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DIVERSITY JURISDICTION AND CHOICE OF LAW: OF STRANGERS BEARING STALE PRODUCTS LIABILITY CLAIMS

ROBERT L. FELIX*

I. INTRODUCTION

*Ratliff v. Cooper Laboratories, Inc.*¹ and *Nichols v. Sterling Drug Company*² are two products liability cases brought to South Carolina solely because of its long six year limitation period for personal injury suits.³ These claims by non-residents against foreign drug companies arising from out-of-state injuries were barred by the statutes of limitation of the states in which suit might be expected.⁴ Little quarrel can be made with the results in the two cases. The Court of Appeals held that the facts presented as a basis for in personam jurisdiction were insufficient "contacts, ties, or relations" to satisfy the due process clause of the Fourteenth Amendment.⁵

In *Ratliff v. Cooper Laboratories, Inc.*, defendant's activities in South Carolina were limited to solicitation by mail to dealers and wholesalers, and the mailing of promotional literature to approximately 650 doctors. In *Nichols v. Sterling Drug Co.*, Ster-

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1. 444 F. 2d 745 (4th Cir. 1971), *cert. denied*, 404 U.S. 948 (1972), *reh. denied*, 404 U.S. 1006 (1972).

2. *Id.* Both cases were decided on a consolidated interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1971). The district court had denied defendants' motion to set aside the service of summons and dismiss the complaint.

3. S.C. CODE ANN. § 10-143 (1962). The South Carolina version of the Uniform Commercial Code also sets a limitation period of six years, presumably in anticipation of the imposition of warranty liability for bodily injury claims as well as other claims arising under the Code. S.C. CODE ANN. §§ 10.2-318, 10.2-725 (1966).

4. In *Ratliff* suit might have been instituted in Florida (domicile of the plaintiff and place where the injury occurred); or in Delaware (place of incorporation of the defendant); or in Connecticut (defendant's principal place of business). In *Nichols*, suit might have been instituted in Indiana (domicile of the plaintiff and place where the injury occurred); or in Delaware (place of incorporation of the defendant); or in New York (defendant's principal place of business). In each potential forum, however, the state's respective statute of limitation had run. See CONN. GEN. STAT. § 52-584 (1968); DELA. CODE ANN. 10 § 8118 (1953); FLA. STAT. ANN. § 95.11 (Cum. supp. 1972); IND. ANN. STAT. § 2-602 (Cum. supp. 1962); and N.Y. CIVIL PRACTICE LAW AND RULES § 214 (McKinney 1972).

5. 444 F.2d at 746.

ling Drug's activities in South Carolina were more extensive than those of Cooper Laboratories. Sterling maintained five "detail men" who lived in South Carolina and promoted Sterling's products through personal contacts with doctors and drugstores in the state. It had also filed application for and been given authority to do business in South Carolina and had appointed an agent for service of process.⁶ To require these defendants to defend stale claims in an uninterested forum was held to trespass the bounds of "traditional notions of justice and fair play."

Judge Craven treats the cases as factually indistinguishable for the purposes of the decision: "Here the activities of the defendant corporations in South Carolina, *although possibly sufficient to constitute 'presence'* are nonetheless minimal."⁷ Judge Craven is a practical man⁸ and basing the decision on due process standards for state judicial jurisdiction is a practical direction for the development of minimal constitutional standards within the doctrine of *International Shoe Co. v. Washington*.⁹ It is also a pragmatic use of federalism. The court's restraint in picking a jurisdictional solution leaves untravelled the choice of law route and the hazards of reforming state conflict of laws rules for the selection of limitation periods. Thus the decision leaves much to academic speculation regarding the *Erie-Klaxon* doctrine¹⁰ and the degree to which a federal court in diversity jurisdiction shall follow state law in jurisdictional and choice of law matters.

