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THE FEDERAL "DOOR-CLOSING" DOCTRINE*

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

JAMES W. H. STEWART†

II. Suit in the Federal Courts of the Forum

The third problem* presented by the Wells case has never been "laid upon the table" by the Supreme Court and explored, and this, it is submitted, is the vice of the situation in regard to this problem. That problem is, whether in a diversity case a federal court must act in every instance as a "mirror" of the courts of the state within which the federal court sits and apply the conflict rules of that state, provided it would not be violative of the Constitution (Full Faith and Credit Clause in the Wells case) for the state courts to apply such rules.

Such application by federal courts would not be required in the instant type case if the federal courts are not bound to follow either (1) the forum state's conflict rules generally, or (2) so much of such rules as require the application of the forum state's remedial rules, or (3) so much of the forum state's conflict rules as require the application of those remedial rules of the forum state which operate only to close the state court's doors.

However, the Supreme Court has held that the federal courts are bound to follow the forum state's conflict rules, and in a broad holding has held that this applies even when remedial rules are involved. And relying on cases broadly requiring the application by the federal courts of the forum's conflict rules which in turn require the application of the forum state's remedial rules, the Supreme Court has assumed that a forum rule likewise must be applied which views certain transactions as void and closes the state court doors.

In addition, the Supreme Court has assumed that the decisions in the

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*This discussion is a continuation of Note (1954) 11 Wash. & Lee L. Rev. 47.

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above situations are authority for requiring the application by the federal courts of a forum state rule which recognizes the validity of the cause of action but which closes the state court doors without any consideration of the merits. And all of this has been done without making any distinction as to causes of action which are, without dispute, out-of-state created. Thus a federal court, where jurisdiction is based on diversity, is required to act as a "mirror" of the forum state courts.

To understand better the need for a re-examination by the Supreme Court of the "mirror" doctrine, an investigation must be made of the more basic rule (from which the "mirror" doctrine was evolved) requiring federal courts in diversity cases to apply some state court's view of that state's substantive law rather than allowing the federal courts to take an independent view of such law.

A. Applicable Substantive Law

The "mirror" doctrine was made possible by the overruling of Swift v. Tyson by Erie R. R. v. Tompkins. The Swift case involved a suit in a federal court sitting in New York, jurisdiction being based on diversity, on a bill of exchange dated in Maine but accepted and negotiated in New York. Whether the endorsee could recover depended upon whether he was a bona fide purchaser for value or was subject to the equitable defense of fraud; the question was certified to the Supreme Court, which, on finding the New York law in doubt upon this point, held that even assuming the New York law would bar the defense, the state law was established by state court decision arrived at by reasoning from legal principles and therefore the federal courts were not bound by it under the Rules of Decision Act.


16 Pet. 1, 10 L. ed. 865 (U. S. 1842).

Sec. 34 of the Federal Judiciary Act of Sept. 24, 1789, c. 20, 1 Stat. 92 (1789), 28 U. S. C. § 725 (1928), provided: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." A provision substantially the same is now contained in 28 U. S. C. A. § 1652 (1949).

Justice Story, who delivered the majority opinion, in construing this provision stated: "The true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things..."
After having thus cleared the way, the Supreme Court took the view that the federal courts could, by independently reasoning from the legal principles, arrive at an independent view of the law, it being the type of matter in which the law should be the same all over the nation. Thus the "federal common law" doctrine was involved.

The doctrine laid down in the *Swift* case was subjected to much severe criticism and was finally rejected in 1938 by the Supreme Court in the celebrated case *Erie R. R. v. Tompkins*. In the *Erie* case, the plaintiff, Tompkins, a citizen of Pennsylvania, was injured by defendant's train while he walking along the defendant's tracks in Pennsylvania. He brought suit in the Federal District Court of New York, basing jurisdiction on diversity as the defendant was a New York corporation. The defendant insisted that under the Rules of Decision Act its liability should be determined by the law of Pennsylvania as determined by the highest court of that state which had held that persons who use footpaths along the track of a railroad are trespassers, for the injury of whom there is no liability unless caused by wanton or willful conduct. The plaintiff, however, contended that the Pennsylvania law was not statutory and that it was not binding on federal courts under the Rules of Decision Act as construed by *Swift v. Tyson*. Thus the question was not which state's law would apply, but, granted that a state's law would apply, whether the federal courts could determine for itself what the state law was or whether the federal courts must follow the state court's determination in this respect. The District Court and Circuit Court of Appeals took the position that Pennsylvania law did not control, because "It is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law." However, the Supreme

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having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case." *Swift v. Tyson*, 16 Pet. 1, 18, 10 L. ed. 865, 871 (U. S. 1842).

For a background study of events and views which gave rise to the *Swift* decision, see Teton, *The Story of Swift v. Tyson* (1941) 35 Ill. L. Rev. 519.


