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The Choice Among State Laws in Maritime Death Cases

David P. Currie*

I. THE PROBLEM

In October, 1960, a jet airliner sucked a flock of starlings into its engines and dived into Boston Harbor. Litigation, not surprisingly, ensued. Preliminary skirmishing in some of the resulting suits over the appropriate place of trial, plainly promoted at least in part by the plaintiffs' desire to avoid the 20,000 dollar limitation of wrongful-death damages imposed by Massachusetts,¹ consumed several years. At length the Supreme Court held that transfer from the Pennsylvania to the Massachusetts federal court was not precluded by the fact that Massachusetts law forbade suits by foreign personal representatives, declared that Pennsylvania choice-of-law rules would determine which law governed damages even if the cases were transferred, and remanded for redetermination of the transfer motion.² A further squabble over the disinterestedness of a trial judge resulted in his disqualification by the court of appeals.³ Finally at least one of the claims went to trial in Pennsylvania, and the Third Circuit, in an opinion styled *Scott v. Eastern Air Lines*, inconoclastically pulled down the whole edifice by holding that federal law dictated the application of the Massachusetts damage limitation because the case was maritime.⁴ An en banc rehearing has been granted,⁵ and the subject is due for a canvass.

Of course, the case should never have been held to be maritime to begin with. The justification for the federal admiralty jurisdiction is, or ought to be, an interest in promoting the shipping industry.⁶

* Associate Professor of Law, University of Chicago.

1. See MASS. GEN. LAWS ch. 229, § 2 (Supp. 1966), and accompanying notes. For future accidents the limit was raised to \$30,000 in 1962 and to \$50,000 in 1965.

2. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

3. *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965).

4. 35 U.S.L.W. 2609 (3d Cir. March 30, 1967). Neither the Law Week excerpt nor the slip opinion (No. 16328) says whether the plaintiff in *Scott* had been a party to the earlier appeals, but the plane accident was the same.

5. So saith the court clerk, in Dec. 1967.

6. See G. GILMORE & C. BLACK, *ADMIRALTY* 27 (1957).

The courts have not accepted the plausible argument that the entire air transport business comes within this purpose, and, apart from matters that affect water commerce directly, such as salvage and collisions with ships, the fact that a plane crashes in water instead of on land is irrelevant to federal policy. The absurdity of the traditional location test for admiralty jurisdiction in tort is strikingly emphasized by the fact that the same Third Circuit opinion that characterized as maritime a negligence claim against an airplane engine manufacturer because the plane had crashed into H₂O threw out a warranty claim against the same defendant for the same losses caused by the same acts because that claim sounded in contract,⁷ and the test of jurisdiction was therefore not locality but subject-matter.

But I digress, for this article is about choice of law, not jurisdiction. Suffice it that the court of appeals was prepared to equate a damp Convair with a Cunarder.^{7A} It is a very interesting fact that in admiralty cases, unlike diversity cases, the governing substantive law, in whatever court, is predominantly federal; the Supreme Court has consistently held that the grant of admiralty jurisdiction to federal courts by the Constitution gives federal judges power to create federal decisional law,⁸ although the similarly worded diversity grant does not.⁹ If this distinction is justifiable, it must be because of the different purposes the Court has perceived in the two jurisdictional provisions. The admiralty clause is said to represent a policy of uniform federal regulation of the shipping industry, while diversity jurisdiction exists only to protect nonresidents from local prejudice in the administration of state law.¹⁰

Yet the ascendancy of federal law in maritime cases has never been absolute. Early in the nineteenth century, for example, the federal courts enforced state-created liens for supplies and repairs furnished a vessel in her home port,¹¹ even in the heyday of federal maritime supremacy States were permitted to give workmen's compensation to workers injured on navigable waters when the facts were so "local" that the policy of uniformity was not threatened,¹² and to apply state

7. *Weinstein v. Eastern Airlines*, 316 F.2d 758 (3d Cir. 1963). This decision too arose out of the same plane crash. For detailed consideration of the jurisdictional issue see D. CURRIE, *FEDERAL COURTS* ch. 4 (to be published 1968).

7A. I am aware that the plane in the actual case had been manufactured by Lockheed, but I am a poet.

8. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

9. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

10. See, e.g., *id.*; *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 *Sup. Ct. Rev.* 158-65.

11. E.g., *The Planter (Peyroux v. Howard)*, 32 U.S. (7 Pet.) 324, 340-41 (1832).

12. E.g., *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

law to enforce an arbitration clause in a maritime contract;¹³ States have been allowed to assess maritime employers for unemployment-compensation contributions¹⁴ and to apply a smoke-abatement code to interstate ships;¹⁵ state statutes of limitation have been referred to in determining the basic period for laches in maritime suits.¹⁶ Perhaps the most extreme application of state law in recent times was the 1955 decision respecting the effect of harmless warranty breaches in a maritime insurance policy.¹⁷ Finally, and most pertinent to the *Scott* case, ever since *The Hamilton*¹⁸ in 1907 the Supreme Court has made it clear that state wrongful-death statutes may be applied in maritime cases.

The question naturally arises: When a federal court applies state law in a maritime case, how does it decide which state law to apply? Similar questions arise outside the maritime context whenever state law is referred to in the interstices of federal. How should a federal court determine, for example, which state's statute of limitation to invoke against a federal claim created by a statute lacking a limitation period,¹⁹ or which state's law to use in ascertaining whether an illegitimate is a "child" entitled to renew a copyright after the death of its owner?²⁰ It was this sort of problem that confronted the Third Circuit in *Scott*.

The *Klaxon* decision made clear that in diversity cases federal courts were to apply the choice-of-law rules of the states in which they sat.²¹ This case has been defended on the ground, among others, that it minimizes forum shopping between federal and state courts in the same state.²² It has been criticized for creating unpredictability

13. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924).

14. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943).

15. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

16. *See Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1956).

17. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

18. 207 U.S. 398 (1907).

19. *See UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Since Indiana was "both the forum State and the State in which all operative events occurred," there was "no occasion to consider whether such a choice of law should be made in accord with the principle of *Klaxon* . . . or by operation of a different federal conflict of laws rule." *Id.* at 705 n.8.

20. *See DeSylva v. Ballentine*, 351 U.S. 570 (1956). "[T]he only State concerned," said the Court, "is California." *Id.* at 581. Some hint of the approach the Court might take in such a case if several states were concerned may be found in the statement, for purposes of choosing among various California definitions of "children," that because the statutory purpose was "to provide for the family of the author after his death" the question was one "of the descent of property." *Id.* at 581-82. But such a transplantation of categories is dangerous.

21. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

22. *See, e.g.*, the memorandum of Professor Cavers in ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 158-59 (Tent. Draft No. 1, 1963).

by promoting shopping among federal courts in different states and for shutting off the contribution of the neutral federal judges in resolving interstate conflicts.²³ This criticism presupposes three debatable propositions: that federal courts have the tools to resolve these conflicts; that it is within the purpose of the diversity grant for them to do so; that the removal statute²⁴ should be amended (beyond the present diversity policy of protecting nonresidents from bias) to permit a defendant to remove a case filed in his own state court. In any event *Klaxon* has been applied to interpleader cases²⁵ despite the fact that its intrastate-forum-shopping rationale was inapplicable since the parties could not all have been sued in the nearby state court. Further, in *Van Dusen v. Barrack*, an earlier course of the litigation still boiling in *Scott*, the Supreme Court refined *Klaxon* in accord with its holding that the case should be decided as it would have been if there were no federal court: After a case is transferred from one federal court to another under 28 U.S.C. section 1404(a), the choice of law should generally be made under the rules of the state where the action was originally filed.²⁶

However, in all the foregoing cases the Court was considering situations in which, under *Erie R.R. v. Tompkins*,²⁷ the federal court sat as a disinterested forum, constitutionally and by congressional command impotent to meddle with the merits. This principle did not dictate the *Klaxon* decision; for, within broad limits, *Erie* is satis-

23. See, e.g., H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 634-36 (1953).

24. 28 U.S.C. § 1441 (1964).

25. *Griffith v. McCoach*, 313 U.S. 498 (1941). The availability of nationwide process in interpleader greatly enhances the danger of interstate forum shopping. See also Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROB.* 754, 786-87 (1963): "When power to select the forum is lodged not in either of the adverse parties but in a stakeholder who is theoretically disinterested, but actually in excellent position to play games of collusion, mandatory determination of the case in accordance with the choice-of-law rules of the forum is indefensible."

26. 376 U.S. 612 (1964). The Court quite correctly cautioned that matters might be different if transfer were sought by the plaintiff, or from a court in which the suit was improperly brought (where possibly the state court would lack jurisdiction), or if the transferor state would invoke forum non conveniens. See ALI, *STUDY OF THE DIVISIONS OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, pt. I, proposed §§ 1305(c), 1306(c) (Official Draft 1965), and the criticism of the ALI proposals in Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROB.* 754, 790-94 (1963). Compare the question of which state's law to use when parties not subject to state court process are brought into federal court on claims pendent to federal causes for which nationwide service is provided, or by service within 100 miles of the court in impleader as authorized by Rule 4(f), *FED. R. CIV. P.* See Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 *LAW & CONTEMP. PROB.* 732, 750-52 (1963). See also Hill, *The Erie Doctrine and the Constitution*, 53 *Nw. U.L. REV.* 541, 545, 553-54, 557-58, 564 (1958), discussing some of the above situations as well as the general question whether, in light of *Erie's* purpose of respect for state interests, *Klaxon* should apply when the forum state is disinterested.

27. 304 U.S. 64 (1938).

fied as well by the use of one state's law as by another's.²⁸ Yet plainly *Klaxon* is an outgrowth of *Erie*. Perhaps *Klaxon* should not be followed when, as in maritime cases and those based on federal statutes, the *Erie* compulsion to apply state substantive law is absent.

When the choice is between federal law and the law of a foreign country, it would be silly to follow state choice-of-law rules. The Supreme Court has made it clear that this question involves essentially the construction of the federal law in the light of foreign interests, and there is no reason to inject disuniformity.²⁹ Thus, in *Siegleman v. Cunard White Star, Ltd.*,³⁰ the Second Circuit expressly declared *Klaxon* inapplicable in choosing between federal and English law respecting the effect of a time limitation on injury claims in a contract of ocean passage. Since the claim was federal, uniformity could be assured without *Klaxon*: even a state court might be required to apply federal choice-of-law principles. Perhaps, the court conceded, *Klaxon* might apply even in admiralty if, as in wrongful-death cases, the claim were based upon "a state-created right." In such a case, however, "it is possible that the federal court would not be bound by the state's choice-of-law rule, unless the rule limited the scope of the right."

Scott v. Eastern Air Lines presented the problem left unsolved in *Siegleman*: choosing between Massachusetts and Pennsylvania laws respecting damages for a wrongful death in the admiralty jurisdiction. Deciding whether in this kind of case *Klaxon* should be followed requires discussion both of the reasons for applying state wrongful-death laws in admiralty and of modern choice-of-law learning.