The cases pose specifically and suggest generally a number of issues relating to jurisdiction and choice of law in diversity jurisdiction. These are not cases against defendants "with which

6. See, S.C. CODE ANN. §§ 12-23.1 to 12-23.16 (Cum. supp. 1971). Section 12-23.1 (c) provides:

The provisions of this section shall not be deemed to establish a standard for activities which may subject a foreign corporation to service of process under this chapter or any other statute of this State.

In *Nichols* it was stipulated regarding the detail men that "their primary responsibility is the promotion of drugs, not the actual sale of them." 444 F.2d at 746.

7. 444 F.2d at 748 [emphasis added].

8. For elaboration of Judge Craven's judicial philosophy see his *Paeon to Pragmatism*, 50 N.C. L. REV. 977 (1972).

9. 326 U.S. 310 (1945).

10. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) requires a federal court to decide according to state law those matters reserved to the states by the Constitution. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), requires the federal court in diversity jurisdiction to follow the applicable conflict-of-law rules of the state in which it is sitting. For comments in this review see *Symposium: Erie Railroad v. Tompkins Revisited*, 17 S.C.L. REV. 467 (1965).

the state has *no* contacts, ties, or relations”¹¹ at all. Something more than the use of the due process clause as a residual check on state law is inferable from the complex of factors identified in the court’s statement of the issue: “Are the activities of the drug companies extensive enough in South Carolina to warrant in personam jurisdiction when the plaintiffs are non-residents and the causes of action arose outside the forum and were unconnected with defendant’s activities in South Carolina?”¹² To suggest a distinction between the two cases may be analytically useful. *Ratliff* is just too easy a case to require more than a statement that a foreign corporation may not be sued solely on the basis of correspondence with persons in the state except as to matters arising from the correspondence. It is the facts of *Nichols* that give meaning to the test of “a rational nexus” between the forum state and the relevant facts surrounding the claims presented.¹³ *Nichols* gives practical significance to the requirement that contacts between the corporation and the state must be “fairly extensive”¹⁴ if the plaintiff’s injury does not arise out of something done in the forum state. The implication that the “presence” of a corporation is not enough to meet due process standards appears to restrict the concept of transitory actions. If jurisdiction were accepted, the requirement that the court must follow the choice of law rules of the state in which it is sitting would compound the unsuitability of the forum. The prospect of a change of venue adds still another complication to the choice of law issue. It is the purpose of this article to explore these issues.

II. DUE PROCESS

The minimum contacts theory of Justice Stone’s opinion in *International Shoe* emphasizes that the maintenance of suit against foreign defendants must not offend “traditional notions of fair play and substantial justice.”¹⁵ Against the catalog of inconveniences to the corporation must be balanced the appropriateness of the particular suit in the forum selected. Two points

11. 444 F.2d at 747, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) [emphasis added].

12. *Id.* at 747.

13. *Id.* at 748.

14. *Id.*, quoting F. JAMES, CIVIL PROCEDURE § 12.8 at 640 (1965).

15. 326 U.S. at 316.

may be noted. First, when the defendant is a corporation doing interstate business the inconveniences of suit in a given forum may pose few or no problems of practical as distinguished from legal significance.¹⁶ In the federal courts, the practical problems posed by the original choice of forum can be avoided or mitigated by a change of venue.¹⁷ Second, Justice Stone does not expressly give controlling effect to the contact of the forum with the facts upon which the claim for relief is based. The forum's contact with the cause of action is a matter to be considered on a case by case basis; it is not, as such, an organizing principle for distinguishing jurisdiction or the lack of it under due process standards. The same can be said of the relevance of the plaintiff's contact with the forum.

Elsewhere in this issue,¹⁸ Professor Leflar writes of the double edge of the due process standard for state judicial jurisdiction: as a grant of power to the outer limits of justice and fair play and as a constitutional guide for the appropriate use of that power. Accordingly, he chides state legislatures for not giving more particular directions to their courts in jurisdictional matters. His argument is obviously well taken and needs no paraphrasing here.

