

THE CHANGING CHOICE-OF-LAW PROCESS AND THE FEDERAL COURTS

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INTRODUCTION

Those contributions to this symposium which are directed to developments in the judicial resolution of choice-of-law problems will have examined in some detail a major change that has been occurring in the conception of the court's task in a choice-of-law case. In this article, I shall content myself with a brief statement of this trend as I see it¹ and then turn to a consideration of its significance for the federal courts in the decision of cases falling within their diversity jurisdiction. In so doing, I shall neither be concerned primarily with the way in which the federal courts are discharging their duty, under *Klaxon Co. v. Stentor Electric Mfg. Co.*,² to follow the conflict of laws rules of the respective states in which they sit, nor discuss the validity of the *Klaxon* rule as a matter of constitutional or statutory interpretation.³ Rather, I shall be occupied chiefly with the question whether the current trend in choice of law calls for an overruling of *Klaxon* by decision or statute, either generally or in those cases wherein the federal district court's jurisdictional reach is greater than the state court's.

I

THE CHANGING CONCEPT OF THE CHOICE-OF-LAW PROCESS

A still slender but steadily swelling stream of choice-of-law decisions has been departing from the channels prescribed by the American Law Institute's original *Restatement of the Law of Conflict of Laws* and, in a number of situations, the Tentative Drafts of *Restatement Second* have either approved or permitted these deviations. Since, on many points, the original *Restatement* could not report a

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¹ I have depicted this trend at some length, with special attention to contracts, torts, and property cases, in *Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 159-82 (Tent. Draft No. 1, 1963) [hereinafter cited as STUDY OF JURISDICTION], a memorandum I prepared as Consultant on Choice-of-Law Problems to the Reporters. Appended to their report to the Institute as a "Special Memorandum," it also considers essentially the same subject matter as this article. My connection with the Institute's study may be inflated for the readers of Professor Currie's contribution to this symposium by his attribution to me, either singly or as titular head of "Cavers and company," of decisions that were reached by the Reporters, Professors R. H. Field and P. J. Mishkin, their Advisers, and the Institute's Council. The fact that I found much to approve in their recommendations as these bore on *Klaxon* does not mean that I conceived them. Indeed, their recommendations had been largely shaped before I was asked to comment on the choice-of-law aspects of their proposals.

² 313 U.S. 487 (1941).

³ I believe that the *Klaxon* rule is not required by the Constitution and that it represents a valid interpretation of the Rules of Decision Act, Judiciary Act of 1789, § 34, as amended, 28 U.S.C. § 1652 (1958).

consensus among the cases or, in some instances, even a plurality in support of the positions it espoused, the fact that various courts had subsequently refused to fall into line with its formulations is scarcely to be wondered at. What is significant is the change in objective that these deviant decisions reveal. They do not reflect a continuing effort to develop a system of broad rules operating automatically, whenever the key contacts had been found, to select the jurisdictions from which the governing laws are to be drawn. Though typically the new opinions are obscure in explication, the courts rendering them appear to be embarking on a much subtler inquiry.

The innovating courts have tended to consider the policies embodied in the conflicting substantive rules between which they are called upon to choose. By comparing those policies in the light of the transaction or events giving rise to the action, the court can ordinarily determine whether only one of the states involved has an interest in the application of its law. An affirmative answer to this question would put an end to the search for the governing law. If, instead, the court were to find the policies of both states relevant, the court might then consider whether the particular circumstances of the case could be viewed as giving rise to a greater interest on the part of one state in the effectuation of its policy in that situation than could reasonably be ascribed to the other. In some situations, the court might not find an answer in such an inquiry and yet conclude that, as to the matter in dispute, the claims of justice would lead to the choice of the law favoring one party rather than the other, as, for example, where application of the law favoring the latter would defeat the justifiable expectations of the former.⁴

By the use of such unrevealing formulas as "the grouping of contacts" and the failure to articulate the bases in policy and fairness of the decisions reached,⁵ the pioneering courts have left to the commentators the task of describing their methodology. To state this in terms of past controversies, I think it broadly accurate to say that they have been applying the "local law" theory (as conceived

⁴ Choice of law decisions resting on the ground that one state has a greater interest than the other in the effectuation of its policy in the circumstances of the case would probably lend themselves more readily to generalizations that could be embodied in rules than would cases resting on the relative "equities" of the parties. To use as an example of the former a variation on *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953), suppose a motorist from Arizona had died after injuring a Californian in California, and the victim sued the motorist's estate. There is, to be sure, a rational basis for application of the Arizona policy that personal injury actions abate upon the death of the tortfeasor. However, the greater interest of California in applying its policy of non-abatement to the injury of a person on its highways by an out-of-state user of those highways seems to me not only clear but susceptible of generalization into a workable rule, a rule which, one might hope, would be recognized in Arizona as well as in California. If one were to say that there is no "true conflict" in such a case, the effect would be only to convert the concept of "false conflict" from a premise into a conclusion.

⁵ The courts' hesitancy to elaborate the rationale of their decisions is understandable at this stage in the development of their new approach and of the legal scholarship supporting it. They have cast aside old premises; they are proceeding, in the case-by-case manner of the common law, to fashion new ones. A comparison of the opinion in *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), with that in *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), both by the same able judge, reveals progress in the difficult task of articulating the grounds of decision.

by Professor Walter Wheeler Cook) in distinction to the "vested rights" theory⁶ and that they have narrowed their choices to the particular conflicting rules that would govern the matters in dispute between the parties.⁷ As a consequence, their decisions have in effect determined, for the particular case and similar cases presenting a like pattern of conflicting rules,⁸ the reach of the respective state laws. Where both states can reasonably be said to be concerned with a matter in dispute, the effect will, of course, be to extend the reach of one state's policy and to curtail the other's.⁹

If this is a valid statement of the emerging methodology of choice of law, one may ask whether it is proper, under our federal system with its peculiar division of the judicial power between the state and federal judiciaries, for a federal court to proceed independently of state law in making a choice-of-law ruling in a diversity case where the mandate of *Erie R.R. v. Tompkins*¹⁰ would compel it to apply the substantive law of some one of the concerned states.

I am approaching this problem without reference to the views of the framers

⁶ As I view the Cook conception of the local law theory, the forum models its rules of decision on rules of decision drawn from the law of one or more states. The Hand conception sees the forum as modeling a right homologous to a right created by another state, a view which appears to have about the same consequences for choice of law as the vested rights theory. See Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950). For the vested rights theory, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 366-70 (1945).

⁷ If a court chooses a rule of law to govern a particular matter in dispute, it must confront the logical possibility that, on another issue arising out of the same event or transaction, it may be led to choose a rule of law derived from another jurisdiction. That to do so is constitutional, see *Pearson v. Northeast Airlines*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

⁸ An idea that both courts and commentators have been slow to recognize and accept, despite its necessary implication in a policy-oriented, issue-by-issue process for choosing law, is the proposition that two cases having identical facts would present distinct problems of choice of law if the pattern of local laws in the first case were reversed in the second. See Cavers, *A Critique of the Choice-of-Law Process*, 47 HARV. L. REV. 173, 178-82 (1933); Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws*, 29 U. CHI. L. REV. 237, 253-54 (1962). The pattern of local laws is a key factor in the choice-of-law methodology developed by Professor Brainerd Currie and presented by him in numerous articles beginning with *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958). The fact that the pattern of laws differs need not always bring about the choice of a different jurisdiction. For example, in Case 1, the law of the state of injury which favors the plaintiff may be chosen; in Case 2, the law of the state of injury which favors the defendant. What is important is that the result in Case 2 be reached only after an evaluation of the significance for the choice of law of the circumstance that in Case 2 the state of injury has a different policy from the policy of that state in Case 1.

