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The Full Faith and Credit Clause as Related to the Diversity Clause in Statute of Limitations Cases

NOTE

THE FULL FAITH AND CREDIT CLAUSE AS RELATED TO THE DIVERSITY CLAUSE IN STATUTE OF LIMITATIONS CASES

If a personal cause of action accrues in one state and is sued upon in another, the problem of which state's statute of limitations shall be applied is presented if suit would be barred under the statute of one of the two states but not under the statute of the other. If the suit is brought in the state courts, rather than the federal court, of the forum, the solution of this problem will depend upon the forum state's applicable conflict of laws rule and whether the Full Faith and Credit Clause of the Federal Constitution is contravened by such application. On the other hand, if suit is brought in a federal court sitting in the forum state, additional considerations may require a different result.[1]

I. *Suit in the State Courts of the Forum*

The Federal Constitution provides that "Full Faith and Credit *shall* be given in each State to the public Acts ... of every other State. And the Congress *may* by general Laws prescribe the Manner in which such Acts ... shall be proved, and the Effect thereof."[2]

Shortly after the ratification of the Constitution, Congress held

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[1]If suit is brought in a federal court because of diversity, it is still important to determine whether the forum state courts could apply a forum statute of limitations to an out-of-state-created cause of action without violating the Full Faith and Credit Clause. If the state courts could not constitutionally apply such a statute of limitations then it is clear that the federal courts may not do so. First National Bank of Chicago v. United Air Lines, 342 U. S. 396, 72 S. Ct. 421, 96 L. ed. 441 (1952); Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. ed. 1212 (1951). However, if it is determined that the forum state courts could constitutionally apply a forum statute of limitations, then a more difficult problem arises as to whether the federal courts sitting within the forum state must likewise apply the forum statute of limitatitons.

The first part of this Note is devoted to the first problem: Under what circumstances may a state court apply a forum statute of limitations to an out-of-state-created cause of action without violating the Full Faith and Credit Clause of the Federal Constitution?

The second part of this Note will be published in the following issue of the Washington and Lee Law Review and will be concerned with the problem: Is a federal court required to close its doors to suit just because a forum limitation period, constitutionally applicable in the forum state courts, has expired and the state courts' doors are closed?

[2]U. S. Const., Art. IV, § 1 [italics supplied].

its first session and passed the Judiciary Act of 1790, which provided for the authentication of the statutes of the several states but which said nothing regarding their "extra-territorial" operation.[3] This silence, however, has "been repealed, in part, by judicial decision."[4] The Supreme Court has held that acts of the state legislatures are covered by the Full Faith and Credit Clause.[5]

Constitutional law writers seem to agree that this provision of the Constitution came into being because "The framers of the Constitution felt . . . that the rules of private international law [conflict of laws] should not be left as among the States altogether on a basis of comity, and hence subject always to the overruling local policy of the *lex fori,* but ought to be in some measure at least placed on the higher plane of constitutional obligation."[6]

But as the Supreme Court of the United States has observed in

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[3]See Annotated Constitution of the United States of America (1952) 652. "Of course the provision that 'full faith and credit shall be given in each State to the public acts . . . of every other State' [sic] does not give extra territorial effect to state legislation. It simply requires that, when rights or obligations have in one State been fixed by the statutes of that State, the force of such statutes in fixing such rights or obligations shall be recognized in controversies arising in any other State." Burdick, The Law of the American Constitution (1922) 475. See Cooper v. Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808 (1899).

[4]Annotated Constitution of the United States of America (1952) 652.

[5]Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 154, 52 S. Ct. 571, 76 L. ed. 1026, 82 A. L. R. 696 (1932). But it is argued that by "public acts" of a state it was meant those acts of its legislature, which had a general or "public" application as distinct from those appertaining to the rights of some particular designated person, or persons, only, which were known, by way of contradistinction, as "private acts." And the history of the Full Faith and Credit Clause in being shaped in the constitutional convention would indicate this. See 1 Crosskey, Politics and the Constitution in the History of the United States (1953) 542-43.