Court reversed, overruling *Swift v. Tyson* and holding that the federal courts, under the Rules of Decision Act, must apply state law as determined by the state courts.61

If the facts of the *Erie* case are varied as indicated below the soundness of the holding by the Supreme Court in the *Erie* case is more clearly pointed up. Suppose that Tompkins had had a companion walking with him who was a co-citizen with the Railroad and injury resulted to him also. Under the *Swift* rule Tompkins would be governed by one rule whereas the companion, not being able to come into the federal court under diversity of citizenship, would have to sue in the state courts, and if he sued in New York a different rule would be applied (since the Full Faith and Credit Clause would require the application of Pennsylvania law of the duty) by New York courts. Thus, two people injured by the same act at the same place would be governed by different principles (in matters not of procedure but of basic underlying obligation) depending on where suit is filed. In the light of this supposition of what the *Swift* doctrine made possible the Supreme Court in the *Erie* decision had four possible bases62

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for justifying the overruling of the *Swift* case: 1) *Political unsoundness*—The unsoundness (in the light of the basic assumption of a Federal system) of having federal courts exercise independent powers of determining what the law is in an area where the states have legislative competence. 2) *Privileges and Immunities Clause*—This basis would relate the doctrine of *Erie* to the Privileges and Immunities Clause of the Federal Constitution, in the sense that the primary obligation does not vary according to citizenship (whereas it did under the *Swift v. Tyson* era). This consideration has greater force in regard to substantive primary rights or obligations than in regard to procedural rights. 3) *The Uncertainty of the Primary Duty*—When parties enter into a relationship with each other they do so with a view to performance and not with a view to litigation. If different forums would apply different standards involving the same relationship, and it is not known which will be applied, confusion as to what will constitute performance is caused. Thus, this basis recognizes the unsoundness of having substantive or near-substantive primary rights and duties depend upon the plaintiff's choice of forum (or the defendant's choice, where he would have a right to remove) where that choice could not be predicted at the level of basic action (that is, at the level at which the parties undertake to perform duties or rely on rights) which gives rise to the question. And it is at this level that uncertainty of choice is important, as it is material that the choice be known because the parties are concerned with what the rights and duties are. (They are not concerned with litigation; thus it is for this reason that uncertainty as to procedural questions is not important at the primary level of basic action—because they are not looked to for guidance at the primary level.) 4) *The Uncertainty As To Litigation Outcome*—the unsoundness of having the outcome of litigation depend on the choice of forum when performance does break down at the primary level. It is desirable to have litigation come out the same way no matter in which forum the remedy is sought. However, since this kind of uncertainty does not affect the vast number of primary activities but only a relatively small number of activities where performance has already broken down, it is not as important as uncertainty as to primary rights or duties.

B. *Applicable Conflict of Laws*

   (1) *In Re Substantive Law*

   The problem is complicated when in addition to diversity the occurrence over which the litigation arose happened in a different state from the one within which the federal court was sitting, and the in-
ternal law of the two states is not the same. Although the *Erie* case decided that the federal courts could not, under the Rules of Decision Act, apply an independent concept of the common law rule respecting liability but must follow the applicable state internal law, it was assumed that the applicable state law was that of Pennsylvania (the place of the occurrence) rather than of New York (the place of the suit). Thus the question was left open by *Erie* as to whether the federal courts could make an independent determination of the proper conflict rule to apply in order to determine which state's internal law would be applicable, or whether the federal courts must follow the choice of laws rule prevailing within the state wherein the federal court sits irrespective of whether the question is characterized as procedural or substantive. The Supreme Court took the view in *Klaxon Co. v. Stentor Electric Mfg. Co.* that a proper situation was presented to decide the entire matter. In this case an agreement had been entered into in New York, to be performed there by a Delaware corporation. In a suit for breach of the agreement brought in a federal court sitting in Delaware, a question arose as to whether interest would be allowed on the principal recovery from the date of verdict as was required by the New York Civil Practice Act (in which state performance was to be had) or whether another rule might be applicable. Justice Reed stated that the issue was whether in diversity cases the federal courts must follow the conflict rules prevailing in the states in which the federal courts sit. It is submitted that this statement of the issue is much too broad, as choice of laws may concern primary substantive laws or procedural laws since there are many kinds of conflict rules—raising a whole host of questions, (to be discussed below) yet the issue as stated purports to embrace all of the problems as a single question. And the Court, without considering that the answer might vary according to the problem, assumed that all the problems involved in this area could be settled by deciding the single issue as stated by Justice Reed. It was then held that the *Erie* decision prohibition against an independent determination by federal courts extends to the field of conflict of laws, and that the conflict of laws rules to be applied by a federal court sitting in Delaware must conform to those prevailing in Delaware state courts. "Any other ruling," the court said, "would do violence to the principle of uni-

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*See Wells v. Simonds Abrasive Co., 345 U. S. 514, 520, 73 S. Ct. 856, 859, 97 L. ed. 1211, 1217 (1953) (dissenting opinion).*

*"313 U. S. 487, 61 S. Ct. 1020, 85 L. ed. 1477 (1941)."

*Sec. 480 of the N. Y. Civ. Pract. Act.*
formity within a state upon which the ... [Erie] decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." If this is true, under the sweeping dicta of Erie, federal courts must apply a state rule of the remedy as well as a state rule of the primary duty.