⁹ Professor Currie considers that "when the court, in a true conflict situation, holds the foreign law applicable . . . it is holding the policy, or interest, of its own state inferior and preferring the policy or interest of the foreign state." He believes that the "assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order . . . which should not be committed to courts in a democracy." Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176.

I do not believe that any such invidious comparisons need flow from a decision that, in a given situation, another state's law may be more appropriately applied than the forum's. Professor Currie seems to me to invite the judiciary to perform essentially the same function he would forbid when he would allow a court in State F to take into account the policy of State X in determining whether the forum's policy should be considered in conflict with it, presumably in a situation where, but for the State X policy, the forum's law would be applied. Cf. Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 69 (1959).

¹⁰ 304 U.S. 64 (1938).

of the Constitution or of the First Judiciary Act.¹¹ However, I think it important to consider the problem in terms of the congruence of its alternative solutions to our federal system's allocation of law-making and adjudicatory functions as that allocation has been shaped by a century and three quarters of national life.

II

THE CONGRUENCE OF KLAXON WITH OUR FEDERAL SYSTEM

Professor Henry M. Hart, Jr., an unrelenting critic of the *Klaxon* rule, sees the basic problem in the same broad terms.¹² To repose in the federal judiciary the responsibility for determining which of two conflicting state rules should govern a case between citizens of different states seems to him even more clearly appropriate for a choice-of-law process which is avowedly concerned with the delimitation of state policies than for a process which seeks to construct a system of choice-of-law rules that ignore the policy objectives of the states' laws between which choice is to be made. He points out that, as a matter of plain fact, no state can enjoy the power to effectuate its own policies by applying its own laws to *all* of the cases that arise out of two-state transactions or events, especially when citizens of both states are involved. The situation is one which demands decision-making that will achieve a wise accommodation of the conflicting state interests, and this function the disinterested federal courts, more accustomed than state courts to viewing problems in national terms, are peculiarly well equipped to discharge. The federal courts should not be compelled to reflect those biases favoring local law that they are likely to find in state choice-of-law decisions.

The conflicting conception of the proper role of the federal courts emphasizes the inroads in the legislative authority of the states that would result from a grant to the federal courts of power to choose the governing law in such cases, and, in particular, questions whether the diversity jurisdiction provides an apt instrumentality for achieving the accommodation of conflicting state policies. I join with Professor Alfred Hill in disagreeing with Professor Hart's thesis on these grounds.¹³

When a state enjoys, within constitutional bounds, autonomy in choice of law, that state's power to effectuate a policy with respect to matters that are also connected with another state need not be greatly impaired by the fact that it will not be the forum for all choice-of-law cases involving that policy, especially if the law embodying its policy is one that would impose a duty.^{13a} Therefore, a choice-of-law

¹¹ Section 34 of the Judiciary Act of 1789, as amended, 28 U.S.C. §1652 (1958), has come to be known as the Rules of Decision Act.

¹² See Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954). The article cited does not develop in full the argument presented above which is drawn from classroom presentations by Professor Hart of his views in the numerous occasions when we have shared classes to debate *Klaxon*.

¹³ See Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 541, 546-68 (1958). Professor Hill believes that independent choice of law by the federal courts in diversity cases would be constitutional.

^{13a} X, a duty-creating state, would be able to effectuate its policy as far as its judicial jurisdiction could reach, and, in so far as behavior is affected by knowledge of laws and their applicability, the

decision favorable to that policy, if made by a federal court endowed with supra-state authority, might not add greatly to the effective reach that the policy already had. On the other hand, the unfavorable decision of such a court could confine the policy's reach to wholly local situations, and, if broadly based, would tend to inhibit the reach of future state legislation in other fields. Therefore, to require every state to yield to the federal courts the power of decision whether to assert its various policies in all the choice-of-law cases that could reach those courts would be to compel the state to surrender more authority than it would be accorded in return. One might, of course, speculate on the chance that somehow the wisdom and detachment of the federal judges would enable them to produce choice-of-law decisions of such soundness than even the states whose authority was being curtailed would value them. But do we have, in the diversity jurisdiction of the federal courts, an apparatus that gives promise of such results?

To deny to the federal courts in diversity cases a veto power over state assertions of interest in choice-of-law situations is not, of course, to deny the desirability of searching for accommodation when state interests conflict; rather, it means leaving that responsibility with a court that is charged with the application, and often the formulation, of one of the policies that are to be accommodated. A state court has to discharge that responsibility in cases that are not tried in a federal court, and the United States Supreme Court has accorded it ample freedom in the performance of this function. Indeed, would it not be anomalous if the Supreme Court's broad grant of constitutional authority to every state to apply its own law whenever it has an interest to advance or protect, despite the conflicting policy of another state, were to be subjected, by the rejection of *Klaxon*, to the power in every district judge in a diversity case to override the forum state's exercise of this constitutional authority, even when that exercise has taken explicit statutory form?¹⁴

Professor Hill recognizes that traditional choice-of-law rules do not take cognizance of policy considerations, but he does not concede that the federal court should therefore be charged with the task of substituting "a theoretically better policy"¹⁵ for that which a state has chosen by its use of a mechanical choice-of-law rule. I would add that, if developing policy-oriented choice-of-law rules is recognized as

risk of subjection to that jurisdiction would be taken into account by those on whom *X*'s law would impose a duty. *Y*, a state with a policy of denying a duty or conferring a privilege, could be less sure of effectuating its policy since *Y*'s law could protect only those persons who were not exposed to suit in *X* or other states, and jurisdictional trends are serving to reduce their numbers. However, *Y*'s policy to deny a duty in a given situation would rarely be impaired when *X* imposed a duty on an *X* citizen for the benefit of a *Y* citizen. Also, when the assumption that *Y* has a genuine policy against imposing a duty depends on the fact that *Y* has simply left the behavior in question free from legal control, then, to support the assumption, one may have to rely on the dubious inferences to be drawn from legislative inaction.

¹⁴ Professor Hill asks "whether the disposition of sovereign powers effected by these [Supreme Court] . . . decisions is to be altered by the federal government, acting through its judicial arm, when the only federal interest is the concurrent federal jurisdiction to adjudicate controversies over claims arising under state law." *Id.* at 548. And see *id.* at 566.

¹⁵ *Id.* at 553.

a task for state courts, then certainly they must also have the power to decide whether and when to depart from the traditional rules.

Professor Hill notes that a state court, by choosing the law of another state, may deny that the forum state has an interest in the application of its own law. There might then seem no obstacle to the assertion of a contrary federal judgment applying the law of the forum or that of a third state. However, Professor Hill rejects the idea that this situation would justify an independent federal choice, observing that the state court's application of the other state's law might reflect the forum's preference for uniformity and certainty to which its decision might be thought to minister.¹⁶ To this I would add the further consideration that the courts of the forum state might well have thought it wiser not to extend their own state's law to an out-of-state event or transaction, even though there were sufficient connections with the forum state to justify its application. It may be just as unwise to push a local policy towards its geographical as toward its logical extreme.

A case in which the forum state is disinterested, having no other connection with the cause than the provision of the forum, places the state court in essentially the same position as the federal court would occupy in such a case. If, then, the latter departed from the state court's views of choice of law, this would not result in an inroad upon, or an undesired extension of, the forum state's own policies. From the standpoint of considerations drawn from the federal system, I would agree with Professor Hill that this situation is not one that calls for the preservation of the *Klaxon* rule.¹⁷ However, other considerations bearing on the desirability of *Klaxon*, which will be canvassed below, persuade me (though not Professor Hill), that no exception to *Klaxon* should be made in the case of the disinterested forum state.