II. WRONGFUL DEATH IN ADMIRALTY

Consideration of wrongful death in admiralty takes us back to the 1886 case of *The Harrisburg*.³¹ The Court there held that the maritime law, like the common law, historically made no provision for recovery in death cases. Moreover, the Court refused to create a maritime remedy because "it is the duty of courts to declare the law, not to make it." As Mr. Justice Brennan later made clearer by analogy, this does not suggest a substantive policy opposing relief but rather indicates "the felt necessity of having some statutory definition"³²—a

28. *Erie*, for example, would be just as compelling if there were only one federal court, and that located in Washington, D.C.; but nobody would ever have conceived of *Klaxon*.

29. See *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

30. 221 F.2d 189, 192-93 (2d Cir. 1955).

31. 119 U.S. 199, 212-14 (1886).

32. *The Tungus v. Skovgaard*, 358 U.S. 588, 604 (1959) (concurring opinion). This statement is further confirmed by the results of the cases, for state death statutes would never have been applied if they offended federal policy.

conviction, perhaps, that formulating the details of such a remedy was a task unsuitable for the judiciary. In this state of affairs two quite different reasons for resorting to state law are suggested. The first, stated by Judge Addison Brown in an early case, is that state law could be applied because it serves state interests in protecting life and in averting "the dependency or pauperism of the survivors" without impairing either substantive federal policy or the general federal policy of uniformity in maritime affairs.³³ The second, by analogy to decisions applying state time limitations in federal statutory cases,³⁴ is that state law is employed to fulfill a federal interest in giving damages for wrongful death without requiring the courts to formulate arbitrary beneficiary lists or damage limitations.

It was a dispute over which of these reasons underlies the use of state wrongful death laws that divided the Supreme Court in the important case of *The Tungus*.³⁵ A workman named Skovgaard had met his Maker in a shipboard vat of hot coconut oil, and his widow sought relief on the ground that the ship had been unseaworthy. Had Skovgaard survived, he could have recovered under the maritime law on this ground. But the Justices all agreed there could be no recovery for death except under the state statute; and "if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction," the Court quoted from *The Harrisburg*, "it must take the right subject to the limitations which have been made a part of its existence."³⁶ Relief was allowed because of the decision below that New Jersey would construe its statute to encompass an unseaworthiness case. Mr. Justice Brennan, joined by three other Justices, argued that the state statute merely provided a remedy for enforcing the federal obligation to keep the ship seaworthy, and therefore that it was immaterial whether or not the state would give relief in the particular case: "Any state statute which generally provides remedies for tortious death can and should be drawn upon by the maritime law in enforcing the federal cause of action."³⁷

Mr. Justice Brennan's view was simply untenable if state death statutes are applied out of deference to state policy: "[R]ealistically it seems that to apply 'state law' in a situation to which the state would hold it inapplicable is not to apply state law at all."³⁸ But Mr. Justice Brennan's position was based upon a contrary premise. In cases applying state statutes of limitation, he explicitly reasoned, the death laws are utilized to further federal rather than state policy:

33. *The City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893).

34. See *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961).

35. *The Tungus v. Skovgaard*, 358 U.S. 588 (1959).

36. *Id.* at 592.

37. *Id.* at 603.

38. *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 151 (1959).

"It is the federal maritime law that looks to the state law of remedies here, not the state law that incorporates a federal standard of care."³⁹ On this hypothesis it seems clear that the Court may pick and choose at will among the provisions of state law in order to implement federal policy.⁴⁰

From Mr. Justice Brennan's position it would follow that, just as the federal court would be free to choose those parts of a state's law that best fulfilled federal needs, it would be free to choose among the laws of the several states on the same independent basis. In a case like *Scott*, on this view, the choice seems obvious. Since Massachusetts' antipathy to full indemnity dates from an era in which wrongful death was a mistrusted novelty and since arbitrary damage limitations have no place in present policy, Pennsylvania law should be chosen because it more fully effectuates the federal interest in providing compensation for the victims of maritime negligence.⁴¹

However, Mr. Justice Brennan's hypothesis was rejected in *The Tungus*, where the Court made clear that it applied state death laws in deference to state policy:

The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor

39. *The Tunga v. Skovgaard*, 358 U.S. 588, 601 (Brennan, J., dissenting in part).

40. Compare, for example, the recent and controversial decision in *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), enforcing a foreign remedy for the death of a resident of the forum state but ignoring the foreign ceiling on damages as contrary to public policy. After initially holding this procedure unconstitutional on grounds comparable to those of the *Tungus* majority, the Second Circuit reversed itself en banc, holding that because the forum state had "a legitimate constitutional interest in the application of its own rules of law" it was free to "absorb" the foreign rule "into the corpus of New York law" without binding itself to respect the limitation. *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131 (2d Cir. 1962), *rev'd on rehearing*, 309 F.2d 553 (2d Cir. 1962). *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965), supports this analysis.

41. Indeed, on this reasoning Pennsylvania law or another like it should be chosen even if the case has nothing to do with Pennsylvania, because no maritime case should be relegated to the unsuitable Massachusetts law and because of the interest of uniformity. Chinese law, if substantively appropriate, could equally well be used, for in essence what the Court would be doing is creating a federal remedy by copying someone else's law. The question naturally arises why the federal courts should be so modest about their ability to create the remedy without referring to any other law (Chief Justice Chase on circuit was willing to create the death action. *The Sea Gull*, 21 F. Cas. No. 12, 578 (C.C.D. Md. 1865); *cf.* *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 713-14 (1966) (White, J., dissenting) (statute of limitation)), or why they do not refer to the uniform wrongful-death provisions of the federal Jones Act or Death on the High Seas Act. *Cf.* *Giddens v. Isbrandtsen Co.*, 355 F.2d 125 (4th Cir. 1966) (Jones Act, not state, time limitation a model for laches in seaman's injury suit). Mr. Justice Brennan's answer is based upon some traces of legislative spoor—whose importance I think he exaggerates—that suggest a congressional deference to state interests in delineating the schedule of beneficiaries, 358 U.S. at 607-08. The *Tungus* majority read the same history as a total disclaimer of federal interest. *Id.* at 593. See *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 152 (1959).

