For a discussion of some of the reasons for limiting the statement to less than all such problems see Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1012 *et seq.* (1958).

¹⁵ See Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L. J. 1.

¹⁶ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

¹⁷ *Lauritzen v. Larsen*, 345 U.S. 571, 576 (1953).

¹⁸ *Lauritzen v. Larsen*, *supra* note 17; *Romero v. International Term. Operating Co.*, 358 U.S. 354 (1959).

¹⁹ See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959).

as any other construction of the act by the Supreme Court. Conversely, a state court's construction of a state statute, determining how that statute is to be applied to cases having foreign aspects, is parcel of the statute, and is as much to be respected in federal courts as any other construction by the state courts.²⁰

The most regrettable passage in my article concerns the interpleader case, *Griffin v. McCoach*:

There can be no possible basis for determining that one claimant has a better right to the law of Texas than his opponent has to the law of New York—except in terms of conflict-of-laws principles. The remaining question, *with which we need not be concerned*, is what answer would result from the application of such principles. It is necessary here only to observe that the question is whether Texas policy must yield to the law of New York, *which concededly is the proper law apart from the policy question*. *Nothing could be more appropriate than to have that question resolved by the federal courts.*²¹

In the first place, this is avoidance of the issue, which ought to be recognized as a cardinal sin in legal writing. Had I not absolved myself and the reader from concern as to how the federal courts would resolve the conflict between the law of New York and that of Texas; had I inquired into the possible content and source of those "conflict-of-laws principles" that were to be employed in the task, I might have appreciated then the illusory character of the project. Certainly I did not have in mind that the federal courts should employ the *Restatement*,²² I spoke repeatedly of "enlightened" principles of conflict of laws.

In the second place, it is difficult now to understand how I could have so readily conceded that New York law was the proper law, "apart from the policy question." Of course, the error was induced by another artificial concept of separation endorsed by conflict-of-laws theory. Not only are choice-of-law rules detached from municipal law, but "policy" in turn is detached from choice-of-law rules, as well as from municipal law. As the place of contracting and performance, New York furnished the applicable law; only by invoking a second line of defense—local public policy—could Texas defeat the claims of the assignees; and local public policy was not a very respectable defense to invoke, since it abrogated "vested" rights and interfered with the attainment of uniformity of result. As I now understand the matter, there was simply a conflict between the policies and interests of New York and Texas. New York law did not require that the assignees have an insurable interest. New York had an interest in the application of its law to vindicate the expectations of the assignees, who were residents of New York. Texas law, on the other hand, required an insurable interest. This law expressed a policy, however misguided, for the protection of the life of the insured, and Texas had an interest in the application of that policy because the insured was a resident citizen of Texas. Therefore Texas law was as "applicable" as New York law.

²⁰ Cf. *Angel v. Bullington*, 330 U.S. 183 (1947).

²¹ 22 U. CHI. L. REV. at 495-96. (Italics supplied.)

²² RESTATEMENT, CONFLICT OF LAWS (1934).

"Nothing could be more appropriate than to have [the question whether Texas policy must yield to the law of New York] resolved by the federal courts." I can now think of two things that would be more appropriate: (1) To have that question resolved by Congress in the exercise of its powers under the full-faith-and-credit clause;²³ and (2) to leave it unresolved, except to the extent that it is resolved in a particular case by the court's (including the federal court's) application of domestic law and policy. Nothing could be more *inappropriate* than to have that question resolved by the federal courts—except to have it resolved by Texas courts in favor of New York policy, or by New York courts in favor of Texas policy. It is perfectly clear that no choice-of-law rule can possibly be invented that will do anything more than subordinate the policy of one state to that of the other. There can be no justification for any such rule that does not also justify a court in saying to a state that its policy is inferior to that of a coordinate state. No court is in position to say that. No such power exists in our federal system except that conferred on Congress by the full-faith-and-credit clause to "prescribe . . . the effect" of the public acts of one state in another. I suppose that when I wrote the article I had in mind that right-thinking people would prefer the policy of New York to that of Texas. No other state indulged the "cynic fear"²⁴ that the life of the insured was endangered when he himself applied for a life insurance policy payable to persons without insurable interest; and the Texas statute was repealed a few years after *Griffin v. McCoach* had been decided.²⁵ But a state legislature has the right to be wrong. When its error involves no infringement of the Constitution, no power exists to correct it, nor to subordinate it to the wisdom of other states, except the power that Congress has never exercised.²⁶