While I agree with Professor Leflar, I would make the point in somewhat different terms. In one sense, the doctrine of *International Shoe*, as an exercise in the development of the due process clause, is a function of the *Erie* doctrine leaving to development by state law such matters not otherwise ordered by the Constitution or federal law. In later cases, little is said of the

16. Time, distance, expense, the availability of witnesses and evidence—all pose issues of convenience and even justice in a practical sense. They are distinguishable, however, from such choice-of-law consequences as render one liable according to the law of one state, but not according to the law of another. Hereupon might be constructed the difference between practical litigational (or jurisdictional) forum shopping and dispositive choice-of-law (or legislative) forum shopping.

17. 28 U.S.C. § 1404(a) (1971) provides that:

For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Compare § 1404(a) with 28 U.S.C. § 1406(a) (1971) which provides that:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. Despite or because of change of venue, choice-of-law problems may persist or arise. Under which section would transfer be made in cases like *Ratliff-Nichols*? The answer may have significant choice-of-law consequences. See text p. 211-13 *infra*.

18. Leflar, *Barely Fair, Not Grossly Unjust*, 25 S.C.L. REV. 177 (1973).

function of the due process clause as anything more than an indulgent monitor.¹⁹ To date, the use of the due process clause as a residual check has been the standard reaction to state expansion of judicial jurisdiction. Federal courts have even accelerated this expansion by interpreting state laws as intended to go to the outer limits of the due process clause.²⁰ The *Ratliff-Nichols* opinion illustrates this aspect of the due process clause.

In another sense, though, *International Shoe* can be read as something more than laying the basic foundation for establishing the outer limits of state judicial jurisdiction. In *International Shoe* Justice Stone offers the jurisdictional counterpart of a general theory for allocating the authority of the several states to hear cases and to make rules to decide them.²¹ The problems of federalism require for their solution something more than an either/or delineation of state and federal authority. A process of flexible interplay between state and federal decisional authority is needed.

19. In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) jurisdiction was upheld upon the basis of an isolated act. Consider, however, that a local plaintiff was suing on a local cause of action. In writing for the majority Mr. Justice Black pursues the theme of his concurring opinion in *International Shoe*: "[i]t cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* at 223.

Hanson v. Denckla, 357 U.S. 247 (1958), with its formalistic analysis in terms of in rem and in personam distinctions appears athwart the analytical development promised by *International Shoe* as a general theory of the exercise of state court jurisdiction. That *Hanson* avoids a troublesome choice-of-law problem concerning the doubtful application of the law of the after-acquired domicile to test the provisions of an intervivos trust see *Scott, Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959).

20. For an interpretation of South Carolina's long-arm jurisdictional ambitions see *Shealy v. Challenger Mfg. Co.*, 304 F.2d 102, (4th Cir. 1962). This expansive interpretation of state law is approved in *Carolina Boat and Plastic Co. v. Glascoat Distributors, Inc.*, 249 S.C. 49, 152 S.E.2d 352 (1967). Both cases involved local plaintiffs and local causes of action. By contrast, see *Surinam Lumber Corp. v. Surinam Timber Corp.*, 259 F. Supp. 206 (D.S.C. 1966), where jurisdiction was refused when the only contact was the place of incorporation of the plaintiff.

21. *International Shoe* schematically represents a part of a series of opinions by Justice Stone. In this light, consider Stone's dissenting opinion in *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (dealing with the recognition of sister state judgments and the full faith and credit clause) and *Alaska Packers Ass'n v. Industrial Accident Commission of Cal.*, 294 U.S. 532 (1932); and *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939) (workmen's compensation cases dealing with choice-of-law). See generally Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1949). Cf. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 CHI. L. REV. 9 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* at 188 (1963).

This reading of *International Shoe* is consistent with an understanding of Justice Stone's contribution to the better management of conflict of laws problems. The traditional divisions of conflict of laws—jurisdiction, choice of law and judgments—have been clarified by his opinions. As to each his approach appears twofold. There is a delineation of state and national authority in the federal system in terms of the negative implications of constitutional provisions. There is also a functional examination of the problem of allocating authority in terms of the relative governmental interests of the involved states. This aspect is more than a warning to the offending state that it is about to sail off the edge of minimum contacts or to deny credit to a judgment only minimally entitled to recognition. When one attempts to balance governmental interests, the problems of federalism can no longer be rationalized through merely the negative implications of due process or of full faith and credit.