III

THE GOAL OF SUPERIORITY IN CHOICE-OF-LAW DECISIONS

Among the critics of the *Klaxon* rule, an inducement for its elimination has always been the alluring vision of improvement in choice-of-law decisions. This goal has gained support from the general agreement that the room for such improvement bulks very large. The prospect of a succession of federal decisions, including a few by the United States Supreme Court, which would banish the existing confusions, achieve uniform federal choice-of-law rules, and provide models for emulation by state courts has been thought by some to be sufficient alone to justify the emancipation of the federal courts from the restraints of *Klaxon*. In my opinion, this prospect is a mirage. I shall summarize below my reasons for believing so.

1. *The Heritage of the Past.* The quality of disinterestedness stressed by opponents of *Klaxon* as a special virtue of the federal courts is one that they enjoyed under *Swift v. Tyson*,¹⁸ when choice-of-law questions fell into the domain

¹⁶ *Ibid.*

¹⁷ *Id.* at 553.

¹⁸ 41 U.S. (16 Pet.) 1 (1842).

of "general law." In that period the record of the federal judiciary as umpires in cases of conflicting state laws was far from distinguished.

In his jurisdiction-by-jurisdiction survey (briefly antedating *Erie* and *Klaxon*) of all the American choice-of-law decisions relating to contracts, Professor Beale remarked: "The condition of the authorities in the federal courts is confused and puzzling. No doctrine can be said to have been adopted by the Supreme Court to the exclusion of other inconsistent doctrines."¹⁹

Even if we credit today's federal judiciary with greater ability (or, at least as to choice-of-law problems, greater sophistication) than was possessed by the pre-*Klaxon* federal courts, the existence of a substantial body of federal precedents (many of them over fifty years old) would itself represent a serious impediment to the exercise of the creative powers of the federal bench. This, of course, would be a particularly galling curb on the district courts. They could not readily turn their backs on faded decisions of their own circuit courts even though certain decisions in other circuits had begun to break away from the older case law.

2. *The Lowest Common Denominator.* An especially serious influence that would work against innovation is the fact that an about-face on *Klaxon* would be heralded as a major move in the direction of uniformity and certainty in this area of law—as a stride toward a truly national system of choice-of-law rules. This view of the mission of the federal courts would create great pressure for agreement upon broad mechanical rules which have long been touted as the remedy for diversity and uncertainty in choice of law. The process of change that policy-oriented decisions would set in motion would be recognized by the federal judges as slow and as accentuating, for a time at least, the existing degree of uncertainty. A premium would be placed on rules that could be readily subscribed to, rules that would serve as a kind of lowest common denominator for all circuits. Though past experience has shown the futility of this effort to establish more than verbal uniformity, no doubt a renewed demonstration would be required, and, in the process, the federal courts—or most of them—would have turned their backs on the very process of change from which improvement in choice-of-law decisions is expected to come.

3. *The Lack of Central Guidance.* In evaluating the response of the federal courts to freedom from *Klaxon* one must keep in mind that, in diversity cases, the federal courts do not constitute a true judicial system, though, to be sure, they use a common set of rules of procedure. For a large number of courts really to constitute a judicial system, it is necessary that they be subject to the surveillance of a single supreme court which by its decisions can give direction to, and impose uniformity upon, the courts subordinate to it. This is a function which clearly the Supreme Court of the United States has not been discharging with respect to diversity cases involving choice-of-law problems for many decades, and its encounter with such problems in federal question cases has also been sporadic and specialized. It is plain, moreover, that the Court is confronted by demands upon its limited time and

¹⁹ 2 JOSEPH H. BEALE, *THE CONFLICT OF LAWS* § 332.9 (1935).

attention that are far too important to be set aside for the perplexing choice-of-law problems that arise in private litigation.

In so far as the Court attempted to give the lower courts guidance—as, for example, by endeavoring to resolve some egregious clash between the circuits—the Court would be under even greater pressure than the circuit courts to resort to what I have termed the lowest common denominator by approving rules that promised to be easy to follow and to cover a large number of cases.

Moreover, the Court's experience in dealing with constitutional issues involving choice of law could seldom be extrapolated to provide guidance in cases involving actual conflicts of state policy—cases of “true” as distinguished from “false” conflicts—unless it were ready to adopt Professor Currie's defeatist solution that in such cases the interested forum ought always to apply its own law and so a disinterested forum might as well do the same.²⁰

The only point at which I see a significant opportunity for a contribution toward uniformity and certainty by the Supreme Court would be in a reformulation of the substance-procedure dichotomy to deny to state courts the constitutional power to apply their own laws, by stretching the concept under the label of “procedure,” to cases in which the application of the same rules without the procedural label would be held to deny full faith and credit or due process.²¹ I believe clarification in this area could be achieved by relatively few decisions narrowing the range of the “procedural” for this purpose.

4. *A Creative Role for the Federal Courts.* The pessimism with which I should view the functioning of the federal courts if *Klaxon* were abolished does not extend to their role as long as *Klaxon* is preserved. In those states which demonstrate hospitality to change in the choice-of-law process, I believe there is a very important opportunity for the federal courts to join with the state courts in developing the new approach. One virtue of that approach is that it narrows the range of a controlling precedent and enables courts to differentiate past decisions where this seems appropriate. The federal courts in such a state will not therefore be blocked by sweeping pronouncements which blanket a number of essentially different cases under a single rubric.

One may ask, however, why, if the federal courts are to enjoy this freedom under *Klaxon*, the value of *Klaxon* as a safeguard of state policies will not be undermined? The answer is that a federal decision with which a state court later

²⁰ See Currie, *supra* note 8, at 260-62; Currie, *supra* note 9, 1959 DUKE L.J. at 177-78.

²¹ Oddly enough, the application of this counsel to *Klaxon*, would, in my opinion, have led to a result contrary to that reached by the Supreme Court which remanded the case for a determination of the Delaware choice-of-law rule governing the addition of interest before verdict in contract actions. Delaware's only connection with the case was as forum and as the defendant's state of incorporation. The case arose out of a New York transfer of assets and agreement between firms doing business there, most of the operations in performance of the contract being also carried out there. The Court might well have required the federal court in Delaware to give (statutory) full faith and credit to the New York law as to interest. Incidentally, such a ruling would not have compelled New York to adopt the Massachusetts ceiling on wrongful death damages in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), in view of the substantial basis for the application of New York's conflicting policy in that case.

finds itself in disagreement can, under *Klaxon*, be nullified as a precedent by a contrary decision of the state court; from the standpoint of the state's legal system, the federal decision is a temporary aberration, like the erroneous decision of an intermediate appellate court. If, however, *Klaxon* were to be abolished, either the state court would have to acquiesce in the federal decision or two sets of laws would thereafter be administered in the state, one a "federal law, depending for its application upon the unpredictable contingency of litigation and the accident of federal jurisdiction of the controversy."²²

IV

THE PROBLEM OF FORUM-SHOPPING

The *Klaxon* rule has inspired fears of abuse by plaintiffs who, taking advantage of the constant exposure of numerous corporate defendants to suit in many states, would search for the state with a favorable choice-of-law rule with the assurance that the federal court in that state would be obliged to apply the rule thus chosen. With the abolition of the *Klaxon* rule, it is argued that the risk of such maneuvering would steadily dwindle as the federal courts progressively achieved a uniform, nationwide system of choice-of-law rules.

I have already indicated my disbelief in the attainment of any such system; for the indefinite future I should expect ample freedom for circuit-shopping to prevail. However, experience under *Klaxon* does not suggest that plaintiffs have indulged in forum-shopping to any substantial extent. This is an opinion that is not easy to document; I can only report my personal impression gained from watching choice-of-law and transfer cases in the *Federal Reporter* and *Supplement* over a number of years. Moreover, a highly effective safeguard against the forum-shopping abuse lies in plaintiff counsel's natural disinclination to send his case off to another lawyer. The matter of fees apart, counsel will recognize that his correspondent will lack his own familiarity with the facts and background of the case and that the efficacy of his forum-switching tactic must depend on the reliability of his prediction of a favorable choice-of-law ruling in the other state. Not infrequently, in this time of doctrinal transition, confidence in such a prediction would be hard to attain.

