in obtaining support if the husband remarries, since the second wife would be in a better position to get at the husband's assets.

Apart from the formal adequacy of the wife's legal remedies, the injunction may nevertheless be necessary to protect the interest of the state in the marriage relationship.[19] Although New York courts would not give full faith and credit to the Florida decree, the validity of the decree in New York may never be litigated, for a wife who asks for an injunction may not be willing to bring a declaratory judgment action. In that case, the foreign decree would in effect dissolve the marriage. By deterring the husband from procuring the out-of-state divorce, the injunction serves to prevent the state's interest from so being circumvented.[20] This consideration should be of paramount importance in New York where the underlying domestic relations policy has been a strict enforcement of marital status, as evidenced by strict divorce laws and refusal to give full faith and credit to "Reno" divorces. Denial of an injunction in the present case stands in marked contrast to this policy.

Federal Jurisdiction—Erie Railroad Co. v. Tompkins—"Federal Field" Doctrine—[Federal].—In a suit by an employee against an interstate railroad for back pay, the Supreme Court of Mississippi held that the cause of action was based upon the collective agreement between the Brotherhood of Railroad Trainmen and the railroad, rather than upon the oral contract of employment between the plaintiff employee and the defendant; and that therefore the six-year state statute of limitations was applicable.[1] Following the remand of the case for trial, plaintiff amended his pleadings so that an amount of more than $3000 was involved, whereupon defendant secured a removal to a federal court. The federal district court, holding itself bound under *Erie R. Co. v. Tompkins*[2] by the state court decision as to the foundation of the cause of action, rendered judgment for the plaintiff.[3] Upon appeal to the circuit court of appeals, *held*, the Congressional statute regulating some aspects of interstate railroad labor relations should be considered as making the entire matter a "federal field." Consequently even though there was no federal statute applicable to the particular situation, the federal court was not bound to follow the state court decision, but was free to make an independent determination. The cause of action was based upon the oral contract, and the three-year state statute of limitations should have been applied. Reversed and remanded.[4] *Illinois Central R. Co. v. Moore.*[5]

[19] 1 Beale, Conflict of Laws 502–3 (1935).

[20] However, in Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819 (1929), and Lowe v. Lowe, 265 N.Y. 197, 192 N.E. 291 (1934), the courts have shown an unwillingness to use the injunction to prevent adultery, or to stop an adulteress from acting as if she were the wife of a husband who had obtained a foreign divorce.

[1] Moore v. Illinois Central R. Co., 180 Miss. 276, 176 So. 593 (1937).

[2] 304 U.S. 64 (1938).

[3] Moore v. Illinois Central R. Co., 24 F. Supp. 731 (Miss. 1938).

[4] The remand was for the purpose of giving the plaintiff an opportunity to produce additional documents to show that the contract of employment between himself and the defendant was a written contract.

[5] 112 F. (2d) 959 (C.C.A. 5th 1940).

In view of the large number of fields of activity which are partially regulated by federal statutes,[6] this first application of the "federal field" doctrine[7] since the *Erie* case[8] brings to light an almost forgotten means of attaining much of that uniformity of regulation which has thus far been denied by the *Erie* case. Because of the close relationship of the subject matter of the instant litigation to matters actually covered by the federal statute,[9] it is true that the present case represents no great restriction on the operation of the *Erie* doctrine.[10] The significance of the case, however, lies not only in that it is the first revival of the "federal field" notion since the *Erie* case, but also in that it operates to attain uniformity in a much more direct manner than did previous cases applying the doctrine. Formerly, the "federal field" doctrine was applied only in instances where, after denying the applicability of a state statute[11] or de-

[6] Civil Aeronautics Act, 52 Stat. 973 (1938), 49 U.S.C.A. §§ 401–81 (Supp. 1939); Food, Drugs and Cosmetics Act, 52 Stat. 1040 (1938), 21 U.S.C.A. §§ 301–92 (Supp. 1939); Communications Act, 50 Stat. 56 (1937), 47 U.S.C.A. § 318 (Supp. 1939), 50 Stat. 189 (1937), 47 U.S.C.A. §§ 151, 153, 154, 303, 321, 322, 329, 351–62, 402, 504, 602 (Supp. 1939); Motor Carriers Act, 49 Stat. 543 (1935), 15 U.S.C.A. § 77c, 49 U.S.C.A. §§ 301–27 (Supp. 1939); Packers and Stockyards Act, 42 Stat. 159 (1939), 7 U.S.C.A. §§ 181–83, 191–95, 201–3, 205–17, 221–29 (1921); Tobacco Control Act, 49 Stat. 1239 (1936), 7 U.S.C.A. §§ 515–15K (1939).