Problems involving competing interests—whether between states or between a state and the federal system—cannot always be solved by a method seeking to determine that one has no interest at all!²² Too often the question is one of "a little more or a little less."²³ Of judicial jurisdiction Justice Stone says that the demands of due process

. . . may be met by such contacts of the corporation with the state of the forum as make it reasonable, *in the context of our federal system of government*, to require the corporation to defend *the particular suit* which is brought there.²⁴

What is needed is a more subtle process of management, an affirmative development, or shared filling-in of a constitutionally approved as distinguished from a constitutionally required doctrine of state court jurisdiction.²⁵ In the context of diversity jurisdiction, the issues in *Ratliff-Nichols* might productively be

22. "[The due process] clause does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relation." 326 U.S. at 319 [emphasis added].

23. *Id.*

24. *Id.* at 317 [emphasis added].

25. That reference is made to state law to determine jurisdiction in simple diversity cases is the predominant view. *See, e.g.,* Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963). *Erie* may not always compel such a balance. *Id.* at 226. *Cf.* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 133-34 (1969). *See also* Note, 64 COLUM. L. REV. 685 (1964).

viewed as arising out of the work-a-day operation of the federal judiciary system rather than the Constitution upon which the system is based. The federal courts are particularly apt partners in this task for their own authority to apply law is in question.

The real difficulty, of course, is how to keep the *Erie-Klaxon* doctrine with the due process clause as its policeman and at the same time give scope to the federal courts in diversity jurisdiction for participation in the management of the problems caused by the fact of federalism. To move to a positive use of the due process clause to structure state court jurisdiction may be said to tamper unduly with the *Erie-Klaxon* doctrine. Such a move, moreover, in the name of Federal Common Law,²⁶ would be extravagant, for it would only compound our problem. It would treat as a federal question an issue presently over-litigated in the name of due process. What is properly indicated is a further relaxing of the idea that a federal court sitting in diversity jurisdiction is just another state court. Elsewhere the priority of federal substantive²⁷ and procedural interests²⁸ has been held to justify disregarding or departing from state authority. This departure is an accepted adjustment of the *Erie* doctrine. When the question of access to diversity jurisdiction is presented in such a way as to justify a decision free from state law regarding state judicial jurisdiction, a decision can be based not on national or state but on "federal courts" law.

III. DOOR CLOSING

Ratliff-Nichols does not present issues of federal substantive law or rules for the management of litigation. Plainly viewed, the problem is one of the availability of the federal court. In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*²⁹ the Supreme Court introduced the notion of affirmative countervailing considerations. Later, in a notable opinion, the Fourth Circuit in *Szantay*

26. Cf. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

27. Consider the assertion of national interest in foreign relations in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), and in interstate commerce where the interest of the government is directly involved in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

28. *Hanna v. Plumer*, 380 U.S. 460 (1965).

29. 356 U.S. 525 (1958).

*v. Beech Aircraft*³⁰ asserted its independence of South Carolina's "door closing statute"³¹ that prevents non-resident plaintiffs from suing foreign corporations on causes of action not arising within the state. The South Carolina federal district court was deemed the most appropriate forum for a case that additionally involved a domestic corporate defendant that could not be sued elsewhere. Judge Craven himself notes the case but, in deciding on due process grounds, he finds no need to use it. The refusal to decide a question of state court jurisdiction by reference to state law is curious. Elsewhere in the opinion he notes that "oft repeated test" that requires attention to whether state law provides for jurisdiction before consideration of whether such assumption of jurisdiction would violate the Constitution.³² It seems paradoxical to approve of an approach only to adopt the opposite course. To have disposed of the case on state law grounds would have produced an opinion that does not perpetuate the notion that state judicial jurisdiction extends to the abyss of due process. In this sense, Judge Craven's technique is an intellectual tease, for the due process issue should be moot. Professor Sedler's analysis of the statute as a grant of jurisdiction well within due process limits

30. 349 F.2d 60 (4th Cir. 1965). For a helpful note on this case see 17 S.C.L. REV. 631 (1965).