[6]Annotated Constitutiton of the United States of America (1952) 652. See also Corwin, The Constitution and What It Means Today (10th ed. 1948) 135, citing Cooley, Principles of Constitutional Law (3rd ed. 1898) 196-206. See 1 Crosskey, Politics and the Constitution in the History of the United States (1953) 550 where it is said that "the 'command' which 'shall' [in the Full Faith and Credit Clause] expresses, should comprehend the whole body of rules and principles to which the clause relates. Nor can there be any doubt that this extraordinary step, of making this whole department of the 'law of nations' a branch of constitutional law, as between our states, was deliberately taken. For the records of the Convention show that there was difference of opinion within that body as just what, in this particular, had best be done; and although the Committee of Details had recommended the step that finally was taken, various other proposals were made before the substance of the committee's proposal, *coupled, however, with a permission to Congress to legislate in the field, which the committee had not included,* was at last adopted." In support of the position that conflict of laws were deemed to be part of the common law at the time of the convention, see James v. Allen, 1 Dall. 188, 1 L. ed. 93 (U. S. 1786); Miller v. Hall, 1 Dall. 229, 1 L. ed. 113 (U. S. 1788).

Pink v. A. A. A. Highway Express, Inc.,[7] the Full Faith and Credit Clause is not an inexorable and unqualified command. "It leases some scope for state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another."[8] It was, the Court said in the *Pink* case, "the purpose of that provision [the Full Faith and Credit Clause] to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises, it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another."[9] Thus, the Supreme Court has taken the view that the Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws but merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state.[10] "The states are free," the Court has said, "to adopt such rules of conflict of laws as they choose . . . [within certain limits]."[11] If it is meant by this that one state may give less recognition to another state's laws than was given by way of comity at common law, then this view would seem to be indefensible on its face, since it seems clearly to be contrary to the express words and the convention history of the Full Faith and Credit Clause.[12] However, when the language of the Supreme Court ex-

[7]314 U. S. 201, 210, 62 S. Ct. 241, 86 L. ed. 152 (1941).

[8]Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 210, 62 S. Ct. 241, 86 L. ed. 152 (1941).

[9]Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 210, 62 S. Ct. 241, 86 L. ed. 152 (1941). See also Pacific Ins. Co. v. Commission, 306 U. S. 493, 500, 59 S. Ct. 629, 83 L. ed. 940 (1939); Alaska Packers Assn. v. Commissioner, 294 U. S. 532, 547, 55 S. Ct. 518, 79 L. ed. 1044 (1935).

[10]Wells v. Simonds Abrasive Co., 345 U. S. 514, 73 S. Ct. 856, 97 L. ed. 1211 (1953); Kryger v. Wilson, 242 U. S. 171, 37 S. Ct. 34, 611 L. ed. 229 (1916).

[11]Wells v. Simonds Abrasive Co., 345 U. S. 514, 73 S. Ct. 856, 857, 97 L. ed. 1211 (1953).

[12]See 1 Crosskey, Politics and the Constitution in the History of the United States (1953) 550.

pressing that the states are "free" within certain limits "to adopt" such rules of conflict of laws as they choose is compared with the holdings, it appears that the result aimed at by the framers of the Constitution has been attained. It has been held that a statute of one state giving rise to a right or defeating a right must be applied by the courts of another state.[13] It is only in the area of remedial law affecting the measure of recovery,[14] kind of remedy,[15] or the time within which a remedy must be sought[16] that the "freedom to adopt" language of the Supreme Court has allowed any "freedom." However, it is submitted that even in this area, states will not be allowed to apply a rule of conflict of laws which would not at least meet the minimum recognition of "foreign law" which would have been given by comity under the common law.[17] On the other hand, if a state should see fit to adopt a rule of conflict of laws which gives greater recognition to "foreign law" than the common law rules of conflict of laws required, it is difficult to conceive any argument that the Full Faith and Credit Clause would prevent it, as that clause sets a minimum recognition and not a maximum. Thus, it may be that the "freedom" spoken of by the Supreme Court is to give more effect to the acts of a sister

[13]Of course it is assumed that the cause of action accrued under the statute or in the state with the statute defeating the cause of action and that there is no problem about this. Statutes giving rise to a right: First National Bank of Chicago v. United Air Lines, 342 U. S. 396, 73 S. Ct. 421, 96 L. ed. 441 (1952); Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. ed. 1212 (1951); Northern Pacific R. R. v. Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958 (1894) (wrongful death statutes involved). Cf. the treatment of Workmen's Compensation statutes disscussed in Annotated Constitution of the United States of America (1952) 681. See note 5, *supra*. Statutes defeating a right: See The Harrisburg, 119 U. S. 199, 214, 7 S. Ct. 140, 149, 30 L. ed. 358, 362 (1886). Certain statutes defeating a right in one person, however, create rights in another person. See note 31, *infra*.