If the Klaxon decision is tested by the four possible bases for Erie, it appears that Erie has been reduced by Klaxon to the fourth and least important consideration. Testing these bases in the order set out above, the following seems apparent: 1) Political Unsoundness—In a sense this consideration is not involved here, but it has ceased to be a governing principle. It is not clear that Congress does not have the right (that is, the power) to make a uniform rule—as to the allowance of interest on damages recovered in a federal court—though there may be a problem. But this much is clear: it would not make sense in a case like this to deny the right to Congress when New York-created rights are being litigated but yet to recognize the right in Delaware. Therefore, from the Klaxon decision it is clear that the basis of Erie was not considered an attempt to match powers of Congress with powers of the state and to say that if Congress does not have the power to change, then the federal courts cannot; Klaxon refused to balance power between two states—that is, a state other than the one within which the cause of action accrued was allowed to change the law respecting the cause of action. 2) Privileges and Immunities Consideration—The spirit of the Privileges and Immunities Clause was to prevent different measure from being applied just because there was diversity of citizenship—that is, to prevent getting a different result for that reason, or differently stated, to prevent a primary obligation from varying with citizenship. However, it was worded to prevent a different measure from being applied to non-citizens than would be applied to citizens, for occurrences within that state. Thus, the result of the Klaxon case is that although federal courts are disabled under Erie from using diversity as an instrument for creating a divergence of primary rights when

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67It may be said that this consideration is not relevant because Tompkins in the Erie case could have sued in New York in the circumstances of the Klaxon case.
the occurrence happens within the state wherein the federal court is sitting, federal courts are required to use diversity as an instrument for creating divergence of primary duty when the occurrence happened in another state. Therefore, to this extent, the *Klaxon* case is inconsistent with this principle of *Erie* and shows that *Erie* was not viewed as being founded on this consideration. 3) *The uncertainty of the primary duty*—It is inherently undesirable that the plaintiff's choice of a forum should make a difference, and if the plaintiff goes to another state and brings suit in the state courts, the defendant can remove the case to a federal court. But the *Klaxon* case puts it within the power of the plaintiff to determine a state with favorable conflict rules which may involve not only questions of "interest (money)" but more fundamental primary rights and duties. Also the *Klaxon* case puts it within the power of the defendant, insofar as he is able, to avoid service of process, and it is not desirable that the federal system should be used to create this kind of asylum. And, even more desirable, is that the plaintiff or defendant may not obtain any advantage according to where suit is brought. Therefore, the *Klaxon* decision has reduced *Erie* to the fourth consideration. 4) *Uncertainty as to litigation outcome*—To test this consideration as being the controlling one in *Erie*, a rewriting of the opinion of Justice Brandeis should be attempted on the assumption that *Klaxon* is the law—that is, that the choice the Supreme Court must make is between an independent sitting. Would such an opinion have persuaded the Court to overrule *Swift*?

Although *Erie* could not create complete uniformity of primary legal obligations, it could move in that direction, and if parties went into a federal court anywhere else (other than a federal court sitting in the state within which the question concerning the primary obligation arose) the same result as to the primary obligation could be reached; or if the suit were brought in another state's court the defendant would have it within his power to remove the suit to the federal court there and preserve the uniformity without the aid of the Full Faith and Credit Clause limit put on state courts, which limit the federal courts, in diversity cases must also observe. However, under the *Klaxon* decision, jurisdiction is reduced to the requirement that federal courts do what the courts of the state within which it sits would do if such would not be violative of the Constitution if done by the state courts; whereas, the very purpose of diversity jurisdiction was to prevent one state from nullifying rights created by the laws of another state and not from any consideration of bias. And there is historical
warrant for this position. It was probably the confusion of basic legal relations throughout the area of primary activity caused by the overlap of two different systems of courts deciding plainly substantive questions differently when it was unpredictable as to which system would acquire jurisdiction, together with the introduction of an element of retroactivity into every judicial disposition of resulting disputes which Justice Brandeis spoke of in the Erie opinion as the result of the unconstitutional course the federal courts had pursued under Swift v. Tyson. But just because the federal courts ought not to try to administer (within the sphere of state legislative competence) their own separate system of "plainly-substantive" law, it does not follow that federal courts have no appropriate function in making more effective the system of a particular state—namely, the state which has the closest connection with the matter in litigation.

In the Klaxon case Justice Reed spoke of "the right" of a state to pursue local policies diverging from those of its neighbors. But, does this "right" (in a federal system) have the same claim to recognition when involving matters primarily connected with another state as it does when involving matters primarily connected with the forum state? Also, why should the courts treat forum-shopping between different courts in the geographical area as a great evil of diversity litigation which Erie corrected as to the most important aspect of the

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68 See Federalist paper No. 80. Also see Friendly, The Historic Basis of Diversity Jurisdiction (1928) 41 Harv. L. Rev. 489.
70 Where a cause of action accrues under the laws of one state and suit is brought in another state and there is diversity of citizenship, the chances of uniformity under Swift v. Tyson, Erie R. R. v. Tompkins, and Erie R. R. v. Tompkins as modified by Klaxon are as follows: 1) Under Swift v. Tyson there are four possible courts and three possible results; that is, two possible results in the two sets of state courts and another possible result in the federal courts, so the chance against uniformity would be three to one. 2) Under Erie R. R. v. Tompkins (as modified by the Klaxon case) there are again four possible courts but only two possible results as each federal court would do what the court of the state, wherein it sits, would do, so the chances against uniformity are two to two. 3) Under Erie R. R. v. Tompkins (unmodified by Klaxon and the uniformity of the primary duty viewed as of the essence) there, also, are four possible courts, and again two possible results, but the chances for uniformity would be three to one as the two federal courts would apply the rule applicable in a single state court system and the other state court might apply a different rule.
evil, but then treat forum-shopping among courts in different geographical areas as an inescapable weakness of a federal system, which Klaxon not only refused to correct but required to be possible?\textsuperscript{72} If it is concluded that the greatest good of diversity litigation is a federal court which perfectly mirrors a state court, does such a conclusion attribute any rational purpose to the diversity clause?\textsuperscript{73a}