31. S.C. CODE ANN. § 10-214 (1962):

An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: (1) By any resident of this State for any cause of action; or (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

32. "The oft-repeated test" was first stated in *Pulson v. American Rolling Mill Co.*, 170 F.2d 193, 194 (1st Cir. 1948):

There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. U.S. Const. art. 1, § 8, cl. 3; amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation.

See also *Clark v. Babbitt Bros., Inc.*, 196 S.E.2d 120 (S.C. 1973) (Jurisdiction of state court in the first instance a question of state law).

rather than a restriction, underscores this point.³³ Professor Leflar's argument that state legislatures be more explicit and restrained in framing jurisdictional rules is also relevant.³⁴ The South Carolina legislature has done just that with its "door-closing" statute.

One might also chide the federal court for similar reasons. Here a decisional "door-closing" based on federal jurisdictional concerns might be thought appropriate. The explanation must be sought in a proper approach to affirmative countervailing considerations. The district court, I think erroneously, took too literally the idea of "affirmative" to indicate keeping the federal court open when a state court would close its doors. The crucial consideration seemed to be to avoid discriminating against plaintiffs from other states. This is hardly convincing on the facts. "Affirmative" would better be read to indicate the presence of a federal interest to be free of state authority. Here, if anything, federal policy mirrors state policy (to use hyperbole) ". . . not to so extend the jurisdiction of the courts . . . as to open their doors to any person, from any quarter of the globe, to demand redress for injuries received anywhere. . . ." ³⁵ This becomes all the more clear in the case of federal courts when one considers the implications of assuming jurisdiction on choice of law, especially in the event of transfer of venue.

IV. CHOICE OF LAW

Historically and analytically judicial jurisdiction and choice of law are separable. According to traditional doctrine the decision to hear a case or not is unaffected by the choice of law to be applied in disposing of the case.³⁶ Recent developments, however, show that while the issues are separable, they are not mutually exclusive. In *Ratliff-Nichols*, absence of contact with the facts giving rise to the claim for relief is a significant factor in the court's decision to deny jurisdiction. If jurisdiction were allowed, the lack of such contact would have to be considered in determin-

33. Sedler, *The Truly Disinterested Forum*, 25 S.C.L. REV. 185 (1973).

34. Leflar, *supra* note 17, at 177.

35. *Central R.R. & Banking Co. v. Ga. Constr. Co.*, 32 S.C. 319, 346, 11 S.E. 192, 203 (1889).

36. See A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 599-601, 615-618 (1965).

37. The territorial vested rights theory of choice of law, epitomized by the First Restatement, prescribed exclusive reference in tort cases to the law of the place where the

ing which state's law to apply.³⁷ Long arm jurisdictional statutes based on particular acts or transactions impose upon the court an assessment of contacts which subsequently may determine choice of law.³⁸ The question may be asked: to what extent a court should take choice of law into account in deciding whether to assume jurisdiction? Both judges and academicians have urged attention to choice of law in the solution of jurisdictional problems.³⁹ Indeed the move toward a theory of forum conveniens imports a complementary choice of law approach.