[14]As a matter of conflict of laws the weight of authority characterizes this question as one of substantive law and applies the law of the lex loci. Goodrich, Conflict of Laws (3rd ed. 1949) 254. However, some few states apply the law of the forum. E.g., Door Cattle Co. v. Des Moines Nat. Bank, 127 Iowa 153, 98 N. W. 918, 4 Ann. Cas. 519 (1904); Wooden v. Western N. Y. & P. R. R., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803 (1891). Cf. Northern Pacific R. R. v. Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. ed. 958 (1894), with Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. ed. 2079, 160 A. L. R. 1231 (1945). The York case impliedly took the view that the Full Faith and Credit Clause is not offended by the minority state view.

[15]If the law of the lex loci "awards damages in a manner which the local machinery is not adapted to enforce, the plaintiff cannot ask to have the existing legal machinery changed for his benefit." Goodrich, Conflict of Laws (3rd ed. 1949) 253. See Slater v. Mexican Nat. Ry., 194 U. S. 120, 24 S. Ct. 581, 48 L. ed. 900 (1904).

[16]See note 22, *infra*.

[17]See Christmas v. Russell, 5 Wall. 590, 18 L. ed. 475 (U. S. 1866). Cooley, Constitutional Law (1898) 204.

state than the Full Faith and Credit Clause requires or to give only the minimum, whichever the local policy of the forum state dictates.

In examining in particular the conflict of laws treatment of statutes of limitations to determine whether the previously discussed standard of the Full Faith and Credit Clause has been applied, a more intelligible understandng can be had if the basic philosophy behind statutes of limitations is first alluded to.

The object of statutes of limitations "is to fix certain periods within which all suits shall be brought in the courts of a state, whether they are brought by or against subjects, or by or against foreigners. It has been said by John Voet with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal, while men are mortal: *Ne autem lites immortales essent, dum litigantes mortales sunt.*"[18] In regard, at least, to ordinary or general statutes of limitations or prescription of suits and lapse of time, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits.[19]

Since the application of an ordinary or general statute of limitations merely bars the remedy for enforcing an established right, it has accordingly become the generally accepted conflicts rule that the limitation period of the *lex fori* is applied.[20] And this is true even though the limitation period provided for by the *lex loci* may be shorter so that suit may no longer be brought there or may be longer so that a remedy is still available in the *lex loci*.[21] Such a conflict of laws rule has long been upheld by the Supreme Court as not offending the Full Faith and Credit Clause of the Constitution.[22]

Even if the Full Faith and Credit Clause is viewed as compelling that which was done by comity at common law (herein referred to as the strict view) rather than as an indefinite quantity which in every instance

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[18]Story, Conflict of Laws (Redfield's ed. 1865) 766.

[19]Story, Conflict of Laws (Redfield's ed. 1865) 766.

[20]Goodrich, Conflict of Laws (3rd ed. 1949) 240.

[21]Restatement, Conflict of Laws (1934) §§ 603, 604. See Restatement in the Courts (1945) 324.

[22]Bacon v. Howard, 20 How. 22, 15 L. ed. 811 (U. S. 1857); Townsend v. Jemison, 9 How. 407, 13 L. ed. 194 (U. S. 1850); McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177 (U. S. 1839). But the Supreme Court early indicated that it is not competent for any state to pass an act of limitation which would in effect nullify rights acquired in other States and allow no remedy upon them whatever. See Christmas v. Russell, 5 Wall. 290, 300, 18 L. ed. 475 (U. S. 1866). See also Branson v. Kinzie, 1 How. 311, 317, 11 L. ed. 143 (U. S. 1843). Cooley, Constitutional Law (1898) 204.