At one point in the article I did concern myself with the result that a federal court would reach if it constructed independent conflict-of-laws rules on rational principles:

A district court, looking for guidance to enlightened principles of conflict of laws, would recognize, first, that no real question of inconvenience *or of conflict with local policy* is involved in applying a foreign rule on burden of proof [of contributory negligence] in the critical situations in which that rule operates.²⁷

²³ U.S. CONST., art. IV, § 1.

²⁴ *Grigsby v. Russell*, 222 U.S. 149, 155-56 (1911).

²⁵ See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 48 (1958).

²⁶ I emphatically do not suggest that Congress should attempt to enact "choice-of-law" rules such as that the law of the place of contracting shall be preferred. If Congress were to address itself to the problem of *Griffin v. McCoach*, the appropriate legislation would simply declare that the interest of a state in safeguarding the lives of its people by requiring that beneficiaries or assignees of life insurance policies have an insurable interest shall be subordinated to the conflicting interest of another state.

²⁷ 22 U. CHI. L. REV. at 484.

The case under discussion was the familiar *Sampson v. Channell*.²⁸ But a rule as to the burden of proof on the issue of contributory negligence is a party-favoring rule, and if, for example, the forum is the state of the defendant's residence, the courts of the forum have good reason to apply their own rule placing the burden on the plaintiff.²⁹

The article's treatment of the interrelationship between section 1404(a) and the full-faith-and-credit clause as interpreted in *First Nat'l Bank of Chicago v. United Air Lines*³⁰ is hopelessly wrong, but there is no point in being overly contrite about that. The devious purpose of the Illinois legislature in enacting the statute there involved was so ingeniously concealed that none of the courts that decided that case—and the related case of *Hughes v. Fetter*³¹—nor any of us who commented on it appreciated the real constitutional problem.³² As I now understand those cases, the right of the plaintiff in *United Air Lines* to trial in an Illinois court was secured by the equal-protection clause.³³ That being so, and Illinois being free to apply its own law "to measure the substantive rights involved," to transfer the action to Utah, where a different substantive law might be applied, would give rise to very serious problems. These might perhaps be avoided if, despite *Norwood v. Kirkpatrick*,³⁴ the Court were to hold simply that such a case is not an appropriate one for transfer. I realize that exceptions on constitutional grounds will greatly complicate the administration of section 1404(a),³⁵ but the alternative now appears to me to be the more objec-

²⁸ 110 F.2d 754 (1st Cir. 1940).

²⁹ This was not the situation in *Sampson v. Channell*. The plaintiff was a citizen of New Jersey and the defendant a citizen of Massachusetts. Letter from Joseph J. Duwan, Esq., Deputy Clerk, United States District Court for the District of Massachusetts to Brainerd Currie, Jan. 4, 1960. The district court applied the law of Maine, thus limiting the plaintiff to the degree of protection afforded him by the law of the state of injury, and giving the defendant a higher degree of protection than would have been afforded him by his home state in a domestic case. 110 F.2d at 754. In thus denying to a citizen of another state a privilege accorded to domestic plaintiffs, the district court may have raised a problem under the privileges-and-immunities clause. Cf. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L. J. (1960). (The argument to the contrary, of course, would be that the classification of plaintiffs according to whether they are injured within or without the state is a reasonable one.) The court of appeals reversed on the ground that Massachusetts law called for application of the Massachusetts rule as part of the procedural law of the forum, thus, among other things, eliminating any problem of discrimination. 110 F.2d at 759. Two Massachusetts cases were cited, in one of which both parties were residents of Massachusetts, *Levy v. Steiger*, 233 Mass. 600, 124 N.E. 477 (1919). In the other the residence of the parties does not appear, *Smith v. Brown*, 302 Mass. 432, 19 N.E.2d 732 (1939).