In *Ratliff-Nichols* the choice of law problem is nowhere mentioned. There is good reason for the court to avoid the determination of which statute of limitations to apply. The court would then face a dilemma. The *Erie-Klaxon* doctrine requires that a federal court in diversity jurisdiction apply the law of the state in which it sits, including that state's conflict of laws rules. The doctrine functions pragmatically for the most part to save federal courts from unnecessary litigation and to leave to the states the task of working out private law problems reserved to them by the Constitution.⁴⁰ Here, however, slavish application of the *Erie-Klaxon* principle would appear to lead to the application of South Carolina's six year limitation period and convert the federal court into a clearinghouse for stale claims. South Carolina seems mired in the "ice-age"⁴¹ of choice of law and would likely maintain a

injury occurred. RESTATEMENT, CONFLICTS OF LAW § 378 (1934). Under modern approaches in cases where the place of injury is deemed "fortuitous" the significance of the place of injury must be considered in the light of the particular issue presented before it can be dismissed as such. See *Babock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Further, the place of conduct retains choice of law vitality when the conduct itself is at issue. *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

38. See, e.g., S.C. CODE ANN. § 10.2-801 *et seq.* (1966). This specific jurisdiction facilitates the legislative as well as the judicial jurisdiction of the state for local law will often govern claims arising out of acts or activity upon which jurisdiction is specifically based.

39. Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657 (1959); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103 (1971).

40. See Cavers, *Change in Choice of Law Thinking and its Bearing on the Klaxon Problem*, A.L.I. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154 (Tent. Draft No. 1, 1963); Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732 (1963). Cf. Hart, *The Relations Between Federal and State Law*, 54 COLUM. L. REV. 489, 513-515 (1954).

41. The phrase is from Rosenberg, *An Opinion for the N.Y. Court of Appeals*, 67 COLUM. L. REV. 459 (1967). For a recent expression of choice of law method in South Carolina, see *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964); noted in 17 S.C.L. REV. 305 (1965).

characterization of the issue as procedural and thus regulated by the law of the forum.⁴²

It should be noted that South Carolina does not have a borrowing statute that would provide a choice of law reference to the limitation period of the state in which the cause of action arose. This would limit the forum statute to cases in which the indicated substantive issues are also governed by forum law. A borrowing statute would, of course, perform the function of limiting access to both state and federal courts and save everybody a lot of uncertainty. It is unlikely, however, that South Carolina can constitutionally be compelled to enact a borrowing statute.⁴³ That is a matter for state legislative law reform.⁴⁴

Moreover, the application of the South Carolina six year limitation provision might not be that easy. Consider, for example, that the complaint of plaintiff Ratliff alleges bodily injury resulting from negligence; carelessness; recklessness; willfulness; wantonness; breach of express and implied warranties of merchantability and fitness for consumption; false, fraudulent, deceitful and negligent misrepresentation—to all of which is added her husband's claim for loss of consortium. With no express state decisional authority regarding the basis of strict liability in such cases, a question of characterization may arise.⁴⁵ If tort is selected, the problem seems solved, for the statute is general enough to accommodate a procedural classification for choice of law purposes. If implied warranty is selected, however, the problem of extracting the six year limitation provision from South Carolina's version of the Uniform Commercial Code is presented,

42. See *Sawyer v. Macaulay*, 18 S.C. 543 (1882). Cf. *McDaniel v. McDaniel*, 243 S.C. 286, 133 S.E.2d 809 (1963); *Hemingway v. Shull*, 286 F. Supp. 243 (D.S.C. 1968). For a historical analysis of the statute of limitations in the conflict-of-laws see A. EHRENZWEIG, *CONFLICT OF LAWS*, 428-436 (1962).

43. See generally *Vernon, Some Constitutional Problems in the Conflict of Laws and Statutes of Limitations*, 7 J. PUB. L. 120 (1958).

44. See Note, *Papciak v. Richardson-Merrel, Inc.—The case for a Borrowing State*, 21 S.C.L. REV. 82 (1968).

45. Clearly, the South Carolina version of the Uniform Commercial Code provides for liability in implied warranty for bodily injury. S.C. CODE ANN. § 10.2-318 (1966). There is as yet no state supreme court decision applying the code provision in preference, say, to the strict products liability provision of RESTATEMENT (SECOND) OF TORTS § 402A (1965). Cf. *Rutledge v. Dodenhoff* 254 S.C. 407, 175 S.E.2d 792 (1970) (implied warranty of habitability and workmanship in property damage claim against builder-vendor of new house). The federal courts assume quite soundly that South Carolina has or will impose strict products liability in some form when the need arises. See, e.g., *Smith v. Regina Mfg. Corp.*, 396 F.2d 826 (4th Cir. 1968).

for the Code provisions governing substantive liability would not apply. Practically, of course, the fact that all are six year provisions may moot the issue. But in theory one may wonder whether there is a South Carolina limitation provision available to apply!