It is submitted that Klaxon should be rejected and the federal courts should develop one set of conflict rules in order to assure uniformity of primary rights and duties. If the plaintiff goes into a state court, uniformity would not be entirely take care of, except to the extent of constitutional limits; however, this is not too bad as the defendant has the power to remove to a federal court, and having one federal rule would tend to promote uniformity in the state conflict of laws rules.\textsuperscript{73b} That is, (a) hope the state courts will be influenced by federal conflict rules, and also, (b) if both Erie and Klaxon are not accepted but Klaxon is rejected, since Art. III of the Constitution gives the Supreme Court power to review as to diversity questions, if Congress would exercise this authority and vest this jurisdiction in the Supreme Court,\textsuperscript{73c} then the Supreme Court could take jurisdiction, under the Constitution in diversity cases, on appeal from the state courts to see that the correct state law is applied. If the state's own law is the correct law to be applied, the Supreme Court under the authority of Murdock \textit{v. City of Memphis},\textsuperscript{74} will accept the state court's decision as to what that law is even though thought to be erroneous. But if another state's law is the correct law to be applied, the Supreme Court would determine if the correct law was applied. Thus, the Constitution could insure uniformity of the primary obligation in this area. On the other hand, if both Erie and Klaxon are accepted there would be nothing for the Supreme Court to decide, and the jurisdiction provided for in Art. III of the Federal Constitution could not function. This may cast a shadow on Klaxon, as, otherwise, it must be said that the framers provided something with nothing to operate on.\textsuperscript{75}

\textsuperscript{73a}U. S. Const. Art. III, § 2.
\textsuperscript{73b}Cf. Note (1941) 9 Chi. L. Rev. 113, 118, n. 29.
\textsuperscript{73c}See Note (1939) 52 Harv. L. Rev. 1002, 1005, where it is suggested that this jurisdiction may have already been vested in the federal courts.
\textsuperscript{74}20 Wall. 590, 22 L. ed. 429 (U. S. 1875).
\textsuperscript{75}However, it would not necessarily follow, if Klaxon were rejected, that federal conflict rules would be a restatement of conflict rules or framed from the same considerations. For instance, if both states had an unorthodox conflicts rule which was the same in both states concerned, then if the federal courts had adopted an
In Re Remedial Law Generally

Putting Klaxon to one side insofar as it concerns conflict rules relating to the duty, (that is, assuming that in each instance all conflict rules would recognize the duty) the inquiry then is: To what extent has Erie as modified by the language of Klaxon (hereinafter referred to as the Erie-Klaxon doctrine) been held applicable by the Supreme Court. Consideration of this application to a great extent will be limited to the problem presented in the Wells case—that is, whether the federal courts must apply the forum statute of limitations when to do so will close the federal court doors just because the state court doors are closed. It seems that the answer to this might depend on whether the duty sought to be enforced was created by the forum state and on whether the statute of limitations of the forum state extinguishes the cause of action or merely closes the state court doors. As already pointed out, the majority opinion in the Wells case ignored the entire problem, supposedly considering the question settled. As has been submitted, however, the Court has never succeeded in getting the problem out on the table. That Justices who joined in earlier majority opinions have later dissented or joined in a dissent when such an issue was involved seems clearly to show that they did not understand the Court to be passing on this particular issue in earlier decisions.76

The language of the majority opinion in Guaranty Trust Co. v. York77 which was written by Justice Frankfurter almost assured a blind application of the forum state statute of limitations, in the federal court when jurisdiction is based on diversity, if the forum conflict rule requires such application by the forum state courts.78 In this abstract conflicts rule the federal rule would engender a different result from the result in either state's courts. But on the other hand this is an exceptional situation and the uniformity of primary obligation which would be promoted by a "federal" conflicts rule would far outweigh any nonuniformity it would promote. Besides, federal courts should be equal to the situation, for a federal court in this situation is in a different position from state courts, as it could choose, disinterestedly between two state laws whereas a state court must make the choice between its own law and the law of another state. See Note (1939) 52 Harv. L. Rev. 1002, 1007 quoted with apparent approval by Cheatham, Sources of Rules for Conflict of Laws (1941) 89 U. of Pa. L. Rev. 430, 447.

76See notes 96, 101, and 107, infra. However, sufficient new members of the Court have gone along with the majority opinions in a series of cases applying the Erie-Klaxon doctrine to problems covered by the broad language of Klaxon but which were not in fact involved in that case, so that the problems of such application have never been discussed by the entire Court. See note 104, infra.