the Supreme Court must approve,[23] a conflict rule applying the statute of limitations of the *lex fori,* rather than the statute of limitations of the *lex loci,* does not violate the Full Faith and Credit Clause, for such a conflict of laws rule was recognized in the common law.[24] The basis for such a conflict rule is that every nation must have a right to settle for itself the times within and under which suits shall be litigated in its own courts. If the statute of limitations of the *lex fori* is shorter "There can be no pretense to say, that foreigners are entitled to crowd the tribunals of any nation with suits of their own, which are stale and antiquated [by the policy of the forum as expressed by its own statute of limitations], to the exclusion of common administration of justice between its own subjects."[25] If the statute of limitations of the *lex fori* is longer it is difficult to see how the defendant could complain if no rights have been affected or vested by the running of the shorter limitation period of the *lex loci.* Why should one be heard to complain that the forum has a more lenient policy so as to make its courts available for a longer period to provide a remedy for a wrong? Just because the *lex loci* has a statute of limitations which closes the doors of its courts after the time provided does not mean that the doors of courts of sister states are thereby closed. General statutes of limitations are expressions of local policy dealing with the time in which the state's own courts may provide a remedy. Such general statutes, as pointed out, do not purport to affect rights but only affect the remedy in a particular court system.[26] Thus, it would seem that as to general statutes of limitations the conflict of laws rule has taken into account the right of the *lex fori* to formulate its own local policy (that is, provide for the length of time within which rights must be sought to be enforced in its own courts) while at the same time not resulting in the local policy of the *lex loci* being imposed upon the courts of the *lex fori.* Then, in this area, at least, the only other choice and thus "freedom to choose its own rules of conflict of laws" that a state has under the

[23]See Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1923) 39 Harv. L. Rev. 533, 560. See Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 210, 62 S. Ct. 241, 246, 86 L. ed. 152, 158 (1951), cited *supra* note 9.

[24]"[It is]...a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought *(lex fori,)* otherwise the suits will be barred; and this rule is as fully recognized in foreign jurisprudence, as it is in the common law." Story, Conflict of Laws (Redfield's ed. 1865) 766.

[25]Story, Conflict of Laws (Redfield's ed. 1865) 768.

[26]See notes 19, 20, 21, and 22, *supra.*

view of the Supreme Court is to apply the statute of limitations of the *lex loci.* Since this would be a voluntary adoption of foreign local policy it would not do violence to the stricter view of the Full Faith and Credit Clause since a state adopting such a rule would be giving more recognition to foreign law than was given by comity under the common law.[27]

By contrast, it is held that when a statute creating a right unknown at common law contains an express time limitation on that right, and suit within that time is a condition to the right, all rights created by the statute are destroyed after the time specified in the statute has elapsed. Thus, if the *lex fori* has a similar statute but which provides for a longer period of existence of the right than does the statute of the *lex loci,* which latter period has elapsed, the statutory period of the *lex loci* is usually held operative by the state courts.[28] And in *The*

[27]See note 24, *supra.*

[28]Dunn Const. Co. v. Bourne, 172 Miss. 620, 159 So. 841 (1935); Wingert v. Carpenter, 101 Mich. 395, 59 N. W. 662 (1894); Sea Grove Bldg. & Loan Ass'n v. Stockton, 148 Pa. 146, 23 Atl. 1063 (1892); Perkins v. Guy, 55 Miss. 153 (1877); Brown v. Parker, 28 Wis. 21 (1871). Goodrich, Conflict of Laws (3rd ed. 1949) 243. But some of the cases discussing this point qualify it by insisting that, in order for the right to be destroyed, both parties must have been resident for the statutory period within the jurisdiction where the cause of action arose. Canadian Pac. Ry. v. Johnston, 61 Fed. 738, 25 L. R. A. 470 (C. C. A. 2nd, 1894); Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510 (1877); Smith v. Webb, 181 S. W. 814 (Tex. Civ. App. 1915), and authorities cited; Brown v. Parker, 28 Wis. 21 (1871). This qualification has been criticized as a needless refinement. "... If the statute purporting to 'extinguish' the obligation does extinguish it, the matter ceases to be one of procedure, and residence would become immaterial; whereas if such words do not extinguish the obligation [which depends on construction and if interpreted by the courts of the state of the statute, that interpretation is binding on courts of other states applying that statute] there seems little reason for the exception based on residence." Note (1918) 27 Yale 1078. See also Goodrich, Conflict of Laws (3rd ed. 1949) 242. In fact, where the forum statutes created the right and contained a limit on the right the forum has generally denied a remedy after the expiration of that period, regardless of residence. E. g., Eastwood v. Kennedy, 44 Md. 563 (1876). Note (1918) 27 Yale 1078. The Supreme Court of the United States in The Harrisburg, 119 U. S. 199, 214, 7 S. Ct. 140, 147, 30 L. ed. 358, 362 (1886) said that "No one will pretend that the suit ... could be maintained if brought ... after the expiration [of the time limit of the lex loci qualifying the right]." And in that case the defendant had not remained in the jurisdiction of the lex loci for the entire time, yet the running of that period, nevertheless, was held to kill the right and nothing remained to sue on. Unless the lex loci itself has a provision tolling the running of its own period of limitation when the defendant leaves that jurisdiction it would seem that the Full Faith and Credit Clause would and should compel other states to recognize that no cause of action exists at all. For, the second state in recognizing rights in the plaintiff, which does not alone offend the Full Faith and Credit Clause, would be rejecting the force of "public acts" in fixing rights in the defendant, which does offend the Full Faith and Credit Clause.