³⁰ 342 U.S. 396 (1952), discussed in 22 U. CHI. L. REV. at 497 *et seq.*

³¹ 341 U.S. 609 (1951).

³² See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959).

³³ U.S. CONST., amend. XIV, § 1.

³⁴ 349 U.S. 29 (1955).

³⁵ See 22 U. CHI. L. REV. at 498-99, n.230.

tionable course. The power of Congress to regulate the place of trial in the federal judicial system may be sufficient to overcome the constitutional right of a citizen of Illinois to trial in his own state; the right, after all, is protected only against state action, not against action by the national government. But to transfer the case to Utah, with the understanding that Utah law is thereafter to be applied, would be to raise a very serious question indeed under the *Erie* doctrine, if not under the Constitution itself.

It would be fair to ask how I would propose to solve the problem of the law applicable after transfer if the solution based on independent choice of law by the federal courts is renounced. I am no longer disposed to give a confident answer to that question. The problem now appears to be insoluble, in any completely satisfactory way, while diversity jurisdiction exists. The solution proposed in the article sought to derive the maximum procedural utility from the transfer section, regarding the federal courts as both a unitary judicial system and a system of special courts "in and for" the states, administering state law. We simply cannot have all the advantages of such a dualist concept. I would suggest, however, that the safest and most likely approach to solution will be the second of the three originally suggested: that, except to the extent that the application of foreign law would be literally impracticable, the transferee court should apply the same law that would have been applied by the court in which the action was originally filed, provided such application is consistent with the Constitution.

In the article this was regarded as the least objectionable of the three proposed solutions. There were two objections to it: (1) Under it the federal courts would not have the power, which state courts have by virtue of the doctrine of *forum non conveniens*, to deprive the forum-shopping plaintiff of advantages accruing to him under the law of the forum although these might be thought to be advantages to which he was not equitably entitled. If the transfer section is to be administered not only as a simple provision for change of venue, but also as preserving the function of the doctrine of *forum non conveniens*, that power should exist; but it may be that because of the structure of the federal system we cannot treat the transfer section as performing both functions. It might be helpful if Congress were to amend section 1404(a), as it did amend section 1406(a), to give the district courts discretion to dismiss as an alternative to transfer—though that would make it necessary for the Court to resolve a question it was never required to resolve before section 1404(a) changed the conditions of the problem, *i.e.*, whether the *Erie* doctrine requires conformity to state law concerning dismissal on *forum non conveniens* grounds.³⁶ Beyond this, I can say only that there will be some—perhaps many—situations in which application of the law of the state of original filing will be so patently inappropriate that to apply it would violate the Constitution. I shall add a word as to this point in a moment. (2) This solution, where the state of original filing

³⁶ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

would dismiss on forum non conveniens grounds, will produce a difference of result in state and federal courts that will be difficult to reconcile with the *Erie* doctrine: dismissal in the state court would deprive the plaintiff of any advantage he may have sought in the law of the state of original filing, while the transfer section so administered will preserve such advantages. Again, dismissal as an alternative to transfer might provide helpful flexibility.

It seems likely, too, that even this solution will not operate satisfactorily without exceptions. Consider, for example, the case in which the action is barred by the time limitation of the state in which it is filed, but not (at the time of filing) in the state to which transfer is sought.³⁷ It is rather difficult to accept the proposition that after transfer to the more appropriate forum the action will be dismissed because the statute of limitations of the original forum still controls, although the action was filed in a court of the federal system in due time so far as the law of the appropriate forum is concerned. The constitutional considerations that are shortly to be mentioned may be of considerable help in this connection as well.