78Although in the York case the action was brought in federal equity, the answer given to the issue would be a fortiori if the action had been one at law.
case suit was brought against trustees for a breach of trust which was not discovered until after the New York applicable statute of limitations had run, and if the action had been brought in New York state courts the action would have been barred. The question thus was presented as to whether the action was also barred in the federal courts sitting in New York. It would seem that the answer might well depend on which of the following four situations was presented:

(1) Suppose that the state of New York was the state which created the underlying substantive duties of the trustees to be faithful and a right of action in the beneficiaries if the trustees were unfaithful and (a) that New York would regard the statute of limitations not merely as procedural but regard its running as extinguishing the right of action—that is, that the cause of action has a life only for the statutory period, or (b) that New York does not regard its statute of limitations as substantive but regards it merely as door-closing. In the first situation, if the cause of action were sued upon in another state's courts, it seems clear that the Full Faith and Credit Clause would require the other state to apply the statute of limitations of the lex loci. It seems equally clear that Erie would require the federal courts to apply the New York substantive law. In the second situation the New York policy of its courts not being available to enforce the cause of action would not be offended by a suit in another state if the other state court doors are open. Then why should it offend New York policy if it is more convenient to bring suit in the federal district court sitting in New York if that court's doors are otherwise open?

Or, (2) suppose that substantive rights sought to be enforced in the federal court sitting in New York are out-of-state-created substantive rights and (a) that New York regards its statute of limitations as destroying substantive rights, including those created out-of-state, or (b) that New York courts will regard the New York statute of limitations as closing the state courts thereby preventing adjudication in the New York state courts. As to the latter, again, why should the federal courts sitting in New York be available to enforce state policy which merely makes it more difficult for a litigant to enforce his rights?

Thus two possibilities are presented: (1) How the state regards its statute of limitations is relevant, in which instance a determination of this point must be made; or (2) How the state regards its own statute of limitations is irrelevant. Since it was not stated which of the

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\footnote{Jurisdiction was based on diversity of citizenship.}

\footnote{See Hart and Wechsler, The Federal Courts and the Federal System (1953) 659.}

\footnote{This situation might raise another constitutional issue. See Bank of the United States v. Donnally, 8 Pet. 361, 370 (U. S. 1834).}
four situations was involved, the Court seems clearly to indicate that the only interest of the federal courts is a blind reflection of the results which would be reached in the state courts regardless of how the state courts regard the forum statute of limitations and regardless of where the cause of action arose. That the opinion was talking about at least three of the situations at the same time is indicated by the statement of the Court that:

"...since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recovery is made unavailable by the State... within which the federal court is sitting.]"  

In talking about three of the situations at once, the Court again violated the principle laid down in Ashwander v. Tennessee Valley Authority of not deciding a constitutional question any broader than necessary, and in this respect the case is just as bad as Klaxon talking about all kinds of conflict issues at once even though various kinds of conflict issues raise various kinds of questions. As suggested, however, the position subsequently taken by Justices who voted with the majority in the 5 to 2 decision in the York case would indicate that the decision of the York case was not understood by all of them as deciding that without more, if the forum state court doors were closed and such is constitutional, the federal courts sitting there must close their doors without further consideration.

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82It may be assumed that the Court was not talking about the situation presented by 2 (a). See note 81, supra.
85Majority: Chief Justice Stone, Justices Black, Reed, and Frankfurter (who wrote the majority opinion). Justices Roberts and Douglas took no part in the decision. Justice Rutledge joined by Justice Murphy dissented. Cf. notes 96, 101 and 107, infra. However, although Justice Rutledge took the opposite view from the majority, he did not get the issue of door-closing out on the table either, but rather seems also to be talking about all three of the situations at once, and also ignores the special problems raised by each situation. If the situation involved was the first, that is, if New York created the duty and a right of action for a breach of the duty and regarded the running of its statute of limitations as extinguishing the cause of action, then it seems that Justice Rutledge is just as wrong in his dissent as Justice Story was in Swift v. Tyson as both are an improper view of the assumption of federalism; and the only argument which could be made against the majority, if the statute of limitations is of this type, is one based upon emotion.
(3) In Re Remedial Law Which Is Door-Closing

There are, however, several other Supreme Court decisions which seem to indicate that if a state within which the federal court is sitting would close the doors of its courts because of state policy, the federal courts must close their doors also. But it is submitted, the basis for decision or the circumstances in those cases are distinguishable from the situation in the Wells case. In Griffin v. McCooch the life insurance policy had been issued by a New Jersey company and delivered in New York on a Texan's life, naming certain Texas citizens among the beneficiaries. Later there was a change of beneficiaries and an assignment was made in New York to assignees who had no insurable interest. On the death of the insured, the Texas administration brought an action against the New Jersey insurance company in a federal district court located in Texas, setting up a claim for the proceeds of the insurance on the ground that the assignment was void because contrary to Texas public policy. The insurance company filed a bill of interpleader against the assignees. The Circuit Court of Appeals failed to apply Texas substantive law or Texas conflict rules, holding that the contracts of the insurance and the assignment were both governed by New York law and by that law were valid. The Supreme Court reversed, with directions that Klaxon was applicable—that is, the federal court must determine which law applied as to the validity of the assignment according to Texas conflict law, and if Texas law governed, it was to be applied in the federal courts, provided, of course, it would be constitutional to apply Texas law. Thus, the Court was viewing Texas policy only as "closing the doors of Texas courts to a valid foreign contract." However, the case seems distinguishable from the Wells case in that Texas policy, as argued by the plaintiff in the Griffin case, viewed the assignment as unenforceable in the Texas courts because Texas policy did not recognize the assignment as valid, whereas the foreign cause of action in the Wells case is viewed by Pennsylvania as valid and enforceable for one year but unenforceable after one year in Pennsylvania. Even if the Griffin case be considered not distinguishable on this ground, still it is not authority for the door-closing doctrine except in so far as it is authority for having applied the doctrine, since the court did not explore the problem and at most assumed the question had already been decided. A case