Harrisburg,[29] the Supreme Court of the United States declared that: "No one will pretend that the suit... could be maintained if brought... after the expiration... [of the limitation period of the *lex loci*]."[30] Thus, if the statute of limitations has operated to extinguish the right or pass title, the Full Faith and Credit Clause, it is submitted, requires recognition of the force of such statutes in fixing such rights whenever controversy arises in any other state.[31]

However, even if a cause of action arises under a statute creating a right unknown at common law and containing an express time limitation, and suit within that time is a condition on that right and all rights are destroyed after the specified time has elapsed, most state jurisdictions have refused to apply the limitation of the *lex loci* if that time has not run but the time limitation provided by a similar statute of the *lex fori*, if held to be applicable to the enforcement in the forum of such out-of-state causes of action, has expired. In such a situation the usual conflicts rule of the states is that the time limitation of the forum applies.[32]

In the recent case of *Wells v. Simonds Abrasive Co.*,[33] it was argued by the plaintiff that such an application of the shorter limitation

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[29]119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358 (1886).

[30]119 U. S. 199, 214, 7 S. Ct. 140, 147, 30 L. ed. 358, 362 (1886).

[31]Campbell v. Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483 (1885) (title to chattels passed on running of statutory period); Leffingwell v. Warren, 2 Black 599, 17 L. ed. 261 (U. S. 1862) (title to land passed on running of statutory period); The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358 (1886) (running of statutory period of a wrongful death statute extinguishing the right was held to create rights in the defendant, but with no mention of the Full Faith and Credit Clause). Story seems to be the first in dealing with this question as a matter of comity, to suggest that courts of the lex fori should enforce statutes of limitations or prescription of the lex loci when these had already operated to pass title and thus create rights. See Story, Commentaries on the Conflict of Laws (1834) 487. The correctness of Story's suggestion has been recognized by both the Supreme Court of the United States and by the Court of Common Pleas in England. See Shelby v. Guy, 11 Wheat. 361, 6 L. ed. 495 (U. S. 1826); Huber v. Steiner, 2 Bing. (N. C.) 202, 211 (1835). If such be the rule of comity the Full Faith and Credit Clause, it is submitted, makes it binding on the states.

[32]White v. Govatos, 40 Del. 349, 10 A. (2d) 524 (1939); Tieffenbrun v. Flannery, 198 N. C. 397, 151 S. E. 857, 68 A. L. R. 210 (1930); Rosenweig v. Heller, 302 Pa. 279, 153 Atl. 346 1931). Negaubauer v. Great Northern Ry., 92 Minn. 184, 99 N. W. 620 (1904) appears to be contra but contains a distinguishing point. It was held that the statute of limitation provision of the lex loci always applied in this type of situation; but this would not seem to be directly contra to the holding in most jurisdictions as the limitation provision in the statute of the forum creating similar rights was construed as affecting the right created only as not intended to affect causes of action not arising under *it*.