In my opinion speculative maneuvers to obtain favorable choice-of-law decisions would multiply if the *Klaxon* rule were to be abolished. This would be caused by two factors: (1) a marked increase in the actual diversity and uncertainty in the relevant law, and (2) a marked increase in the ease of executing the maneuver. I shall consider these two factors briefly.

1. *Increased Diversity and Uncertainty.* When a commentator deplores the want of uniformity and certainty in the law of choice of law in the United States, usually he is referring to the national scene. As in all fields of law, certainty is

²² Hart, *supra* note 12, at 505. (In Professor Hart's article, this quotation characterizes the "spurious" federal law which the federal courts pronounced as "general law" in diversity cases under *Swift v. Tyson*.)

greater within the law of any one state, though few, if any, states have achieved a stable and certain body of choice-of-law cases extending to all branches of the law. In any event, with the passing of *Klaxon* would come the destruction of such certainty as the forum state had attained wherever any consequential dissent from the state rules could be found within the federal case law. A case in the Ninth Circuit contrary to a view long prevailing in Massachusetts could create uncertainty in the Commonwealth even though the First Circuit had previously shown no disposition to deviate from the Massachusetts view. The federal district court would be bound by the First Circuit's pre-*Erie* precedents, but the First Circuit would not. If, for example, the Ninth Circuit called for rigid application of the place-of-making rule as a means of unifying federal law, counsel for whom that contact was helpful might hope that the First Circuit would turn its back on Judge Magruder's forward-looking opinion in *Jansson v. Swedish American Line*.²³

Suppose a controversy involved States X and Y. Suppose the choice-of-law rules of both states clearly pointed to State X as the source of the governing law. If there were grounds to believe that the federal courts might hold that, in such a case, Y law should prevail, the apparent uniformity and certainty in the choice-of-law rules of both X and Y (and so in the applicable substantive rules as well) would be shattered. Moreover, if, as has sometimes been suggested as an escape from this consequence, the federal court should make an exception and accept the two states' agreement on X law, then a new element of controversy would be injected in future cases. The question "Is the federal choice-of-law rule different from the forum state's rule?" would, if answered affirmatively, have to be followed by another and often difficult question "Is the rule in State Y the same as the forum state's?" Doubtless in some cases a more complex question would be raised, "Though the same rule exists in States X and Y, does State Z, which has a different choice-of-law rule, have a sufficient connection with the case to free the federal court in X or Y from its duty to follow to the X-Y rule?"

A less consequential source of uncertainty would be posed by this question: "What is the 'whole' law of State X (*i.e.*, its local law plus its choice-of-law rules) on the matter in dispute when, as to that matter, the State X courts would apply Y law and the federal court in X would apply X law or perhaps Z law?" The Tentative Drafts of the Conflict of Laws *Restatement Second* do not adhere to the original *Restatement's* almost undeviating insistence that reference be only to the local law of a state;²⁴ except in the field of contracts, *Restatement Second* calls at a

²³ 185 F.2d 212 (1st Cir. 1950). In this case, the law applied was that of the place of making, Sweden, but Judge Magruder examined the various connections of the transaction to ascertain "the jurisdiction with which the matter at hand" [*i.e.*, "that aspect of the contract immediately before the court"] was "predominantly or most intimately concerned." *Id.* at 219.

For a careful analysis of the ways in which a *contra-Klaxon* rule would increase legal uncertainty in economic activities, see Hill, *supra* note 13, at 559-65.

²⁴ The original *Restatement* confined reference to the choice-of-law rules of another state to "questions of title to land" and "questions concerning the validity of a decree of divorce." *RESTATEMENT, CONFLICT OF LAWS* §§ 7-8 (1934).

number of points for reference to the whole law of the state of reference.²⁶ If *Klaxon* were abolished, would the content of a state's whole law depend on "the unpredictable contingency of litigation" and "the accident of federal jurisdiction?"

2. *The Facilitation of Forum-Shopping.* The natural disinclination of plaintiff's counsel to share his case (and his fee) with out-of-state counsel has been remarked above as an effective deterrent to the abuse of the forum-shopping opportunities that in theory exist under *Klaxon*. Note, however, that this deterrent would not exist when the question confronting counsel was whether to sue in the federal or the state court in his own state. In some cases, of course, the federal courthouse would be "a block away" from the state courthouse.²⁶ Even where it was much less convenient, counsel would be on familiar ground and could handle the case himself. Moreover, to be induced to choose the federal forum, he would not have to be sure that the federal rule really was different; the mere possibility of a helpful difference, supported by some extant federal decision, however distant in time or space, would justify his speculation and at least enhance the chance of a satisfactory settlement.

To this complaint, Professor Hart and others might reply that the opportunity to shop in the federal court would be open to both parties—or should be—and that the party shopping there would merely be seeking the protection which the diversity jurisdiction was designed to give him. This answer seems to me inadequate.

Even if access to the federal courts were governed by more rational criteria than it now is, I believe a condition that, in giving parties to litigation a choice between two sets of courts within a single state, offers as an inducement to one party or the other the chance that a rule of law more favorable to his interests can be obtained in the court he chooses, is open to serious objection. The fact that this country lived with such a state of affairs for nearly a century perhaps explains why even now we view it complacently.

Moreover, the criteria by which litigants would be accorded this privilege are arbitrary. The plaintiff would be favored by his ability to sue in the federal court of his home state while the defendant, when sued in his home state, could not remove to the federal court there. The rule as to non-resident personal representatives is susceptible of manipulation and is manipulated.²⁷ The corporation is fitted into the jurisdictional scheme by a gross fiction to which time has not fully inured us, partial tribute having been paid to reality by the recent amendment rendering a corporation a "citizen" of the state in which it has its principal place of business.²⁸

²⁶ See, e.g., RESTATEMENT (SECOND), CONFLICT OF LAWS § 121 (Tent. Draft No. 4, 1957) (governing law as to marriage); *id.* § 254a(2) (Tent. Draft No. 5, 1959) (governing law as to movables).

²⁶ The quoted phrase is from *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), per Frankfurter, J.

²⁷ In a study of more than 1,000 diversity cases filed in the Eastern District of Pennsylvania in November 1958-July 1959, 107, or 20.5%, of the 523 original and transferred cases studied were brought by out-of-state representatives of deceased Pennsylvania citizens, 35 having been brought by five representatives "each clearly identifiable with a particular law firm." STUDY OF JURISDICTION app. B at 122-23.

²⁸ The basic diversity jurisdiction provisions in 28 U.S.C. § 1332 were thus amended in 1958. A corporation remains a citizen of any state in which it is incorporated.

The anomalies in the rules governing diversity jurisdiction, accentuated by the mounting tide of diversity cases (mainly actions on causes arising in the forum state brought by citizens of the forum against defendants incorporated in other states), has led to a re-examination by the American Law Institute, at the instance of Chief Justice Warren,²⁹ of the division of jurisdiction between state and federal courts. The relation to the *Klaxon* rule of the recommendations of that study, together with certain amendments to the Judicial Code and the Rules of Federal Procedure, extending the federal diversity jurisdiction beyond state bounds, remains to be examined.