even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.⁴²

The Supreme Court has thus settled that the use of state death laws in admiralty serves state interests alone; no federal maritime policy, therefore, directs the choice among various state laws in these cases. It is true that care must be taken that the state law chosen does not infringe specific federal policies or unduly impair maritime uniformity, but this fact does not serve to distinguish diversity cases, for even there state laws cannot be applied if they are unconstitutional. The only difference between *Scott* and *Klaxon*, therefore, is that state substantive law is referred to in the former case out of comity and in the latter by compulsion. In terms of *Klaxon's* own policy of reducing forum-shopping by assuring the same outcome regardless of forum, this difference is crucial. Given the limitations of the current removal statute, the doubt whether diversity's purpose includes the resolution of interstate conflicts, and the constitutional inability of federal courts to meddle with substantive law, nothing the Court could have done in *Klaxon*, short of a radical tightening of constitutional strictures, would have assured uniformity; the choice was between intrastate and interstate forum-shopping. In maritime cases, however, complete uniformity of result can be achieved by imposing a federal choice-of-law doctrine upon the state courts under the law-making powers of admiralty.

III. MODERN CHOICE-OF-LAW ANALYSIS

The preceding discussion demonstrates that those who believe that federal courts can effectively arbitrate between conflicting state laws should oppose the application of *Klaxon* in maritime death cases. Modern choice-of-law thinking, however, suggests this task may not be so easy as it might appear.

Once upon a time choice-of-law rules were viewed as a set of laws quite independent from the substantive rules among which they selected. The validity of a contract, for example, was to be determined by the law of the place of contracting—or, some said, by the law of the place of performance, or by the law chosen by the

42. 358 U.S. at 593. The position that state interests may justify applying state death laws was reaffirmed in *Hess v. United States*, 361 U.S. 314 (1960), in which the Court permitted relief under a state wrongful-death law providing a more stringent standard of conduct than that of the maritime law. Because the defendant's acts did not violate any federal duty, recovery served only state and not federal policies. Yet Mr. Justice Brennan's concurrence in *Hess* was not inconsistent with his view in *Tungus*, for he was willing to allow relief where either federal or state policy so demanded.

parties.⁴³ Whether the law selected granted or denied recovery was deemed irrelevant; the content of the law was examined only after the choice had been made. But this approach overlooked the teaching of Holmes and others that laws are adopted in order to accomplish social purposes⁴⁴ and should be applied accordingly. Since enlightened judges for some time had been construing statutes in the light of legislative policy,⁴⁵ it was only a matter of time until this process was applied to cases involving more than one jurisdiction.

The recent California decision in *Reich v. Purcell*⁴⁶ is illustrative. Two Ohio residents were killed by the negligence of a Californian in a Missouri collision. Missouri limited wrongful-death recovery to 25,000 dollars, and under the traditional theory this limitation would have been applied because Missouri was the place of the tort. But, by construing the Missouri law in the light of its purpose, the California court held the limitation inapplicable:

Missouri's limitation on damages expresses an additional concern for defendants, . . . in that it operates to avoid the imposition of excessive financial burdens on them. . . . We fail to perceive any substantial interest Missouri might have in extending the benefits of its limitation of damages to travelers from states having no similar limitation. . . . Under these circumstances giving effect to Ohio's interests in affording full recovery to injured parties does not conflict with any substantial interest of Missouri.⁴⁷

This analysis puts quite another light not only on *Scott* but on *Klaxon* as well. For the California court's position, increasingly accepted by the courts, is that choice-of-law is not an independent body of rules but is intimately bound up with the content and policy of the competing substantive laws. In *Reich*, for example, the question whether Missouri's statute applies to an accident involving only nonresidents was a question of Missouri law, just as was the question whether the statutory term "wrongful act" encompasses unseaworthiness or a manufacturer's strict liability for harm caused by defective products. Thus the choice between state laws in a federal court is in very large part a matter of state law; but not necessarily, as *Klaxon* held, of the law of the forum state.⁴⁸

Applying this analysis to *Scott*, one must first determine by interpretation the interstate reach of the Pennsylvania and Massachusetts

43. See the discussion of these three roles in 2 J. BEALE, CONFLICT OF LAWS 1077-1100 (1935).

44. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-69 (1897).

45. E.g., *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944).

46. 432 P.2d 727, 63 Cal. Rptr. 31 (Sup. Ct. 1967), discussed in a symposium in 15 U.C.L.A. L. REV. (1968).

47. *Reich v. Purcell*, 432 P.2d 727, 63 Cal. Rptr. 31 (Sup. Ct. 1967).

48. See B. Burrie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 787 (1963).

damage provisions. Insofar as Pennsylvania law is concerned the Pennsylvania Supreme Court has substantially answered the question, holding in *Griffith v. United Air Lines*⁴⁹ that Pennsylvania law applied to permit full indemnity for the death of a Pennsylvanian in a Colorado plane crash, notwithstanding a Colorado provision limiting damages to those incurred before death:

Pennsylvania's interest in the amount of recovery . . . is great. The relationship between decedent and United was entered into in Pennsylvania. Our Commonwealth, the domicile of decedent and his family, is vitally concerned with the administration of decedent's estate and the well-being of the surviving dependents to the extent of granting full recovery, including expected earnings. This policy is so strong that it has been embodied in the Constitution of Pennsylvania . . .⁵⁰

Griffith differs from *Scott* in that Pennsylvania was the origin of the flight in the former case and the destination in the latter. This hardly seems relevant to Pennsylvania's announced policy of compensating the dependents of its wrongfully killed residents, and the decedents in both cases were Pennsylvanians. Where the ticket was bought does not appear from the *Scott* opinion, but the prevalence of round-trip arrangements suggests that even in this case the "relationship" may have been entered into in Pennsylvania, if that is important.⁵¹

Griffith indicates also that Pennsylvania would not be likely to defer to Massachusetts policy in a case like *Scott*, for the court considered not only the possibility that Colorado's limitation expressed a policy, inapplicable in Pennsylvania, of relieving Colorado courts from the task of computing conjectural damages, but also the possibility that

49. 416 Pa. 1, 203 A.2d 796 (1964).