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521 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481 (1941) (decided, the same day as Klaxon and four years before the York case, by an unanimous court). See Note (1941) 9 Chi. L. Rev. 141.

similar to Griffin is Angel v. Bullington since in both, out-of-state-created rights were sought to be enforced in a federal court sitting in a state which did not recognize the validity of such rights. In the Bullington case, Angel, a citizen of North Carolina, had bought some Virginia land from Bullington, a citizen of Virginia, and had executed notes in part payment secured by a deed of trust. On default of payment the land was sold and the proceeds applied toward the payment of the notes. Suit was instituted in the North Carolina state courts to recover the deficiency. A North Carolina statute provided that:

"[The]...trustee...of...notes secured by [a]...deed of trust shall not be entitled to a deficiency judgment on account of such...deed of trust or obligation secured by the same. . ."\(^9\)

The North Carolina Supreme Court held that the North Carolina Act barred Bullington's suit against Angel. Bullington then sued Angel for the deficiency in a federal district court sitting in North Carolina. Angel pleaded in bar the suit in the North Carolina state courts. Bullington recovered judgment in the district court and the Circuit Court of Appeals for the Fourth Circuit affirmed but the Supreme Court of the United States reversed. There are two possible grounds for the reversal: 1) That the entire question is now res judicata, or 2) That the question of the constitutionality of the North Carolina statute closing the doors of the state court is res judicata and the federal court must close its doors just because the forum state court doors are closed. If the York and Griffin cases are both door-closing situations, and if these cases are to be adhered to, then it must be concluded that the reversal if placed on this ground in Bullington is correct as Bullington and Griffin cannot be distinguished on door-closing grounds. But a difference is that in the Bullington situation . . .

\(^10\) Bullington v. Angel, 220 N. C. 18, 16 S. E. (2d) 411 (1941).
\(^12\) Angel v. Bullington, 159 F. (2d) 679 (C. C. A. 4th, 1945).
\(^15\) It is difficult to read into the Rules of Decision Act one interpretation for door-closing where it is a case of interpleader (Griffin case) and another interpretation where it is not a case of interpleader (Bullington case).

That the Bullington decision was based on a combination of both res judicata and the Erie-Klaxon doctrine has been proposed by many writers. See Notes (1948) 36 Calif. L. Rev. 127; (1947) 60 Harv. L. Rev. 822; (1947) 42 Ill. L. Rev. 541; (1947) 45 Mich. L. Rev. 1057; (1947) 12 Mo. L. Rev. 333; (1947) 56 Yale L. J. 1037. But cf. Note (1947) 95 U. of Pa. L. Rev. 795.
there is a constitutional question involved, and if the North Carolina statute is unconstitutional then the federal courts do not have to apply door-closing. However, in the Bullington case the state court litigation is res judicata as to the constitutional question, and therefore, the constitutional question cannot now be litigated in the suit in the federal court; but res judicata goes to the single point here of North Carolina's door-closing policy being constitutional. Thus, if the York and Griffin cases in interpreting Erie are door-closing, then Erie applies to the Bullington case.

However, Justice Frankfurter based the Bullington decision on the res judicata aspect and assumed that something was decided in York (and possibly Griffin) which the other Justices had not realized was being decided. This assumption resulted in vigorous dissents in Bullington. The Bullington case likewise seems distinguishable from the Wells case in that North Carolina policy, as set out in the North Carolina statute, refuses to recognize a valid cause of action, whereas the foreign cause of action in the Wells case is viewed by Pennsylvania as valid but unenforceable in Pennsylvania. But, again, even if the Bullington case is not distinguishable on this latter ground, the same objection is present as is present as to the Griffin decision—the doctrine of door-closing was not explored by the court.

Whereas Griffin and Bullington involved out-of-state-created rights which are not viewed as valid in the forum state, another case, Woods v. Interstate Realty Co. involved an in-state-created cause of action which was not regarded as void by the forum but the state court doors were nevertheless closed. The Court of Appeals applied Lupton's Sons v. Automobile Club which involved a question sub-

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63 Justice Frankfurter, who wrote the majority opinion, was joined by Chief Justice Vinson and Justices Black, Douglas, and Murphy. Justice Reed, who wrote a dissenting opinion, was joined by Justices Jackson and Rutledge. Justice Rutledge, who wrote a dissenting opinion was joined by Justice Jackson.