I hope it is evident from what has been said that I have abandoned all of the arguments that could possibly support the ultimate conclusion reached in the article, which visualized the gradual development by the federal courts of an independently reasoned body of conflict-of-laws principles destined ultimately to attain constitutional status, and so to bind the state courts as well.³⁸ Lest there be any misunderstanding, however, I specifically retract that conclusion. The Constitution places significant restrictions upon a state's freedom in the realm of conflict of laws, notably by the due-process³⁹ and full-faith-and-credit clauses, and also by the privileges-and-immunities⁴⁰ and equal-protection clauses. While significant, these restrictions are not comprehensive; they can never, in the absence of implementing legislation by Congress, provide the basis for a complete system of conflict-of-laws rules. They might even be described as rudimentary: all the courts can do under the authority of the unimplemented Constitution to control a state court's decision of conflict-of-laws cases (apart from questions of full faith and credit to judgments) is to denounce the application of the law of a state having no interest in the application of its policy, or to denounce unreasonable discrimination. Truly conflicting interests of the states cannot be judicially resolved.

Not all the conclusions suggested in the article were wrong, though the broad basis for them—that the federal courts should independently develop conflict-of-laws rules—was completely so. In certain of the cases considered the conflict-of-laws question could be determined by reference to the constitutional principles that have been mentioned, and, since the subject of discussion was forum non conveniens, such cases might be relatively numerous—more so,

³⁷ See 22 U. CHI. L. REV. at 481.

³⁹ U.S. CONST., amend. XIV, § 1.

³⁸ 22 U. CHI. L. REV. at 503.

⁴⁰ U.S. CONST., art. IV, § 2.

perhaps, than I was prepared to believe at the time. Thus when I advocated that the applicable statute of limitations be determined by reference to "enlightened principles of conflict of laws"⁴¹ I offered a meaningless guide for the decision of such cases as *Wells v. Simonds Abrasive Co.*,⁴² where the interests of two states are in conflict. But in the typical forum non conveniens situation the state in which the action is filed is the residence of neither party, nor did the injury occur there. For example, in *Headrick v. Atchison, Topeka & Santa Fe Ry.*,⁴³ the plaintiff was a resident of Missouri, the defendant was a Kansas corporation, and the injury occurred in California. New Mexico, the state in which the action was filed, had no conceivable interest in allowing the plaintiff a longer time to sue than was allowed by California law.⁴⁴ If the time allowed by New Mexico had been less than that allowed by California, a possible case could be made for New Mexico's application of its own law on the basis that it expressed a policy for the protection of the courts against the hazards involved in adjudicating stale claims; but no thinkable policy merely of court administration would support New Mexico's application of its own *longer* period of time. By applying its statute, New Mexico, without advancing any interest of its own, would defeat the interest of California in affording the protection of its shorter period to a foreign corporation doing business in the state, with respect to litigation arising out of the conduct of that business.

I suggested no specific solution for the *Headrick* case, although I probably had in mind some such concept of New Mexico's lack of interest in the matter. If a disposition on this basis could be reached in the federal courts only by the exercise of independent judgment by those courts as to conflict-of-laws rules I would not suggest it now; but I believe it is a disposition that can and should be rested on constitutional considerations. There is persuasive precedent for the view that a state which insists upon giving the plaintiff the benefit of its policies providing a longer time to sue than that allowed by a foreign state, where the forum has no interest in allowing the longer period and the foreign state has an interest in the application of the shorter, deprives the defendant of due process;⁴⁵ and where both are states of the Union the full-faith-and-credit clause may also be invoked.⁴⁶ I suggest, therefore, that while in general the law of the state of original filing will continue to govern after transfer, this will not be so where that state has no interest in the application of its law. It should follow

⁴¹ 22 U. CHI. L. REV. at 478.

⁴² 345 U.S. 514 (1953), discussed in 22 U. CHI. L. REV. at 500, n.232.

⁴³ 182 F.2d 305 (10th Cir. 1950), discussed in text at note 7 *supra*.