50. *Id.* at 24-25, 203 A.2d at 807.

51. Professor Cavers has argued that the victim's residency in the state is not enough to bring a case within a state's policy of granting relief for wrongful death. Consequently he insists that the more generous law of the victim's home state should not be applied unless that state is also the one "in which a relationship has its seat." D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 166, 167-76 (1965). In part, one suspects Mr. Cavers' caution is inspired by the danger of unfair surprise. *Cf.* *People v. One 1953 Ford Victoria*, 48 Cal.2d 595, 599, 311 P.2d 480, 482 (1957), where the court on this ground refused to extend to a Texas lender a California law requiring automobile mortgagees to make character investigations designed to reduce the narcotics traffic: "A person financing the sale of an automobile in Texas for use exclusively in that state . . . cannot reasonably be expected to familiarize himself with and comply in Texas with the statutes of the 48 or more jurisdictions into which the automobile could possibly be taken . . ." But this element, the Pennsylvania court thought, was lacking in *Griffith*. "United . . . does business in and flies over other States, including Pennsylvania, which do not limit recovery. Certainly, United could reasonably anticipate that it might be subject to the laws of such states and could financially protect itself against such eventuality." 416 Pa. 1, 24, 203 A.2d 796, 807 (1964). Whether or not this argument counters Professor Cavers' objections in his hypothetical cases, it seems to fit *Scott* as well as *Griffith*. In terms either of expectations or simply of significant contacts it should be sufficient that Pennsylvania was the flight's destination.

the limitation was "intended to protect Colorado defendants from large verdicts." Nevertheless the court applied Pennsylvania law, finding Pennsylvania's interest great and minimizing Colorado's by pointing out that "although United obviously does some business in Colorado, it is not domiciled there."⁵² Eastern, the defendant in *Scott*, is in the same position with regard to Massachusetts, and thus it seems quite probable that Pennsylvania would apply its own law to a case like *Scott*.

Things are less clear from the Massachusetts side of the picture. It may still be Massachusetts law that the Massachusetts limit applies to all accidents occurring in that state,⁵³ although in some cases this would violate modern notions of full faith and credit.⁵⁴ On an interest analysis Chief Justice Traynor's reasoning in *Reich v. Purcell*⁵⁵ suggests the purpose of the limitation is likely to be the protection of Massachusetts defendants from excessive liability. Just who is a "Massachusetts defendant" is not clear, but plainly the term includes Northeast Airlines (the defendant in the famous *Kilberg* case),⁵⁶ which is incorporated in that state and has its principal place of business there.⁵⁷ The *Griffith* opinion suggests that the place of incorporation may be critical; but, even apart from possible equal-protection problems,⁵⁸ a state might reasonably want to extend its financial protection to foreign corporations engaged in local business, if only for the selfish purpose of encouraging their operations.⁵⁹ Indeed the place of incorporation is quite likely (as in *Scott*, where it was Delaware) to be a state without substantial connections with the enterprise, or even without any connection at all.⁶⁰ Whether

52. 416 Pa. 1, 24, 203 A.2d 796, 807 (1964).

53. Cf. *Medeiros v. Perry*, 332 Mass. 158, 159, 124 N.E.2d 240, 241 (1955), a guest-statute case: "Since the accident happened in Rhode Island, the law of that State governs the question of liability;" *First Nat'l Bank v. Fairhaven Amusement Co.*, 347 Mass. 243, 244, 197 N.E.2d 607, 608 (1964) (statute of frauds): "The contract was made in this Commonwealth, . . . and its enforceability is to be determined by the law of Massachusetts." The First Circuit was more optimistic in *Shanahan v. George B. Landers Constr. Co.*, 266 F.2d 400 (1959), for it predicted that Massachusetts would refuse to follow several possible single-contact rules for determining the law governing repossession of a power hoe. Although the court forgot to say why it made the choice it did, the opinion lists various contacts after the manner of the worst New York opinions. See *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441 (1961).

54. E.g., if both parties were from Pennsylvania. See D. Currie, *Reich v. Purcell*, 15 U.C.L.A.L. Rev. (1968).

55. 432 P.2d 727, 63 Cal. Rptr. 31 (Sup. Ct. 1967).

56. *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), discussed in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 690-721 (1963).

57. See *Gore v. Northeast Airlines*, 373 F.2d 717, 719 (2d Cir. 1967).

58. See B. CURRIE, *supra* note 56, ch. 11.

59. *Id.* at 704.

60. The New York Post Corporation, for instance, is incorporated in Delaware. See *Buckley v. New York Post Corp.*, 373 F.2d 175, 177 (2d Cir. 1967). For a case study of the danger of basing an interest upon paper incorporation or ship registration,

Massachusetts, on a policy analysis, would hold its damage law to extend to Massachusetts accidents of a Delaware corporation doing considerable Massachusetts business but with its principal place of business perhaps in New York⁶¹ is an unanswered question.