66 225 U. S. 489, 32 S. Ct. 711, 56 L. ed. 1177 (1912). A foreign corporation brought suit on a contract in a federal court sitting in New York. One of the defenses pleaded was that the corporation could not maintain the action because it was a foreign corporation doing business in the State of New York without a certificate of authority in violation of the General Corporation Law of that state and that the state statute also provided that no such foreign corporation may maintain an action in New York on any contract made in New York prior to compliance with the provision requiring a certificate of authority. Thus it appeared that the foreign corporation was not forbidden to make a contract but denied standing in the state courts to sue on the contract, which did not deny the validity of the
stantially identical with the question presented in the *Interstate Realty* case and held that the federal court doors were not closed just because the state court doors were, if the cause of action is recognized as valid by the state within which the federal court sits. No reference to *Bullington* or any *Erie* problem was made. When the *Bullington* decision was called to the court's attention on a motion for a rehearing, the Court of Appeals adhered to its previous decision saying that the Supreme Court was concerned only with *res judicata* in the *Bullington* case. The Supreme Court on certiorari reversed. Justice Douglas, writing the majority opinion, viewed the question in *Bullington*, that is, the question of the constitutionality of the North Carolina statute being *res judicata* and the question of door-closing, as alternative grounds for the *Bullington* decision. However it clearly seems that both questions were necessarily involved in the decision. Justice Douglas took the view that one of the grounds (door-closing by North Carolina) followed *York* and viewed *York* as premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court sitting within that state in a diversity case and that when in such cases one is barred from recovery in the state courts he should likewise be barred in a federal court. The reason for this, Justice Douglas argued, is that a contra result would create discrimination against citizens of the state in favor of those authorized to invoke the diversity jurisdiction of the federal court and that it was this element of discrimination which *Erie* was designed to eliminate. But Justice Douglas overlooked the fact that North Carolina did not create the right in *Bullington* and that *Bullington* dealt with an out-of-state-created right viewed as invalid, and with full faith and credit. Thus *Interstate Realty* mixed the federal court's attitude as to out-of-state-created rights viewed as invalid when judged by local policy and in-state-created rights which were viewed as valid. The dissent in *Interstate Realty* emphasized that the state did not deprive the transaction of its validity or any self-enforcing remedy which the plaintiff might have had or of resort to federal courts, and the dissent protested the Court's refusal to give the state statute the same limited

contract. The Supreme Court, however, held that, although a state may close the doors of its courts in such a circumstance, a state could not close the doors of the federal courts to a suit on a valid contract.

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effect. As the dissent pointed out: "The penalty . . . [the Supreme Court is handing out] does not go to the State which sustained the injury, but results in unjust enrichment of the debtor, who has suffered no injury from the creditor's default in qualification [to do business in the state]."102

The Wells case is clearly distinguishable from the Interstate Realty case, since the latter deals with an in-state-created cause of action, whereas the former deals with an out-of-state-created cause of action.

The apparent dissatisfaction with the federal court door-closing doctrine has caused some of the Justices to go to great lengths to avoid the problem.103

In none of the cases since the York case has door-closing been examined by the whole Court; and as pointed out, it is not known which of the situations possibly involved in the York case was presented, as the


103 In First National Bank of Chicago v. United Air Lines, 342 U. S. 399, 92 S. Ct. 421, 441 (1952), an air accident had occurred in Utah, which state had a wrongful death statute, but Illinois, where an action on the Utah statute was instituted in the federal court, had a statute which provided that no action for out-of-state cause of action for wrongful death shall be brought in Illinois if service of process could have been had in a suit in the state where the wrongful death occurred. Again two questions are presented: 1) Could the Illinois statute be constitutionally applied in the Illinois state courts; and, if so, 2) does it necessarily follow that the federal court must close its doors just because the state court doors are closed? It should be noted that these are the same two questions being considered in the Wells situation. A majority of the Court [the majority opinion was written by Justice Black, Chief Justice Vinson and Justices Douglas, Burton and Clark joining. Two Justices, Jackson and Minton concurred on specific grounds. Justices Reed and Frankfurter dissented] consisting of five Justices took the view that Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. ed. 1212 (1951), where it was held that a Wisconsin statute similar to the Illinois statute could not constitutionally be applied was authority for holding the Illinois statute unconstitutional as violative of the Full Faith and Credit Clause. But the Wisconsin statute did not contain the condition: "[if] . . . service of process in such suit may be had upon the defendant in such place," whereas the Illinois statute did. Ill. Rev. Stat. c. 70, §2. Thus, the Illinois statute is more reasonable. The majority found itself in the position of having to stretch the Full Faith and Credit Clause far to hold the Illinois statute unconstitutional in order to keep from having to say the federal court doors were closed if the statute were constitutional. A dissent of two Justices took the position that the Illinois statute was reasonable and constitutional and should close the federal court doors as well as the state court doors. A concurring opinion of two Justices agreed with the dissent that the statute was reasonable and constitutional but agreed with the majority on result because the concurring Justices view the statute merely as state court door-closing as to an out-of-state-created right which could not close the doors of a federal court sitting in a diversity case in the state. Cf. Wells v. Simonds Abrasive Co., 345 U. S. 514, 73 S. Ct. 856, 97 L. ed. 1211, 1216 (1953) (dissenting opinion).
Court discussed door-closing without reference to any particular one of the possible situations. And as pointed out, it does not appear that all of the Justices in the majority in the York case understood in that case that the Court was deciding as much as the majority in later cases have held it to mean.\textsuperscript{104}