⁴⁴ The time allowed by Missouri was not mentioned.

⁴⁵ *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). But cf. *Hokanson v. Helene Curtis Industries*, 177 F. Supp. 701 (S.D.N.Y. 1959).

⁴⁶ While the *Dick* case involved a foreign contractual time limitation valid under the foreign law, that does not seem a material distinction. The question was left open by Mr. Justice Brandeis. 281 U.S. at 409, n.7.

that in a case of the *Headrick* type, tried in the state courts, New Mexico's application of its own longer limitation period should be subject to reversal on grounds of due process and full faith and credit.

This means that, at least in the typical *forum non conveniens* situation, the federal courts would have the power to deprive the plaintiff of advantages "inequitably" gained by resort to the inconvenient forum, and that disparity between the federal court and the state court in states adhering to the doctrine of *forum non conveniens* would be diminished, thus substantially alleviating a serious problem under the *Erie* doctrine. In addition, this consideration may provide at least a partial basis for dealing satisfactorily with the troublesome case in which the action is barred in the inconvenient forum in which it is filed but not (at the time of filing) in the appropriate forum. If the state of original filing has no interest in interposing the bar of its statute, then after transfer it should be immaterial that the action was filed too late from the standpoint of that state. All that will be required, then, to save the plaintiff's case, even if transfer comes after the limitation period in the convenient forum has expired, is a rationale for treating the commencement of the action in the foreign district as satisfying the statute of limitations of the transferee state.⁴⁷

Looking at conflict-of-laws problems in terms of the policies expressed by the respective laws and of the interests of the respective states in the furtherance of their policies (that is to say, regarding conflict-of-laws problems as essentially problems of construction and interpretation of "municipal" laws) has more than anything else helped me to appreciate the sound basis for the *Erie* doctrine—even the constitutional basis, which in 1955 I was disposed to treat derisively.⁴⁸ It is only by regarding the common law as a sort of *jus gentium*, according to which the rights of citizens of different states may be justly adjudicated, that a general federal common law can be contemplated, and that concept is totally inconsistent with the concept of laws as embodying governmental policy. If a rule as to the burden of proving contributory negligence, or a requirement of insurable interest, or a statute of limitations, states a governmental policy, it cannot be the policy of a national government that lacks power to regulate the matter, or that, having power, has chosen to leave regulation to the states. It must be the policy of the state. This becomes painfully clear to one who, having advocated the development of independent federal rules for choice of law, later comes to believe that the "science" of conflict of laws, properly understood, is essentially the process of construing or interpreting laws in such a way as to effectuate the policies embodied in them. I realize that I am here saying little more than Holmes said better: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign

⁴⁷ Cf. *Herb v. Pitcairn*, 324 U.S. 117 (1945), 325 U.S. 77 (1945); *Viaggio v. Field*, 177 F. Supp. 643 (D. Md. 1959).

⁴⁸ 22 U. CHI. L. REV. at 468-69.

or quasi-sovereign that can be identified. . . ."⁴⁹ "In my opinion the authority and only authority is the State, and if that be so, the voice adopted by the State as its own should utter the last word."⁵⁰ I can only say, in all humility, that what I learned imperfectly from wiser men I have learned better from my own mistakes.⁵¹

Finally, I incorporate by reference the late Mr. Justice Jackson's classic recantation in *McGrath v. Kristensen*, the concluding sentence of which is: "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."⁵²

⁴⁹ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218, 222 (1917) (dissenting opinion).

⁵⁰ *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 532, 535 (1928). (dissenting opinion).

⁵¹ Unfortunately, Holmes did not carry his positivism to its logical conclusion. For him, conflict-of-laws law remained a "transcendental body of law." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, *supra* note 49, at 533. See *Cuba R.R. v. Crosby*, 222 U.S. 473, (1912); *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904); *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 57 (1914), discussed in Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 69 (1958).

⁵² 340 U.S. 162, 176, 178 (1950) (concurring opinion).