Assuming both Massachusetts and Pennsylvania would apply their own damage rules in *Scott*, we are confronted by what seems to be a true conflict in state policies. Only at this point, it seems to me, is it proper to speak of a federal doctrine of choice-of-law; for up to this point the issue has been one of the construction of Pennsylvania and Massachusetts laws. But here the argument for an independent federal decision becomes strong. If forum-shopping is to be avoided, such an independent decision is necessary, because otherwise each state may simply apply its own law. Additionally, the disinterested federal court is ideally situated to make an impartial choice. But here too, a practical question arises: How is the court to make the choice? Brushing aside the unconvincing argument that choosing between competing state interests is undemocratic,⁶² which law should be chosen in *Scott*? If the choice cannot rationally be made, the state courts have the escape route of applying their own law, though this causes an undesirable lack of uniformity; but the federal court, with no law of its own to apply, is in a very uncomfortable situation.⁶³ Consequently, if the conflict cannot be resolved, there is something to be said for resorting to *Klaxon* when all else fails, in order at least to minimize intrastate forum-shopping.⁶⁴

The magnitude of this problem is not so great as it may appear, for by more discriminating comparative analysis of the importance to each state of enforcing its policy in the particular case, a choice may often be made even in an apparent case of true conflict.⁶⁵ This type of analysis was explicitly employed by the Pennsylvania Supreme

see D. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34.

61. More specific information on this question could perhaps be obtained from decisions determining the "principal place of business" under 28 U.S.C. § 1332(c) (1964), although it is not certain that this term should have the same meaning for Massachusetts limitation policy as for diversity jurisdiction. Moreover, the difficulty and arbitrariness of making decisions under § 1332(c), see *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960), suggest it might be more trouble than it is worth to incorporate the principal-place-of-business test into the interpretation of Massachusetts damage law.

62. See B. CURRIE, *supra* note 56, at 124, 272-80.

63. See B. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963).

64. This unpalatable suggestion is even less digestible when, as in interpleader and in admiralty suits in rem, the courts of the state in which the federal suit is brought may not be open at all, or when the state court itself is disinterested.

65. See Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); B. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757-59 (1963).

Court in *McSwain v. McSwain*⁶⁶ to forbid an interspousal suit upon a Colorado accident because of Pennsylvania's interests in preserving the harmony of Pennsylvania families and in protecting their insurers from collusion:

[A]lthough Colorado, as the state of both the conduct and injury could assert an interest in this litigation in order to further the deterrence of negligent conduct on its highways and to secure, in the event of insurance, a fund for the payment of local creditors, those interests would not be disserved by the application of the Pennsylvania rule of interspousal immunity in the instant case.

. . . Since negligent operation of a motor vehicle invariably involves some hazard to persons beyond the family relationship, potential liability still remains to deter unreasonable conduct on the part of those able to insulate themselves from intrafamily suit.

Moreover, with regard to Colorado's interest in securing a fund for the payment of local medical creditors, that interest would not be adversely affected under the facts of the instant case. Since the accident resulted in near immediate death, significant debts are not likely to have been incurred in Colorado.⁶⁷

When this comparative analysis is feasible, I see no reason why the federal courts should not employ it in maritime wrongful-death cases. This point is obvious if both states would agree that the same law applies, for then as a matter of state law there is no conflict. The same process should be followed regardless of whether the states would agree, for comparative analysis enables the court to assure a uniform result in every forum (viewing the question as one of federal law and the answer therefore as binding on state courts), and it most fully comports with the Supreme Court's decision in *The Tungus* that in maritime death cases state interests should be effectuated.⁶⁸

66. 420 Pa. 86, 215 A.2d 677 (1966). *Accord*, *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781 (1966). *Cf.* the pioneer opinion in *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906 (1961), narrowly construing a California statute of frauds in the light of Nevada policy and the parties' expectations.

67. *McSwain v. McSwain*, 420 Pa. 86, 96, 215 A.2d 677, 682-85 (1966).

68. I agree with Professor Baxter, see note 65, *supra*, at 33, that this principle should perhaps be extended to diversity cases by holding the comparative-impairment principle dictated by the full faith and credit clause. So long as that clause is read to give greater freedom than this to the states, however (see the permissive dictum in *Richards v. United States*, 369 U.S. 1, 15 (1962), and *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906 (1961), where the California court deferred to Nevada policy through declaring its constitutional freedom to follow its own), the *Erie* principle of maximum respect for state interests, promoted by the federal courts' independent analysis, competes against the *Erie* principle against intrastate forum-shopping. Both Baxter and Professor Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A.L. Rev. 1191 (1967), argue that the federal courts should repudiate *Klaxon* in diversity cases even in the absence of a constitutional directive. Horowitz would base a federal common law of conflicts upon such analogies as *Banco National v. Sabbatino*,

I have difficulty applying the comparative-impairment principle to the *Scott* problem. Professor Cavers has argued that in the very similar *Kilberg* case, involving a New Yorker killed in Massachusetts while flying from New York on a plane belonging to a Massachusetts corporation, all courts should apply New York's full-indemnity provision:

[N]ortheast also operates out of New York City, and there it entered into a relationship, carrier and passenger, with a New York citizen, undertaking to carry him to Massachusetts, a venture that exposed him to the risk of death if Northeast failed to complete the trip successfully. For New York to assert that the purpose of its constitutional ban on wrongful death recovery ceilings extended to this case seems to me plainly reasonable. New York's concern with the relationship does not stop when the New York State boundary is crossed. Yet, if New York cannot continue the financial protection it prescribes when the plane leaves New York, then the state's effective control over the relationship is seriously impaired.