[7] The "federal field" doctrine, which excludes state legislation only after Congress has occupied the field, is to be distinguished from the doctrine of exclusive federal powers, which, even in the absence of any federal statute, precludes any state legislation in a matter of national importance requiring uniform control. Cooley v. Board of Wardens, 12 How. (U.S.) 299 (1851); Leisy v. Hardin, 135 U.S. 100 (1890). See Bilké, The Silence of Congress, 41 Harv. L. Rev. 200 (1927).

[8] But cf. Hinderlider v. La Plata Co., 304 U.S. 92, 110 (1938) (apportionment of use of waters of an interstate stream as between two states, a federal question), and Board of Com'rs of Jackson County v. United States, 308 U.S. 343 (1939) (taxation of an Indian's land by state, a federal question). The cases are like the "federal field" cases, in that the decisions do not rest upon statute. They are unlike the "federal field" cases, however, in that the matters in litigation have long been considered "federal questions" in themselves.

A short time after the instant case was decided, another circuit court rendered a decision similarly based on the "federal field" doctrine. O'Brien v. Western Union Tel. Co., 113 F. (2d) 539 (C.C.A. 1st 1940), noted in 54 Harv. L. Rev. 141 (1940). It was held that since Congress has occupied the field of interstate communications, by enacting the Communications Act, the liability of a telegraph company in transmitting a defamatory message in interstate commerce is not to be determined under state law, but under the "federal common law."

[9] The Railway Labor Act, 48 Stat. 1186 (1934), 45 U.S.C.A. § 151 et seq., regulates the unionization of railroad employees and provides for the settlement of labor disputes before a National Railroad Adjustment Board. In O'Brien v. Western Union Tel. Co., 113 F. (2d) 539, 541 (C.C.A. 1st 1940) it was expressly stated that there was no federal statute on the particular question.

[10] While it has been stated that the Erie case was not intended to affect the "federal field" doctrine, McCormick and Hewins, The Collapse of "General" Law in the Federal Courts, 33 Ill. L. Rev. 126, 142–44 (1938), it is not necessary to consider that question here. It is sufficient for the purpose of this note to maintain that to the extent that the "federal field" doctrine is operative, the Erie doctrine must be inoperative.

[11] Adams Express Co. v. Croninger, 226 U.S. 491 (1913); New York Central R. Co. v. Winfield, 244 U.S. 147 (1917); Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919); Missouri P.R. Co. v. Porter, 273 U.S. 341 (1927).

cision[12] it was possible to decide the case on well-established federal common law principles. The decision of the court in each particular case did not contribute to the development of a uniform law; it operated only to prohibit a state rule from marring an already existing uniformity. In the instant case, however, there existed no general rule as to whether the cause of action was based upon an oral or a written contract; the decision, therefore, is an initial step toward uniformity.

The mere fact that the "federal field" doctrine operates to attain that uniformity which is denied by the *Erie* case does not mean, however, that the present decision is inconsistent with the *Erie* doctrine. The *Erie* case may be viewed as being primarily a means of effecting a clearer separation between state and national functions, with the prevention of uniformity on certain matters as but a necessary incident to the attainment of this greater aim. The *Erie* case itself, by denying to federal courts the power to apply federal rules of law in state matters, was a step in this separation process. A recent unanimous Supreme Court case carries the process still further: where the state court has not yet "settled" the law on a "local" matter, the federal courts cannot even hear the case, but must send it to the state court for decision.[13] The revival of the "federal field" doctrine in the instant case, it would seem, is entirely consistent with this development; it may well be expected that insistence upon the application of state law in state matters, unhampered by federal courts, would be accompanied by a desire that the regulation of federal matters be not hampered by state rules.