The majority of the Justices of the present Court\textsuperscript{105} apparently have taken the position that "door-closing" no longer alone presents a substantial question. One of the four possible situations in the York case—an out-of-state-created cause of action which the forum state views as valid but for which the state no longer affords a remedy although a remedy exists at the lex loci—was presented in the Wells case, but the majority opinion completely ignored it, even though the problem was called to the attention of the majority by the dissent.\textsuperscript{106} And of all the possible situations, to adhere to door-closing in the situation presented in the Wells case places plaintiff in the worst possible position. This was very ably pointed out in part by the vigorous dissent to the majority opinion in the Wells case:\textsuperscript{107}

"[A]...very practical consideration indicates the unworkability of a doctrine for federal courts that the place of trial is the sole factor which determines the law of the case. 28 U. S. C. § 1404 (a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interest of justice. The purpose was to adopt for federal courts the principles of forum non conveniens. These are broad and imprecise and involve such considerations as the state of the court's docket. Are we then to understand that parties may get a change of law as a bonus for a change of venue? If the law of the forum in which the case is tried is to be the sole test of substantive law...conflicts of laws and other doctrines...then shopping for a favorable law via the forum non conveniens route opens up

\textsuperscript{104}The majority position has been maintained by new members of the court who were not sitting when the York case was decided; e.g. Chief Justice Vinson voted with the majority in the Bullington, Interstate Realty, and the Wells cases. Justice Burton voted with the majority in the Bullington and Wells cases.

\textsuperscript{105}The majority (when the Wells case was decided) consisted of Chief Justice Vinson, Justices Reed, Frankfurter, Douglas, and Burton. Since the Wells decision was handed down Chief Justice Vinson has died.

\textsuperscript{106}This does not mean, however, that in the other of the possible situations in the York case the Court has independently considered each of the problems. Cf. Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832 (1947).

\textsuperscript{107}Justice Jackson, who wrote the dissent, was joined by Justices Black and Minton. It should be noted that Justice Black who voted with the majority in the York, Griffin, and Bullington cases has now joined the minority which seems to indicate that he did not view these cases as requiring a blind closing of the federal court doors just because the forum state court doors were closed.
possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson...* ever held."\(^9\)

However, in tort actions, at least, plaintiffs are in even worse position. In the *York* case the majority of the Court said that "the fortuitous circumstance of residence out of a state of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." It is submitted that the out-of-state party is the one discriminated against as he is in a helpless position, whereas the in-state party is not. This conclusion is based on what seems to be a reasonable assumption that in the usual case the defendant has injured the plaintiff in the plaintiff's place of residence and has left and returned to his own place of residence, the forum state. If the suit had been brought at the place of injury, the defendant is in no position to complain about the law because by going there, he takes the law as he finds it. If the plaintiff is dissatisfied with the existing law at his place of residence, he cannot complain because he has recourse to the legislature of the state and he could have complained earlier about the law of that state and could have brought political pressure to change such law. In fact, even where the cause of action is a foreign one, the plaintiff is protected against a harsh forum law to some extent if the forum law refuses to recognize any cause of action arising out of a particular situation, because the residents of the forum state, not knowing whether they will be plaintiffs or defendants, will more likely exert political pressure to change such a law. Also, in such a situation the Full Faith and Credit Clause offers some protection against a complete refusal to recognize the validity of a cause of action arising out-of-state.\(^1\) Where, however, the forum state recognizes the validity of an out-of-state-created cause of action but limits the remedy to an extent greater than the state wherein the cause of action accrued but not to such an extent as to deny full faith and credit, the out-of-state plaintiff is in the worst possible position. In-state parties might not have as much motive to exert political pressure to bring about a change, as the existing law may meet their needs; however, another measure may be required for the needs of residents of other states and such residents might resist legislation limiting remedies. In such a situation, when a defendant returns to his own state and a plaintiff is forced to go to that place to


bring suit, to require that local law be applied to him in the federal courts would be to apply a law which he has not voluntarily subjected himself to and which he had no political competence in formulating and no political competence to change.

Again, it makes no sense to deny the right to Congress to legislate as to the remedy of state-created rights, if such be the case, and on the same facts turn around and give the right to another state.

It would seem that the Full Faith and Credit Clause and the Diversity Clause of the Constitution are interrelated—that is, although the Full Faith and Credit Clause does not in every instance completely protect out-of-state-created rights, another forum has been provided under the Diversity Clause to fill the gap, and that forum is the federal courts. To construe the Full Faith and Credit Clause to permit reasonable local policy to be adhered to without violating that clause and at the same time to say that a federal court sitting in a diversity suit must apply that same local policy makes possible a place of asylum from suit under the Griffin and Bullington type situation and after a lapse of time under the Wells situation, even though the place which has the closest connection with the circumstances giving rise to the cause of action provides a longer period within which to enforce rights. There is nothing in the history of the Constitutional Convention to indicate that asylum from suit was sought—but otherwise.

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310 It is understandable that there is no claim on the state court to apply out-of-state law where the Full Faith and Credit Clause has been complied with. See Note (1954) 11 Wash. & Lee L. Rev. 47.

311 Unless it can be said that he has subjected himself to that law by seeking a remedy for a wrong.

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