[T]he concern of Massachusetts would seem confined to one party to the relationship, the airline. Though that party would lose the benefit of the Massachusetts ceiling, giving preference to the law removing the ceiling would still leave the ceiling on wrongful-death recoveries intact in most Massachusetts cases. . . . [T]he ceiling would continue to apply to nearly all actions based on in-state wrongful deaths: it would apply not only to all such actions involving Massachusetts persons but also where either the person causing the death or the person killed had a home in, or a close business connection with, Massachusetts, except where the existence of an out-of-state relationship justified resort to the other state's more protective rules.⁶⁹

If this is persuasive, and if an equally certain choice can be made on the slightly different facts of *Scott*, then by all means the federal court should make that choice. However, if the competing interests appear evenly balanced, in this case or in another, a further tool must be found. Since state interests in such a case would be equally served by either result, it is appropriate to consider other relevant policies such as the desire for uniformity and predictability. These

376 U.S. 398 (1964), and Baxter upon his reading of the purpose of diversity and of the concluding phrase of 28 U.S.C. § 1652. Baxter, *supra* note 65, at 34-42. *But see* CAVERS, *supra* note 51, at 217-18, suggesting that to impose federal choice-of-law rules might be incompatible with the freedom the Supreme Court has allowed the states under the full faith and credit clause. The American Law Institute proposes to free the diversity court from *Klaxon* in interpleader cases and those within the projected "dispersed parties jurisdiction." See Study of the Division of Jurisdiction Between State and Federal Courts, pt. I, 39, 46 (Official Draft 1965). Professor Cavers approves because "in this limited body of cases," where jurisdictional barriers preclude state courts from acting, federal judges "can contribute to the development of doctrine from a national viewpoint without introducing new elements of uncertainty into the state law or curtailing the exercise of substantive state power." CAVERS, *supra* note 51, at 223-24.

69. CAVERS, *supra* note 51, at 167-69.

policies would be well served by a totally arbitrary rule that is simple to administer, as some of the first Restatement's rules were not.⁷⁰ Perhaps the best answer would be to apply the law of the state first, in alphabetical order.⁷¹

Professors von Mehren and Trautman have suggested, among other things, that the courts in refractory cases should prefer a policy that is "emerging" to one that is "on the wane," on the ground that the state with the latter policy may not hold it very strongly.⁷² I have my doubts about the propriety and workability of a court's attempting to divine the expiration of unrepealed statutes in domestic or false-conflict cases.⁷³ However, I am not certain that the von Mehren-Trautman suggestion amounts to overruling the legislature in true-conflict cases, for the problem is one of construction in the light of circumstances very probably unforeseen by the legislature. Nor am I altogether convinced the exercise, if proper at all, need be confined to cases in which a policy is found to be waxing or waning, though such a circumstance tends to camouflage the judicial legislation. It has been argued that a court should not abandon a local policy in conflicts cases unless it is prepared to do so in domestic cases as well;⁷⁴ but the desire to respect the interests of other states is perhaps a distinguishing factor, as it was in *McSwain*,⁷⁵ where any deterrent policy of a law allowing interspousal suits was subordinated to another state's interest. Since courts commonly make frank choices among competing local policies on the basis of social desirability, it may not be inappropriate for them to make similar choices in conflicts cases in which competing state interests otherwise appear to be in balance.

If this kind of substantive choice is ever appropriate, one place to use it is in a case like *Scott*, where it can be imposed upon the state

70. *E.g.*, the place-of-contracting rule, which took many sections to define.

71. *Cf.* B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 609 (1963).

72. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE TRANSACTIONS* 376-78, 394-95 (1965). *See also id.* at 407, suggesting that, when one state prohibits what another permits, "the scale can be tipped in favor of the advancement or promotion of multistate activity." This argument seems based upon the dubious but freedom-loving presumption that activity forbidden by one state's law but not another's is desirable. Professor Horowitz, *supra* note 68, also speaks of "multistate policies" such as facilitating multistate transactions.

73. *See* D. CURRIE, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 59 (1966).

74. CURRIE, *supra* note 71, at 153-54, n.82, 707.

75. *See* text accompanying note 66 *supra*. The analogy seems persuasive when the domestic rule survives only from *stare decisis*, but less so when it derives from statute; for it may be strained to argue that though the legislature thought its own the better policy it was prepared to be overruled by the courts whenever another state was equally concerned.

courts as well as the federal.⁷⁶ Beyond this it might also be desirable in non-maritime cases too for the Supreme Court to make such choices as a matter of constitutional law in order to achieve uniformity. This of course would eliminate the whole *Klaxon* problem. The Court certainly has not indicated a disposition to embark on such a project,⁷⁷ and, unless it does so, a federal choice based on substantive preference in a simple diversity case might run afoul of the *Erie* principle.⁷⁸

On either a wax-wane or a social-desirability basis the choice in *Scott* seems clear: The Massachusetts limitation is a vestigial remnant of bad policy.

Thus the argument for relying upon the choice-of-law principles of the forum state in a case like *Scott* boils down to a last resort, when all attempts to resolve the conflict by rational means have failed. Much of the analysis leading to this conclusion, moreover, is equally applicable to other cases in which state law is referred to outside the compulsion of *Erie*. But a caveat is in order: In some cases—for example, the statute of limitation situation—the state law is utilized to serve federal interests, not state interests as in maritime death suits. In such cases an analysis of state policy is not relevant; the question should be simply which state law most effectively furthers the federal goal. In some instances, moreover, it may not be easy to determine whether the use of state law serves federal or state ends, or both. For example, in referring to state law for the definition of “child” in the copyright act, the Supreme Court in *DeSylva v. Ballentine*⁷⁹ observed that states might have an interest in determining who succeeds to the property and also that no federal definition was readily available. The resolution of competing interests in a case in

76. Cf. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (burden of proof respecting fraud in release of maritime tort liability).

77. See, e.g., *Clay v. Sun Ins. Office*, 377 U.S. 179 (1964); *Richards v. United States*, 369 U.S. 1, 15 (1962) (dictum). A strong argument can be made, moreover, that the full faith and credit clause was not meant to allow the Supreme Court in effect to make substantive law in fields reserved by the Constitution or left by Congress to the states. But see note 78 *infra*.