To return to the main point, the choice of law issue is analogous to the jurisdictional issue, but, under present authority, a bad decision would follow. Constitutional policing of state choice of law practices is done by application of the due process clause as only a residual check against overreaching application of forum laws. A state may not apply its substantive law to a matter with which it has *no* contact.⁴⁶ A six year limitation period is not unjust as such in a due process sense. The characterization of the issue as procedural, and the neutral application of the forum's general limitation period to all claims before it, is probably not invidiously discriminatory.⁴⁷ At any rate it is unlikely that the indicated choice of limitation period can be constitutionally restricted to cases in which the forum's law will be applied to the merits of the case. More precisely with respect to *Ratliff-Nichols*, can the forum's statute of limitations be applied to a case that cannot constitutionally be governed by its own law? Keeping in mind the nearly total lack of local interest in the matter, it is not to be doubted that the substantive claims may not be governed by South Carolina law.

The dilemma thus becomes clear: apply the wrong law to the case or revise the *Erie-Klaxon* doctrine. The analogy to the jurisdictional problem is also made clear. Given the negative use of the due process clause to police state practices, fully rational solutions in terms allocating the proper reach of state laws and the amenability to suit before *state* courts cannot be constitutionally compelled. The Supreme Court has endorsed a governmental interest analysis but it has not yet compelled its use.⁴⁸ To search only for constitutional compulsions in diversity cases, however, is to adopt too narrow a focus.

Forum shopping and choice of law shopping are an inherent

46. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). The result would likely survive today, but the Supreme Court has discredited the vested rights theory upon which the case rests and endorsed a government interest approach. *Cf. Clay v. Sun Ins. Off.*, 377 U.S. 179 (1964).

47. *Cf. Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

48. *Cf. Lester v. Aetna Life Ins. Co.*, 433 F.2d 884 (5th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971) (*Klaxon* doctrine inapplicable in case of "false conflict").

aspect of federalism. So long as diversity jurisdiction persists, the federal courts are partners in the management of such problems. Just as they are curbed in certain ways from fashioning rules for jurisdiction and choice of law in matters reserved to the states, they are, as part of a national judicial system, empowered to reach solutions of such problems in ways not available to state courts.⁴⁹ Moreover, federal courts are charged with the distinctive task of maintaining the national interest in the federal judicial system not only in the sense of applying the federal rules of civil procedure, but also in the sense of vindicating its institutional needs. After all it is the federal, not the state, court that is being asked to stay open six years to hear stale claims between strangers, and it is not a necessary (perhaps not even appropriate, to say nothing of rational) function of diversity jurisdiction that it do so.

Transfer of venue from one federal court to another comes readily to mind. The order of the district court indicates that a transfer of venue under § 1404(a) would be appropriate and that plaintiff's choice of law advantages should not be upset. Neither point is beyond objection. Original venue, if technically proper, points up the need for reform. The retention of the choice of law advantage by plaintiff would demand reform, if not reversal. When venue is proper originally and transfer is requested by the defendant, the choice of law rules of the transferor forum are to be applied. This proposition, announced in *Van Dusen v. Barrack*,⁵⁰ is less a matter of constitutional law than of construction of the statute authorizing transfer. Justice Goldberg purposely left open the answer to issues posed by variations from the facts of the case before him.⁵¹ To show whether *Ratliff-Nichols* should have the same choice of law result, the relation between jurisdiction and venue in diversity litigation must be considered.