V

THE BEARING ON THE KLAXON RULE OF PROPOSED CHANGES IN THE DIVERSITY JURISDICTION

The Institute study has already led to a Tentative Draft containing proposed amendments to the Judicial Code with explanatory comment and supporting memoranda (including as a "Special Memorandum" the study of mine on which this article is based).³⁰ The Tentative Draft, the work of Professor Richard H. Field as Reporter and Professor Paul J. Mishkin as Associate Reporter, aided by an Advisory Committee of judges and lawyers, was presented, after approval by the distinguished 41-member Council of the Institute, to the Institute's Annual Meeting on May 22, 1963. The Draft's basic objective—the narrowing of general diversity jurisdiction to those classes of cases for which a "valid justification for being in the national courts" could be found³¹—led to so lively a discussion on the floor that not many of the basic provisions proposed by the Draft could be voted on. Subject to a few qualifications, those voted on were approved, and the reception given the Draft was encouraging enough to justify a consideration here of the bearing of its proposals on the *Klaxon* rule, though, of course, a long gap separates proposals before the Institute from enacted federal law.

1. *The Proposals with Respect to General Diversity Jurisdiction.* To risk summarizing proposals that have been formulated in careful detail, I would group the major changes in general diversity jurisdiction under four headings: (a) qualification of parties as citizens; (b) restrictions on the invocation of jurisdiction (including removal); (c) restrictions on venue; and (d) transfer of cases to more appropriate districts.

The provision conferring diversity jurisdiction (section 1301)³² would preserve

²⁹ At the 1959 Annual Meeting of the Institute, Chief Justice Warren expressed the hope that the Institute would "undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for the jurisdiction of Federal and State courts." *STUDY OF JURISDICTION* at v.

³⁰ See note 1 *supra*.

³¹ *STUDY OF JURISDICTION* 2.

³² As they explain in their "Note on Statutory Numbering System," *STUDY OF JURISDICTION* 5, the Reporters have sought to bring together in one place in the Judicial Code all the sections dealing with original and removal jurisdiction in diversity actions, including venue, process, and kindred matters. For the provisions they have proposed, they have taken unused section numbers 1301-1308 in Title 28.

Throughout the Draft, care has been taken to deal with removals and counter-claims. I shall not

the "citizenship" of the corporation in both the state of its incorporation and the state of its principal place of business, but personal representatives (executors, administrators, and guardians of infants and incompetents) would be declared citizens of the states of the respective decedents or persons whom they represent as well as of the states of their own citizenship.

The right to invoke diversity jurisdiction would be restricted by a new section 1302³³ so as to exclude both individual citizens of the forum state (in terms of caseload, a very important change) and also American corporations having a "permanent establishment" in the forum state for more than two years, provided, in the case of such a corporation, that "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property which is the subject of the action is situated, within that State." (I shall refer to the circumstances thus conditioning this bar to invocation by permanently established corporations as "jurisdictional events or property.")

The Reporters proposed, in section 1303, that the scope of federal process be identical to the scope of process of the forum state, "except as otherwise provided by law," but action on this section at the Annual Meeting was deferred so that the alternative of using the Rules of Civil Procedure as a vehicle for this policy might be considered. Venue would be limited by section 1304 to the defendant's residence (determined for corporations on much the same basis as their citizenship) and to the state or states in which jurisdictional events or property were found. This sharp limitation on venue would, of course, reduce materially the need for recourse to transfer (at least for cases where the venue was rightly laid). The proposed transfer provision (section 1306) would allow transfer on a defendant's motion, based on the same grounds as are now prescribed, to any district except one in which *both* sides would be barred from invoking diversity jurisdiction. Finding no appropriate place for trial not thereby barred, the court must stay the proceedings on terms assuring the plaintiff an opportunity to sue in the court of an appropriate state. In the case of a transfer, the transferee court would be under the same duty as to choice of law as the transferor court had been.

Sections 1307 and 1308 provide for transfer, respectively, on motion of the

make express reference to these. I shall also omit such detail as the treatment of cases against alien defendants and against defendants residing in different districts or divisions. See, e.g., § 1304(c), (b).

³³ Subsection (c) of section 1302 would bar the invocation of diversity jurisdiction to "an individual citizen of the United States who has and has had his principal place of business or employment in [the forum] state for a period of more than two years" provided the jurisdictional events or property were situated there. At the Institute's Annual Meeting, a motion to eliminate subsection (c) lost by a close vote, and a motion to strike "or employment" was adopted. In the light of these developments, the Reporters agreed to take back the provision for further consideration and later presentation. (Unpublished) Notes of ALI Meeting, May 22, 1963.

The scale of the problem to which the "commuter" provision is directed is suggested by the fact that the study of diversity cases in the Eastern District of Pennsylvania, *supra* note 7, disclosed 104 cases of suits brought by individual plaintiffs in which their place of employment could be ascertained. Of these, 29 cases involved persons commuting to work in Pennsylvania, in 28 of which recourse to the federal court would have been barred by the "jurisdictional events" proviso in the proposed subsection (c). See *STUDY OF JURISDICTION* app. B at 121-22.

plaintiffs based on change of circumstances or newly discovered facts and on motion to dismiss where venue had been wrongly laid. Under either section the transfer might be to any district in which venue would be proper, the defendants amenable to process, and the plaintiffs free to invoke diversity jurisdiction. Of course, in either type of transfer, unlike transfer on motion of the defendant, the transferee court would have to apply the law of the state in which it sits.

The foregoing proposals would preserve the *Klaxon* rule intact, even in the controversial area of transfers. They would have the happy dual effect not only of rendering the legal situation more palatable to opponents of the *Klaxon* rule but, at the same time, of making *Klaxon's* abolition more difficult to justify. The former effect would be achieved by narrowing the total number of cases involving the *Klaxon* rule and, especially, by reducing the number of cases in which there would be an opportunity to shop for a favorable choice-of-law rule—a consequence of the narrowing of venue.

The latter effect—making *Klaxon's* abolition more difficult to justify—would flow from two facts. First, the national objective of developing a uniform body of choice-of-law rules by abolishing *Klaxon* would be rendered even more chimerical by the marked reduction in the number of cases in which an independent federal choice could be made. Second, the new barriers to invoking diversity jurisdiction would greatly increase the proportion of cases in which only one party would be entitled to obtain a federal forum and hence, if *Klaxon* were abolished, access to the body of independent federal choice-of-law rules. This would enhance substantially the uncertainty that would confront the parties to an interstate transaction concerning which choice-of-law rule would be available to what party in the event a controversy between them should arise. This uncertainty would diminish an attraction that has been ascribed (mistakenly, I believe) to the *contra-Klaxon* rule.

In the case of transfer on defendant's motion, the Draft's adherence to the law of the transferor state would preserve to the plaintiff whatever advantage *Klaxon* gave him, but, since the plaintiff's initial selection of forum would be narrowed, the risk that this would be governed by the desire to obtain a favorable state choice-of-law rule would be correspondingly diminished. A procedural adjunct—the power that section 1306(c) would give to the transferor court to make “any appropriate ruling of law” before transfer—should enable it to mitigate, where needful, the burden on the transferee court of having to determine the transferor state's choice-of-law rule.

2. *Multi-Party Multi-State Diversity Jurisdiction.* The Institute Reporters saw an important need to expand diversity jurisdiction in one direction, and they proposed to do this through the addition of a new chapter 158 to title 28 of the United States Code (the Judicial Code).³⁴ What has occasioned this proposal (which did not reach the floor at the 1963 Annual Meeting) is the growing number of multi-party cases in which, as a consequence of the dispersal of the defendants, no single

³⁴ For a draft of chapter 158, §§ 2341-2346, with draftsmen's notes, see *id.* at 21-32.

state's process can reach all persons "necessary for a just adjudication of the plaintiff's claim." In such cases the federal courts could perform a function complementary to the state courts', albeit one that would diminish as state "long-arm" statutes increase in number and reach. Accordingly, the Reporters provided, in section 2341 of chapter 158, for the granting of original jurisdiction over multi-party multi-state cases to the district courts, but only where the several "necessary" defendants were not all subject to the process of "any one territorial jurisdiction." To implement this complementary function fully, they would not apply to such cases the qualifications as to citizenship in section 1301 and the barriers in section 1302 to the invocation of diversity jurisdiction. They would even dispense with the jurisdictional amount³⁵ and permit the diversity requirement to be satisfied whenever diversity existed between any two adverse parties.