78. But see B. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 779-80 (1963), arguing that a disinterested state court is constitutionally free to make such a choice or to apply its own law (if this accords with that of an interested state) because the full faith and credit and due process clauses simply require that the law applied be that of one or another interested state. Currie argued, indeed, that the federal courts should make a choice based on substantive preference in interpleader cases, and perhaps also whenever the diversity court sits in or hears a case transferred from a disinterested state. *Id.* at 788-89, 792 & n.126. In ordinary diversity cases, apart from the constitutional question and the comparable effect of the Rules of Decision Act, 28 U.S.C. § 1652 (1964), and assuming that such a choice is otherwise appropriate, the issue reverts to the primordial debate over *Klaxon*: the relative demerits of interstate and intrastate shopping and the purposes of the diversity grant.

79. 351 U.S. 570 (1956).

which both state and federal interests are at stake presents a problem even more complex than that in *Scott*.

IV. THE OPINION

Finally a word should be said about the Third Circuit's opinion in *Scott*. Although the plaintiff had invoked the diversity rather than the admiralty jurisdiction, the court quite rightly held that this was immaterial. In a federally dominated field like maritime law it would make no sense to allow the result to depend upon such a fortuity, even if no federal policy dictated the choice between state laws.⁸⁰ From this point on, however, the opinion is on shaky ground. *Erie* and *Klaxon*, said Judge Hastie, are inapplicable because "the maritime character of the tort brings the controversy under the governance of federal law. . . . Obviously, a court thus undertaking to apply federal substantive law would have no occasion to defer to or to apply state choice of law rules."⁸¹ This reasoning would be impeccable if indeed federal law applied; but, as the opinion recognizes, the choice is between Massachusetts and Pennsylvania law, not federal. I agree that *Klaxon* should not be applied, except *in extremis*; but not for the court's reason.

In support and in application of its decision that state choice-of-law rules were irrelevant, the court of appeals purported to find the choice of Massachusetts law compelled by precedent:

The maritime law will accord dependents and survivors rights of recovery neither more nor less extensive than they would enjoy under the law of the state within whose territorial waters the fatal maritime tort occurred. *Hess v. United States*, 1960, 361 U.S. 314; *The Tungus v. Skovgaard*, 1959, 358 U.S. 588; *Western Fuel Co. v. Garcia*, 1921, 257 U.S. 233; *The H. S. Inc.*, 3d Cir. 1942, 130 F.2d 341.

Of course some other expedient might have been adopted. Borrowing could have been made from the law of the decedent's domicile or the law of the state whose contacts with the parties, their dealings and the mishap were deemed most significant. But, over the years, the Supreme Court and the inferior courts under its guidance have adhered to the simple rule of borrowing in their entirety the wrongful death and survival rules of the state within whose boundaries the maritime tort occurred.⁸²

None of the cases cited is authority for this proposition. The courts have sometimes said the law of the state of the wrong was applicable, but not in response to the question posed in *Scott*; for the issue in all the cases cited was whether the use of state law violated federal principles, not which state's law to choose. The reference to the law of the tort state was natural enough, since in each instance that

80. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-11 (1953).

81. Slip Opinion No. 16328, 3d Cir., March 30, 1967.

82. *Id.*

was the law put forward by the plaintiff; but it does not seem proper to blame the Supreme Court for having decided an issue not presented. Moreover, the *Hess* case arose under the Federal Tort Claims Act, which contains its own federal choice-of-law rule requiring application of "the law of the place where the act or omission occurred."⁸³ Thus even a square holding on the interstate issue in *Hess* could not have had general applicability.⁸⁴

Finally, a mechanical federal reference to the law of the place of the wrong would run counter not only to the Supreme Court's generally enlightened approach to conflicts between federal and foreign law,⁸⁵ to its own use of the interest analysis over a considerable period in constitutional choice-of-law litigation,⁸⁶ and to its obiter endorsement of state court decisions departing from the traditional tort rule,⁸⁷ but most pertinently to the basic reasoning of its recent *Tungus* and *Hess* decisions in the maritime-death field itself, which the Third Circuit mistakenly cites in support of its position. As explained above, the thrust of those decisions is that state wrongful-death laws are employed in admiralty to serve state and not federal interests. It does not well comport with this principle willy-nilly to follow the law of the place of the wrong, for other states may be at least equally concerned. Indeed in some cases, as recently held in *Reich v. Purcell*,⁸⁸ to apply the law of the tort state may frustrate the policy of one state without furthering the interest of any other.

Following Massachusetts law would not be that terrible in *Scott*, but it is certainly to be hoped and expected that on rehearing the Third Circuit will give more consideration to this complicated issue and will improve upon the reasoning of its original opinion.

83. 28 U.S.C. § 1346(b) (1964).

84. Further, the Supreme Court since *Hess* has held that the Tort Claims Act refers not to the substantive law of the place of the accident, as held in *Scott*, but to the whole law (including conflicts rules) of the state in which the negligence took place, *Richards v. United States*, 369 U.S. 1 (1962)—quite a different animal when, as in some cases arising from the Boston crash, see *Weinstein v. Eastern Airlines*, 316 F.2d 758 (3d Cir. 1963), one of the claims is for negligent manufacture of an aircraft engine.

85. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571 (1953), considering all significant contacts in the context of statutory construction. For a less modern attack, still however recognizing that the task is construction, see *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963), criticized in D. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 Sup. Cr. Rev. 34.

86. E.g., *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935), upholding a workmen's compensation award by the state of employment although the injury took place elsewhere, and without resorting to a sophistical contract characterization.

87. *Richards v. United States*, 369 U.S. 1, 12-13 (1962).

88. See note 46 *supra*.