[33]345 U. S. 514, 73 S. Ct. 856, 97 L. ed. 1211 (1953). See note 1, *supra*.

period of the *lex fori* constituted a refusal to give full faith and credit to the public acts of the state in which the cause of action had arisen. In this case, Cheek Wells was killed in Alabama when a grinding wheel with which he was working burst. The wheel had been manufactured by respondent, Simonds Abrasive Co., a corporation with its principal place of business in Pennsylvania. The plaintiff, the administratrix of the estate of Cheek Wells, brought an action for damages in the Federal Court for the Eastern District of Pennsylvania after one year, but within two years, after the death of Cheek Wells, jurisdiction being based upon diversity of citizenship. The section of the Alabama Code upon which the plaintiff predicated her action for wrongful death provided that suit "must be brought within two years from and after the death. . . ."[34] The respondent, Simonds Abrasive Co., moved for summary judgment on the ground that the Pennsylvania wrongful death statute required suit to be brought within one year. The district judge ruled that the Pennsylvania statute, which was analogous to the Alabama statute, had a one-year limitation and that the Pennsylvania conflict of laws rule called for the application of its own limitation rather than that of the place of the injury and, deeming himself bound by the Pennsylvania conflicts rule, ordered summary judgment for the respondent.[35] The Court of Appeals for the Third Circuit affirmed.[36]

Though not fully dealt with by the courts, three problems are presented by the case: 1) Which limitation period would the Pennsylvania state courts have applied; 2) If the Pennsylvania state courts would have applied the forum state's limitation period, would this application be a denial of full faith and credit to the public acts of the *lex loci;* and 3) Must a federal court, when jurisdiction is based on diversity of citizenship, act as a mirror of the state courts where it sits in every instance? Of these the latter two present constitutional questions, and consideration of the *Wells* case will be limited to them.[37] The Supreme Court of the United States granted certiorari in the *Wells* case but limited consideration to the second of the above problems—that is, whether the Pennsylvania conflicts rule calling for the application of its own limitation period violates the Full Faith and

[34]Ala. Code (1940) Civil Remedies and Procedure § 123. The limitation period of this provision has been construed as a condition on the right itself and not merely remedial. Parker v. Fies and Sons, 243 Ala. 349, 350, 10 S. (2d) 13, 15 (1952).

[35]Wells v. Simonds Abrasive Co., 102 F. Supp. 519 (D. C. E. D. Pa. 1951).

[36]Wells v. Simonds Abrasive Co., 195 F. (2d) 814 (C. A. 3rd, 1952).

[37]For the limitation period Pennsylvania state courts would have applied see Rosenweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931).

Credit Clause of the Federal Constitution.[38] In a five to three decision, the Supreme Court held that a state could constitutionally apply its own limitation of time within which a suit in the *lex fori* could be brought on a cause of action which accrued in and was based upon a statute of the other state.

As to the full faith and credit aspect of the *Wells* case, Chief Justice Vinson, who wrote the majority opinion, observed that:

> "Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state. We see no reason in the present situation to graft an exception onto it. Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause."[39]

It would seem that as to all things pertaining to the right as distinguished from the remedy alone the Full Faith and Credit Clause requires that "the force of such statutes in fixing such rights or obligations shall be recognized in controversies arising in any other State."[40] And, as pointed out by the dissent in the *Wells* case, the Supreme Court has long taken the position that if "The liability and the remedy are created by the same statutes, ... the limitations of the remedy are ... to be treated as limitations of the right."[41] Apparently the dissent reads the majority view in the *Wells* case as a repudiation of the position of the Court that such limitations of the remedy are to be treated as limitations of the right, for the dissent posed the query: "Suppose even now she [the plaintiff] can get service in a state with no statute of limitation or a longer one; can she thereby revive a cause of action that has expired under Alabama law?"[42] And in answer the dissent reasoned that "The Court's logic would so indi-

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[38]Wells v. Simonds Abrasive Co., 344 U. S. 815, 73 S. Ct. 57, 97 L. ed. 634 (1952).

[39]345 U. S. 514, 517, 73 S. Ct. 856, 858, 97 L. ed. 1211, 1216 (1953).

[40]Burdick, The Law of the American Constitution (1922) 475. See Cooper v. Newell, 173 U. S. 555, 19 S. Ct. 506, 43 L. ed. 808 (1899).

[41]The Harrisburg, 119 U. S. 199, 214, 7 S. Ct. 140, 147, 30 L. ed. 358, 362 (1885). Cf. Davis v. Mills, 194 U. S. 451, 454, 24 S. Ct. 692, 693, 48 L. ed. 1067 (1904); Slater v. Mexican National Ry., 194 U. S. 120, 24 S. Ct. 581, 48 L. ed. 900 (1904); Engel v. Davenport, 271 U. S. 33, 38, 46 S. Ct. 410, 412, 70 L. ed. 813 (1926). See dissent, Wells v. Simonds Abrasive Co., 345 U. S. 514, 519, 73 S. Ct. 856, 862, 97 L. ed. 1211, 1216 (1953), where the above cited cases were viewed as establishing the doctrine that, in such circumstances as are here being considered, "the remedy is inseparable from the right...." 345 U. S. 514, 525, 73 S. Ct 856, 862, 97 L. ed. 1211, 1220 (1953).