In cases where jurisdiction was founded solely on section 2341, venue would be limited to the districts in which jurisdictional events or property were found. Federal cases having other bases of jurisdiction (including section 1301) could be transformed into chapter 158 cases by satisfying its requirements, as, under section 2343(a), could an action instituted in a state court. This could be removed to the federal court when a party necessary to a just adjudication could not be brought before the state court, although "every reasonable effort" had been made to reach the absent party. In a multi-party multi-state proceeding in the federal court, process would run anywhere within the United States and, subject to treaty, anywhere outside it that United States process could reach. Provision has been made in section 2344(b) for the transfer of a multi-party multi-state action to any more convenient district and also, in section 2343(e), for a (discretionary) stay of any such action pending the prosecution of the claim in a convenient and appropriate state court before which all parties to the action could be brought by state process.

For the multi-party multi-state case, the Reporters prescribe the following rule as to choice of law in subsection (c) of section 2344:

"When, under section 1652 of this title [the Rules of Decision Act], State law supplies the rule of decision on an issue, the district court may make its own determination as to which State rule of decision is applicable."³⁶

This would relieve the federal court of its obligation to *Klaxon*. Where a federal court is exercising a jurisdiction that no state court could exercise, the contention that the federal court's choice-of-law rulings should be the same as the choice-of-law rules of the state in which the court sits is no longer compelling. The state court, had it been seized of the case, could not have given effect to state policies with respect to the absent parties and hence the assertion of federal power to do so is not an inroad on state authority. Moreover, the party beyond the reach of the forum state might

³⁵ In a chapter 158 case imposing "an undue burden on distant parties," where the monetary value of each interest at stake did not exceed \$5,000, the court would be authorized by § 2344(e) to dismiss without prejudice the action either as to parties served outside the state or in its entirety.

³⁶ This provision and the corresponding provision with respect to transfer (§ 1306(c)), as drafted, do not commit the Institute to an approval of *Klaxon's* reading of § 1652. However, the Reporters expressly approved the *Klaxon* rule. See STUDY OF JURISDICTION 67.

well complain of the use of federal power to subject him to the choice-of-law rules of that state when those differed from his own. Yet to apply his own state's rules, especially to issues in the controversy that did not involve him, might properly be complained of by the other parties.

The terms of the proposed provision, however, may be read as extending federal choice of law well beyond these justifications for its employment. I grant that, in so far as the matter in dispute relating to the absent party could be severed from the other issues in the litigation, as might often be feasible, recourse to an independent federal choice-of-law rule with respect to the issues involved in that matter would be appropriate. This, however, should not require the resolution by a like rule of other severable issues in the litigation involving parties who could have been brought before the court without resort to chapter 158. Bringing in the absent party ought not to oust the forum state of an authority that otherwise it would have enjoyed with respect to issues involving only the other parties who had been subject to its jurisdiction.

Fortunately, the language of the provision would not compel the federal courts to exercise the independence it seems to grant in cases to which the reason for such a grant would not extend. Note that subsection (c) reads: "...the district court *may* make its own determination..." (italics added). Moreover, the court is to do this when "State law supplies the rule of decision *on an issue*" (italics added), not the rules of decision to govern the case. The draftsmen's commentary on the provision makes it abundantly clear that they contemplate recourse by the district court to a federal rule different from that of the forum state only when a consideration of the circumstances of the case and the rules and policies of the respective states make departure from the *Klaxon* rule in the interest of justice.³⁷ It should be noted that, since this provision would not require a restoration of pre-*Klaxon* law but rather an *ad hoc* treatment of a distinctive situation, its adoption would not reinstate the pre-*Klaxon* federal choice-of-law precedents to bind the district courts.

VI

SECTION 1404A, FEDERAL INTERPLEADER, AND THE HUNDRED-MILE BULGE

There are three other situations in which the federal courts may be required to re-examine the *Klaxon* rule in the light of change in the choice-of-law process.

1. *Transfer Under Section 1404a.* The relation of transfer to the choice-of-law problem has already been considered briefly with respect to the transfer provision

³⁷ The commentary, STUDY OF JURISDICTION 99-101, deals with the problem in careful detail. The Reporters note that the reasons for the proposed provision "do not compel a wholly independent choice-of-law rule as to each issue in every case within this chapter." As an illustration of apt cases for a discretionary adherence by the federal court to the state law, they mention a situation in which all parties interested in an issue were subject to the forum state's jurisdiction, and the issue was one as to which the several concerned states either had the same choice-of-law rules or where the application of their differing rules would yield the same substantive result. Where the federal process would reach a defendant in a state having a valid public policy barring suit on the claim against him, the Reporters would have that policy taken into account by the federal court and "enforced where appropriate, perhaps even through the devising of special techniques for the purpose."

in the general diversity jurisdiction proposals in the American Law Institute study. The main difference between the problem as seen in that context and as posed by section 1404a of the Judicial Code authorizing transfers "for the convenience of parties and witnesses and in the interest of justice" lies in the restrictions on diversity venue that the Institute's draft would impose. These would materially enhance the likelihood that the transferor state would be an interested state, and would reduce the risk that its selection would be the product of a search for a forum with a choice-of-law rule favoring the plaintiff.

Happily, experience under section 1404a indicates that, despite the freedom to forum-shop for this purpose permitted by existing law, little attempt has been made to exploit it. A handful of statute of limitations cases apart, there have been very few cases in which transfer has been sought where the choice of the initial forum appears to have been motivated by the hope of a more favorable law.³⁸ One of these cases, *Barrack v. Van Dusen*,³⁹ will reach the Supreme Court on another point; its disposition may reveal whether the Court is apprehensive lest an abuse of transfer power occur. Absent a showing of such an abuse (which probably could best be corrected by the venue limitations proposed to the Institute), there seems no sufficient reason either to abandon the *Klaxon* rule in section 1404a cases or to render it ambulatory, shifting with the cause to the transferee court.⁴⁰

2. *Federal Interpleader.* On the day *Klaxon* was decided, the United States Supreme Court also decided *Griffin v. McCoach*,⁴¹ and forthwith applied the *Klaxon* rule to require the application of Texas law to a case that had been brought in the federal court there by virtue of the long reach of process under the Federal

³⁸ For cases involving the statutes of limitation, see, e.g., *H. L. Green Co. v. MacMahon*, 312 F.2d 650 (2d Cir. 1963); *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950); *King Bros. Productions, v. RKO Teleradio Pictures*, 208 F.Supp. 271 (S.D.N.Y. 1962); *Gomez v. The Dorothy*, 183 F.Supp. 499 (D.P.R. 1959); *Hargrove v. Louisville & N.R.R.*, 153 F.Supp. 681 (W.D. Ky. 1957), all applying the statute of transferor state. The existence of some conflict among the decisions is indicated in the *King Bros.* case, *supra*, at 276.

For cases involving choice-of-law issues, see, e.g., *H. L. Green Co. v. MacMahon*, *supra*; *Barrack v. Van Dusen*, 309 F.2d 153 (3d Cir. 1962); *Goranson v. Kloeb*, 308 F.2d 655 (6th Cir. 1962) (no abuse of discretion in transfer of wrongful death action from Ohio, decedent's residence, the constitution of which forbids a ceiling on recovery, to Virginia, the place of wrong which has a ceiling, since Ohio precedents show Ohio court would not follow *Kilberg* but would apply Virginia law).