It may be objected, however, that the "federal field" doctrine, as applied in the present case, and as it would have to be applied in order for it to become of any great significance, requires a degree of "judicial legislation" which will not be looked upon with favor. The federal court must decide in the first instance whether the statute is broad enough that it may be said to have "occupied" the field; and, having affirmatively determined that question, the court, unguided by statute, must promulgate a rule to apply to the particular case. The departure from the statute in this instance is to be contrasted with the practice of the courts in determining, for purposes of removal, the analogous question of whether a "federal question" exists. For this latter purpose, Congressional action does not furnish the basis for the application of federal law, unless the construction of the statute itself is in issue.[14] Furthermore, Supreme Court expressions of dislike for judicial legislation have of recent years become increasingly insistent;[15] and those justices who have been most active in the develop-

[12] Southern Express Co. v. Byers, 240 U.S. 612 (1916); Hall v. Western Union Tel. Co., 108 S.C. 502, 94 S.E. 870 (1918); Nichols v. Western Union Tel. Co., 44 Nev. 148, 191 Pac. 573 (1910). See The Applicability of Federal Rules of Decision in State Courts in Suits for Injuries to Interstate Rail Passengers, 30 Ill. L. Rev. 373, 376 (1935).

[13] Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940), noted in 7 Univ. Chi. L. Rev. 727 (1940). But cf. De Long v. Jefferson Standard Life Ins. Co., 109 F. (ed) 585 (C.C.A. 5th 1940); Samuels v. Quartin, 108 F. (2d) 789 (C.C.A. 2d 1940).

[14] Gully v. First Nat'l Bank in Meridian, 299 U.S. 109 (1936); First Nat'l Bank v. Williams, 252 U.S. 504 (1920); Hopkins v. Walker, 244 U.S. 487 (1917); Myrtle v. Nevada, C. & O.R. Co., 137 Fed. 193 (C.C. Nev. 1905).

[15] See dissents of Justice Black in Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1937), and Gwin v. Henneford, 305 U.S. 434, 442 (1938); and the dissent of Justices Black, Frankfurter, and Douglas in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940).

ment of the *Erie* doctrine as a means of separating state and national functions[16] have also been most insistent that national regulations be made by Congress alone.

An additional problem is whether, after a decision such as the one in the present case, state courts will hereafter be required to apply the rule laid down by the federal court, just as state courts would be required to apply a federal statute. Instances, before the *Erie* case, in which state courts were required to apply a well-established federal court rule in preference to a state rule,[17] indicate that the state courts will be required to apply the rule of the federal decision.

There appears to be no direct authority on the analogous problem of whether, following a federal court statement that a particular statute is an occupation of the field, all questions within that field become "federal questions" over which federal courts have original jurisdiction. It is clear that the court in the instant case, having acquired jurisdiction by diversity of citizenship, found authority for applying a federal rule by giving an extended application to the federal statute. It might therefore be argued that the same extended effect should be given to that statute for the purpose of determining jurisdiction. This result could not be reached, however, without changing the practice of refusing to accept removal from a state court unless the construction of the statute is in issue.[18]

Finally, it may be questioned why the court in the present case, having independently determined that the cause of action was based upon the oral contract, proceeded to apply the state statute of limitations. It is true that where a cause of action arises directly under a federal statute which contains no period of limitation, state statutes of limitations are applied.[19] The reasoning in those cases, however, is that the Congress, by failing to set up a period of limitations, manifested an intention that the state statute should apply. In the instant case, Congress had not even set up the cause of action; and the same considerations which enable the court to say that the cause of action is a federal matter would seem also to dictate that there be a uniform statute of limitations. The failure of the court in the instant case to promulgate a definite period of limitations is probably explained on the ground that the universally statutory nature of definite periods of limitation causes the matter to be viewed as being entirely beyond the scope of the judicial function.

Insurance—Incontestability Clause—Age Adjustment Not a Contest within Statutory Incontestability Clause—[Federal].—An insurance policy, containing an incontestability clause was issued by the defendant upon the life of the insured. There was a specific exception as to age adjustment in the incontestability clause itself. Upon the death of the insured it was discovered for the first time that he had misstated his age. The defendant paid the amount due under the age adjustment clause[1] of the

[16] See Barnett, Mr. Justice Black and the Supreme Court, 8 Univ. Chi. L. Rev. 20, 31–32 (1940).

[17] See note 12 supra. [18] See note 14 supra.

[19] Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906).

[1] "*Age.*—If the age of the insured has been misstated, any amount payable under any of the provisions of this contract, shall be that amount which the premium charged would have purchased for the insured's correct age."