[42]Wells v. Simonds Abrasive Co., 345 U. S. 514, 522, 73 S. Ct. 856, 860, 97 L. ed 1211, 1218 (1953).

cate."[43] Having thus posed the question and supplied the answer, the dissent concluded that "The life of her [the plaintiff's] cause of action is then determined by the fortuitous circumstances that enable her to make service of process in a certain state or states."[44]

However, the dissent is viewing the Court's position in the situation where the limitation period contained in the statute of the *lex loci* has not run and the *lex fori* applies its shorter limitation period as a repudiation of the Court's position in the situation where the limitation period of the *lex loci* has run and the limitation period of the *lex fori* is longer. The distinction between the two situations is a relevant one involving different considerations. If the limitation period of the *lex loci* in this type case has run, the cause of action no longer exists, and there is nothing for the local policy of the *lex fori* to operate upon.[45] On the other hand, if the limitation period of the *lex loci* has not run, there *is* a cause of action for the local policy of the *lex fori* to operate upon. Whether or not the local policy of the *lex fori* should be allowed to operate and what the effect of such operation should be present additional problems.

As to the first problem—that is, whether or not the local policy of the *lex fori* in this type case should be allowed to operate on an existing out-of-state-created cause of action—it should be remembered that at common law certain foreign causes of action were enforced by the forum as a matter of comity, provided such enforcement did not override local policy;[46] and (as is submitted above[47]) it was this limited recognition which the Full Faith and Credit Clause undertook to preserve as between the states. If a state can now arrange its code so that the local policy of the state becomes part of the "right," and if this part of the "right" is given the protection of the Full Faith and Credit Clause, it could result in the local policy of the *lex loci* being forced upon the *lex fori*, even though the *lex fori* might have a conflicting local policy. In fact this is the result argued for by the plaintiff in the *Wells* case. The answer should be no different just because the right of action created by the statute was unknown to the common law. For, even though the right of action was unknown to the common law, the fact that the *lex fori* in enforcing a foreign cause

[43]Wells v. Simonds Abrasive Co., 345 U. S. 514, 522, 73 S. Ct. 856, 860, 97 L. ed. 1211, 1218 (1953).

[44]Wells v. Simonds Abrasive Co., 345 U. S. 514, 522, 73 S. Ct. 856, 860, 97 L. ed. 1211, 1218 (1953).

[45]See notes 28, 29, and 31, *supra*.

[46]Story, Conflict of Laws (Redfield's ed. 1865) 768.

[47]See notes 6 and 17, *supra*.

of action would subject it to the local policy (including periods of limitation)[48] of the *lex fori* was not unknown.

The view of the dissent that the majority position affects the life of the plaintiff's cause of action seems unwarranted, as the majority cited "the well established principle of conflict of laws [as set out in the Restatement of Conflict of Laws][49] that 'If action is barred by the statute of limitations of the forum, no action can be maintained [there] though action is not barred in the state where the cause of action arose'."[50] This is the rule applicable to general statutes of limitations, and no one seems to have seriously contended that the life of the cause of action is thereby shortened; nor is there anything inconsistent between the application of this rule to the instant type case and the proposition that in such a case the cause of action ceases to exist upon the running of the time limitation condition of the *lex loci*.[51]

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[48]See Story, Conflict of Laws (Redfield's ed. 1865) 766.

[49]Restatement, Conflict of Laws (1934) § 603.

[50]Wells v. Simonds Abrasive Co., 345 U. S. 514, 516, 73 S. Ct. 856, 857, 97 L. ed. 1211, 1215 (1953).