³⁹ *Supra* note 38, *cert. granted sub nom.*, *Van Dusen v. Barrack*, 372 U.S. 964 (1963). The defendant in a wrongful death action sought a transfer from the Eastern District of Pennsylvania to the Massachusetts District where an airplane crash had killed the decedent. The Third Circuit held that, since the decedent's Pennsylvania representative could not have sued as of right in Massachusetts, the district there was not one in which "the action might have been brought," as § 1404a requires. However, on the motion for transfer, *Popkin v. Eastern Airlines*, 204 F.Supp. 426 (E.D. Pa. 1962), the district court considered but refused to pass upon a contention by the plaintiffs that transfer should be denied so that they might have the benefit of an alleged readiness by Pennsylvania to follow the New York rule in the *Kilberg* case. See note 21 *supra*.

⁴⁰ After having espoused a *contra-Klaxon* position in *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955), Professor Currie shifted to the position that the Reporters have since adopted. Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 *id.* 341 (1960). This shift reflects his post-1955 views as to the choice-of-law process which are incompatible with independent choice of law by the federal courts in diversity cases. For his current views on choice-of-law in transfer cases, see Currie, *The Disinterested Third State*, *infra* p. 754, at 790-94.

⁴¹ 313 U.S. 498 (1941).

Interpleader Act.⁴² Using that process, the insurers had brought claimants from New York and New Jersey to Texas to contest the claim of the insured's estate to proceeds of an insurance policy on the life of a Texas decedent. The Court directed the remand of the case for a determination whether the Texas law would forbid the beneficiaries to recover the proceeds in view of the fact that they had no insurable interest in the decedent, a rule unique to Texas jurisprudence.⁴³ The facts that the application of Texas law to defeat the out-of-state claimants had been made possible by the initiative of the stakeholder and by recourse to the nationwide process provided by the Act have served to alienate many supporters of the *Klaxon* rule from its application to this case,⁴⁴ an attitude accentuated by the tendency to assume that the Texas rule, its idiosyncratic and anachronistic nature apart, ought never to have been chosen to apply to the New York-New Jersey transactions on which the out-of-state claimants based their claim.

The consideration in support of chapter 158's choice-of-law provision that the absent party should not be brought into a multi-state multi-party litigation by federal process and then be subjected to the forum state's choice of law would appear equally applicable to the out-of-state claimants in federal interpleader. Seldom, if ever, could a federal rule be applied to the out-of-state claimant's case on an issue that would be severable from the issues common to all the claimants. On the other hand, unlike the forum state in the chapter 158 situation, Texas could, at the expense of the stakeholder, have effectuated its policy, had it not been for the intrusion of the Federal Interpleader Act. The interest of Texas in the application of Texas policy in this case is much more evident under the emerging concept of the choice-of-law process than it had appeared to be under the old.⁴⁵ An independent choice by the federal court therefore would have to be at the sacrifice either of the Texas policy or of the New York-New Jersey policy, a Hobson's choice perhaps, but, as Professor Field has observed to me, "it makes some difference who Hobson is." He would prefer to cast the federal court in the Hobson role rather than the stakeholder, a party who may not be wholly disinterested.

⁴² 28 U.S.C. § 1335 (1958).

⁴³ Refusal to enforce the contract on public policy grounds would suffice. On remand, the Fifth Circuit held for the Texas administrator. *Griffin v. McCoach*, 123 F.2d 550, 551 (5th Cir. 1941), stating: "Even if the assignees are claiming under foreign contracts which are not governed by the law of Texas, nevertheless, we think the administrator is entitled to recover. . . . The rule in Texas is for the protection of the lives of its [Texas] citizens. . . . The public policy of Texas, as announced by its highest court, is binding upon us, and we have no reason to think that the courts of Texas would permit citizens of other states to speculate upon the death of one of its citizens by means of contracts made without the state when the same is forbidden within its territorial limits."

⁴⁴ E.g., Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1236 n.62 (1946), in which the author, though approving *Klaxon*, suggests that the interpleader situation might provide an occasion for an independent federal choice of law.

⁴⁵ The life that the Texas rule sought to save was that of its own citizen, and this solicitude would extend to a Texas citizen even though the insurance transaction took place in another state. See note 43 *supra*. Professor Currie now approves the application of Texas law. Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 345-46 (1960). But, if the federal court were to be given an independent choice of law in interpleader cases, he would have it choose New York law "for the plain reason that Congress, if it were to address itself to that problem, would almost certainly prescribe that solution." Currie, *The Disinterested Third State*, *infra* p. 754, at 789.

If one may judge from the absence of choice-of-law questions in the annotations to the Federal Interpleader Act since *Griffin*, that case has not been as productive of harsh holdings as the academic distress it has evoked might suggest. However, if the proposed chapter 158 were to be adopted with its (qualified) release of the federal courts from obedience to *Klaxon*, it would be impracticable to preserve *Griffin* since there would be a considerable overlap between the two heads of jurisdiction and consistency in rule would seem essential. Accordingly, the American Law Institute study proposes to give the power of independent choice to the federal court in Interpleader Act cases.⁴⁶

3. *The Hundred-Mile Bulge*. On January 21, 1963, the United States Supreme Court adopted a number of amendments to the Federal Rules of Civil Procedure, among them an amendment to rule 4(f) authorizing service of process outside the forum state "not more than 100 miles from the place in which the action is commenced or to which it is assigned or transferred for trial..."⁴⁷ Such service is authorized to bring in persons as parties pursuant to rule 13(h), rule 14, and rule 19, dealing with various aspects of third-party practice and the joinder of necessary parties. The joinder of third parties necessary for the just adjudication of a case would be the function of chapter 158, and its adoption would substantially curtail the need for rule 4(f). However, rule 4(f) extends well beyond the scope of chapter 158, in particular through its effect in permitting service under rule 14 on a person "who is or may be liable" (severally) to the third-party plaintiff "for all or part of the plaintiff's claim against him." I shall direct my comment to this impleader situation which is expressly excluded by section 2341(b) from the coverage of the proposed chapter 158.

Here again we have a situation where a person may, under *Klaxon*, sometimes be subjected to the choice-of-law rules of a state which could not reach him by its own process. (It should be noted that, unlike chapter 158, rule 4(f) does not depend for its operation on the state's inability to reach the third-party defendant by its own long-arm process.) If, therefore, *Griffin* were to be overruled, it would probably be contended that the federal courts in rule 4(f)-rule 14 cases should be also free to make an independent choice of law. This would seem to me unfortunate.

In part my objection goes to the enlarged rule 4(f) itself, a measure that appears to me to burgeon with unanswered questions⁴⁸ and to expose the unwary to the

⁴⁶ For proposed amendments to § 1335 and related sections, see *STUDY OF JURISDICTION* 33-34. The district court is authorized to "make its own determination as to which State rule of decision is applicable." Transfer to any other district is provided, and process beyond United States territorial limits is permitted "subject to the provisions of any treaty."

⁴⁷ For the text of the amended Rules as adopted and the Report of the Judicial Conference of the United States submitting them to the Court, see 374 U.S. 876-77 (1963). The amended rule 4(f) also includes a provision that does not pose the choice-of-law problems I have discussed above. It provides that "persons required to respond to an order of commitment for civil contempt may be served at the same places," and is aimed primarily at evasive, recalcitrant spouses and parents. The power to reach these persons seems clearly needed, but why should 101 miles give them immunity?

⁴⁸ Apart from doubts as to the validity of diversity jurisdiction when the third-party plaintiffs and defendants are citizens of the same state and problems as to the rule's consistency with statutory limitations on venue, for which the concept of "ancillary jurisdiction" appears to have been stretched

burden of out-of-state litigation⁴⁹ as a consequence of unheralded geographical lines that have no physical or any other functional demarcation (apart from delimiting the service of subpoenas,⁵⁰ an operation not likely to come to public attention or to shape public expectations or behavior).