49. See, e.g., *Atkins v. Schmutz Mfg. Co.*, 435 F.2d 527 (4th Cir. 1970) (Fashioning a federal tolling principle in litigation brought in one federal court and then another).

50. 376 U.S. 612 (1964). See generally Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 CH. L. REV. 341 (1960), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 431 (1963); Note, *Erie, Forum Non Conveniens and Choice of Law in Diversity Cases*, 53 VA. L. REV. 380 (1967); Note, *Choice of Law After Transfer of Venue*, 75 YALE L.J. 90 (1965); and AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 18-22, 149-155 (1969).

51. "In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*" 376 U.S. at 639-40.

The federal courts look to state law to determine the meaning of "doing business" for the purposes of jurisdiction, but what constitutes "doing business" for purposes of venue is governed by federal law.⁵² We have in *Ratliff-Nichols* two examples of insufficient contacts to establish "doing business" as against due process limitations. To find upon the same facts that there is "doing business" for venue purposes would seem an abuse of common sense. Concededly there is in *Nichols* the added element of having qualified to do business in the state, but this is immaterial for jurisdictional purposes under state law.⁵³ The same conclusion is therefore reached. Small wonder that the American Law Institute has recommended modification of the venue statute to establish limitations commensurate with jurisdictional developments.⁵⁴

As in *Ratliff-Nichols*, when venue is inconsistent with jurisdictional premises, choice of law consequences should be beyond forum shopping strategies. Thus, original venue, even though literally proper, unsupported by proper jurisdiction should not control choice of law upon transfer. This approach is within the scope of statutory construction. The federal court might thus reach a proper result without foundering upon the *Erie-Klaxon* doctrine.

When venue is originally questionable and transfer is requested by the plaintiff, the law of the transferee forum should apply. The case would be dismissed at the other end of the line

52. See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 388-389 (Rev. ed. C. Wright 1960).

53. See note 5 *supra*.

54. The pertinent provisions of 28 U.S.C. are:

§ 1391. Venue generally.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

* * *

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

The 1966 addition to subsection (a) authorizing venue in the judicial district in which the claim arose is in harmony with the trend toward specific (activity based) jurisdiction and has manageable choice-of-law consequences. In this light, subsection (c) further authorized venue so as seemingly to exhaust the practical possibilities of corporate activity generally, that is, in matters unrelated to the cause of action. The A.L.I. proposal would no longer authorize venue on the basis that the corporation is "licensed to do business or is doing business" in the judicial-district. A.L.I. STUDY, *supra* note 50, at 15-16, 135-150 (1969).

because the transferee forum's statute to limitations has run.⁵⁵ When the defendant requests transfer of venue, the difference between proper and questionable original venue would be even more crucial. When venue is originally questionable it should not matter that it is now the defendant who asks for transfer. To do otherwise would give the plaintiff the benefit of questionable original venue and choice of law. Where, as here, the resulting choice of law is also questionable, such an outcome would be untenable.⁵⁶

Given that upon present authority, venue is proper in one of our cases, though perhaps not the other, a dismissal upon jurisdictional grounds is proper and practical. The anomaly of variable choice of law consequences depending on whether transfer is under § 1404(a) or § 1406(a) speaks for itself. The further prospect of transfer under § 1406(a) for purposes of choice of law dismissal elsewhere underscores the point in theory; to carry out the transfer in practice to prove the point is unnecessary. Given the district court's handling of the state door-closing statute and its overreading of *Szantay*, avoidance of a decision in terms of countervailing considerations is another piece of judicial pragmatism. Practical solutions may be generally preferred, but some day the case will come along that judicial pragmatism cannot avoid on jurisdictional grounds. Then the issues raised here speculatively will have to be faced.

55. See *Carson v. U-Haul Co.*, 434 F.2d 916 (6th Cir. 1970). Cf. *Schwimley Motors, Inc. v. Chrysler Motors Corp.*, 270 F. Supp. 418 (E.D. Cal. 1967).

56. Cf. A.L.I. STUDY, *supra* note 50, at 18-23, 149-155 (1969).