[51]The dissent in the Wells case, however, argued that the Full Faith and Credit Clause would compel the use of the statutory period provided for by the lex loci, basing its argument on three lines of cases: (1) That "Even as to general statutes of limitation recent decisions have bound the right and the limitation into a single bundle to be taken by the federal court as a whole." Wells v. Simonds Abrasive Co., 345 U. S. 514, 523, 73 S. Ct. 856, 861, 97 L. ed. 1211, 1219 (1953) (dissenting opinion), citing Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530, 533, 69 S. Ct. 1233, 1235, 93 L. ed. 1520 (1940). From this treatment of general statutes of limitation in a federal court the dissent implies that a fortiori the same treatment should be given when the limitation qualifies the right. However, such would not seem to follow from the Ragan Case since it involved no conflict of laws problem (that is, choice between two states—which law is to be applied) but involved the problem of the choice of either federal improvised law or settled state law. For a consideration of the latter problem of choice see the continuation of this Note in the following issue of the Wash. and Lee L. Rev. And even the dissent earlier in its opinion recognized the distinguishing feature of the Ragan case. See Wells v. Simonds Abrasive Co., 345 U. S. 514, 523, 73 S. Ct. 856, 861, 96 L. ed. 1211, 1218 (1953). (2) That whatever the argument concerning general statutes of limitation as applied to common-law causes, that the Supreme Court has "long ago recognized a distinction as to limitations on ... [an] action created by statutes in the pattern of the Lord Campbell Act. This Court early held such an action in federal court to be barred by the limitation contained in the applicable state statute." Wells v. Simonds Abrasive Co., 345 U. S. 514, 524, 73 S. Ct. 856, 861 (1953) (dissenting opinion), citing the Harrisburg, 119 U. S. 199, 214, 7 S. Ct. 140, 147, 30 L. ed. 358 (1886) and supporting language in Davis v. Mills, 194 U. S. 451, 454, 24 S. Ct. 692, 693, 48 L. ed. 1067 (1904) and Slater v. Mexican National Ry., 194 U. S. 120, 24 S. Ct. 581, 48 L. ed. 900 (1904). From the Supreme Court's position in the cases where the limitation of the lex loci had run the dissent reasoned that the limitation of the lex loci should apply likewise to prevent the cause of action from being barred

Is is submitted that the majority in the *Wells* case has allowed the cause of action which accrued in Alabama all the recognition it is historically entitled to under the Full Faith and Credit Clause.

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(Continued in the next issue of the *Washington and Lee Law Review*)

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in a state with a shorter statute of limitation. But, again, the obvious distinction would seem to be that where the limitation of the lex loci has run, rights have been created in the defendant or rights of the plaintiff destroyed whereas before the running of such limitation period the limitation period has operated on nothing. But, as pointed out, if the limitation period has operated to destroy the right, this being recognized renders the court powerless to act; that is, no cause of action exists to act upon; whereas if the limitation period has not yet operated to destroy old rights or create new rights then even if such a period is recognized as part of the right for some purposes it does not follow that it must be so recognized for all purposes and that the forum may not in addition require that forum local remedial policy be complied with. In addition to these distinguishing features, the same objection exists as to this line of cases as exists as to the first line of cases. That is, in these cases the question was not which state law should be applied, but whether a state rule or an independent federal rule should be applied. Thus entirely different considerations were involved. See the continuation of this Note in the following issue of the Wash. and Lee. L. Rev. (3) That the validity of a doctrine does not depend on whose ox it gores and the doctrine of unity of the remedy and the right in this type case has been applied to plaintiffs as well as defendants. The Supreme Court has, argued the dissent, "employed the same premise as to the unity of the right and the limitation to hold a plaintiff entitled to the longer period prescribed in federal legislation instead of the shorter statutory period of the forum state, saying of the limitation, 'This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates.... And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years'." Wells v. Simonds Abrasive Co., 345 U. S. 514, 525, 73 S. Ct 856, 862, 97 L. ed. 1211, 1220 (1953) (dissenting opinion), citing Engel v. Davenport, 271 U. S. 33, 38, 46 S. Ct. 410, 412, 70 L. ed. 813 (1926). But as pointed out in the majority opinion in the Wells case, the Engel case would seem to have no application here. "It presented an entirely different problem. Once it was decided that the intention of Congress was that the... [limitation period contained in the federal statutory cause of action was meant to apply in both federal and state courts] under our Federal Constitution, that was the supreme law of the land." Wells v. Simonds Abrasive Co., 345 U. S. 514, 518, 73 S. Ct 856, 858, 97 L. ed. 1211, 1216 (1953).

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