If the use of rule 4(f) were to be the occasion for the total abandonment of *Klaxon* in cases involving its employment, the result would be to open up an inviting field for gambling on choice-of-law rules. The opportunities, especially in modern tort litigation, to implead a third party are, to be sure, materially greater than their actual exploitation has been, but doubtless the third party who might be impleaded is often judgment-proof. Suppose, however, it were held that the addition of a third party by out-of-state service were thereupon to transform a case from one subject to the forum state's choice-of-law rules to one governed by whatever choice-of-law rules the third-party plaintiff could persuade the federal district court to adopt. Thereafter, once counsel had become aware of the potentialities of the maneuver, speculative and even collusive resort to rule 4(f) cases might grow painfully common.⁵¹ Third-party practice is likely to be used chiefly in tort actions, and, though choice-of-law torts cases are beginning to reflect the new approach to choice of law, the area is still a relatively settled one. The effect of doing away with

thin (see Note, *Rule 14: Federal Third Party Practice*, 58 COLUM. L. REV. 533 (1958)), rule 4(f) leaves uncertain the circumstances in which jurisdiction can be obtained by service in a number of situations. Thus, is jurisdiction obtained by service upon a corporation that does no business within a state containing the bulge, an appropriate officer having been served within it? Would it suffice for the corporation to have done business within the state though not within the bulge itself? If doing business within the bulge is required, must that business have been enough so that it would have satisfied due process criteria in state litigation, or may business done elsewhere in the state be considered? And what is the effect of the corporation's qualification by filing consent to service with a state office located within—or without—the bulge on the foregoing situations and on the case in which the corporation has never done, or has ceased to do, business in the state? Though authority to serve outside the forum state is clearly federal, are the criteria governing the jurisdictional effectiveness of the service thus authorized to be derived from the law of the state of service or federal law? In *Arrowsmith v. United Press International*, 320 F.2d 219 (2d Cir. 1963), a decision by the full bench, overruling on this point *Jaftex Corporation v. Randolph Mills*, 282 F.2d 508 (2d Cir. 1960), the court, per Friendly, J., *id.* at 228 n.9, declined to express an opinion on the standard to govern in federal question cases or "when process is served outside the state under the 100-mile provision for certain types of litigation," citing rule 4(f).

⁴⁹ Unlike a state boundary, nothing in the arc described by the 100-mile radius (measured, presumably as the crow flies, from courthouse to point of service) puts persons on notice of the possible legal consequences of crossing it; most people would know neither of the arc's location nor of its existence. A third-party defendant need not be a citizen of the state in which he is served. A Californian on a business trip to New York could be impleaded in a Hartford or a Philadelphia case; a Texan visiting Chicago, in a Milwaukee or a South Bend case. Of course, the draftsmen saw the problem in terms of enabling the big city court to reach out, but the bulge can run in either direction.

For a criticism by a federal judge of rule 4(f), see Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 106 (D. Minn. 1956).

⁵⁰ Service of subpoenas within a range of 100 miles is authorized by rule 45(e)(1).

⁵¹ In assessing the opportunities for manipulation, one should note that, at least where diversity exists, rule 14 permits the plaintiff to amend his complaint to assert his own claim against a third-party defendant who has been joined by the third-party plaintiff's recourse to rule 4(f), thereby subjecting the third-party defendant to a jurisdiction that the plaintiff could not have invoked independently and, unless *Klaxon* is respected, to an independent choice of law that the plaintiff could not have commanded. Lest this case seem academic, consider a product liability action against a local retailer (the third-party plaintiff), the plaintiff's real target being the manufacturer (the third-party defendant) doing business within the bulge.

Klaxon where rule 4(f) is employed would, under the lowest common denominator principle, tend to keep it depressingly so.

The best solution to the problem posed by rule 4(f) would be to substitute the proposed chapter 158 for it, thereby reducing the occasion for out-of-state service to situations wherein a real need exists to complement the state's judicial jurisdiction. Failing that solution, I would prefer the continuation of *Klaxon* even in those rule 4(f) cases in which parties are added to a litigation who could not have been caught by state process. If, however, this seems too strict, I would suggest that the independent federal choice of law be limited to rule 4(f) cases in which the third-party defendant was not subject to state process and then only to those issues in such cases that pertained to his own liability. The stratagem of adding an out-of-state party should not have the effect of changing the rules of the game for what otherwise would have been an ordinary instance of the general diversity jurisdiction. The limitation I suggest is peculiarly apt in impleader cases where the liability of the third-party defendant may well turn on questions quite distinct, both factually and legally, from the issues between the plaintiff and the defendant.

VII

LEGISLATION: A DOUBTFUL REMEDY

Recognition that, in addition to curtailing the power of state courts to delimit the reach of state policy, the abolition of the *Klaxon* rule would create uncertainties in the law that would confuse those litigants and legal counselors who did not try to exploit them, has led some critics of *Klaxon* to suggest resort to legislation. However, since codification of choice-of-law rules runs in the teeth of the current trend in choice-of-law and is ill-adapted to the special needs of a federal system,⁵² a choice-of-law code does not offer an appealing solution.

An alternative statutory measure would eliminate the erratic incidence of diversity jurisdiction as an instrument of law development by converting every case involving a choice-of-law question into a "federal question" case. A less drastic statutory experiment would make every state decision involving a choice between the laws of two or more states subject to review on appeal from the state supreme court to a federal court of appeal. The former measure would burden the federal courts with an onerous task that in most situations could as well be borne by the state courts—or better. The latter measure would protract litigation unmercifully. Both schemes would render the state supreme courts as well as the parties the victims of the shambles that eleven autonomous federal courts of appeal would soon

⁵² A national code, such as the German, is concerned primarily with assuring the application of the national law to situations in which there is a substantial national interest. The codifiers need have much less concern with the problems of accommodating the conflicting rules and interests of other states. My Special Memorandum includes a brief discussion of foreign experience with codifying choice-of-law rules. See *STUDY OF JURISDICTION* 202-05.

create.⁵³ Only a gravely critical situation could justify such drastic remedies (if such they can be called). I see no evidence that *Klaxon* has given rise to a crisis.

I would not assert that there is no room for federal legislation on choice-of-law problems. However, I think it is a device to which sparing, *ad hoc* recourse should be had.⁵⁴ In this situation we would do well to heed the counsel of Justice Roger Traynor of the California Supreme Court, a leading spirit among those who have been reshaping the choice-of-law process. Not long ago he wrote:⁵⁵

There will remain the inevitable problem in a federal system that recurrently competing state interests in a conflicts case may have to be evaluated in the light of the national interest in interstate harmony.... It does not follow, however, that Congress either would or should enact choice-of-law rules posthaste, or even that it should ever enact them wholesale. As we now finish one long servitude to categorical imperatives, we should be on guard against another. The law of conflicts has been kept in its infancy all too long to survive another deep freeze. It has a chance at last to develop freely. Only as progressive case law accumulates can we gain the necessary perspective for determining the areas in which conflicting state interests so chronically threaten interstate harmony as to call for federal legislation.

For some time to come, therefore, the main responsibility for the rational development of conflict of laws is bound to remain with the state courts.

⁵³ It is sometimes contended that differences in the case law among eleven circuits are to be preferred to differences in the case law among fifty states. This is not so; the fifty states do not purport to comprise a single judicial system. A case in Texas need have no unsettling effect on the common law of Massachusetts, but a decision in the Fifth Circuit will have an impact in the First.

⁵⁴ For some specific suggestions, see *STUDY OF JURISDICTION* 207. I see more promise in federal laws prescribing interstate substantive rules. *Id.* at 208.

⁵⁵ Traynor, *Is This Conflict Really Necessary?*, 37 *TEXAS L. REV.* 657, 675 (1959).