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ERIE V. TOMPKINS AND FEDERAL DETERMINANTS OF PLACE OF TRIAL

Since 1938, when *Erie v. Tompkins* required that “except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any [diversity] case is the law of the state,”¹ the courts have been attempting to determine the extent of that doctrine. The question is, of course, *how much* law should be tied to the states? There is, on the one hand, the consideration that if the federal court is made absolutely identical to the state court nothing is gained by opening the federal courts to what would otherwise be a state problem. On the other hand, if there are significant differences in the federal courts, one may

1. 302 U.S. 64, 78 (1938).

wonder why the essentially fortuitous geographical location of the parties should have such a significant effect upon the outcome.

The familiar substance-procedure dichotomy was utilized almost immediately after the *Erie* decision, but the Supreme Court later rejected it in *Guaranty Trust Co. v. York*:²

In essence the intent of that decision [*Erie*] was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court *should be substantially the same*, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court . . . a block away.³

That these "outcome-determinative" rules include more than substantive law is evident. Those areas where *Erie* might also apply can be divided into these categories: (1) conflict of law rules; (2) state "door closing" laws and (3) procedure.

In *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁴ the Supreme Court required the federal courts to apply the conflict of law rules of the forum state in diversity cases.⁵ The case has been criticized by many writers, who call for independent determination at the federal level of what law applies.⁶ However, *Klaxon* is certainly consistent with the "outcome-determination" test.

In *Angel v. Bullington*⁷ the *Erie* doctrine was applied to a state statute which precluded state courts from entertaining certain causes of action. A North Carolina statute denied recovery of a deficiency judgment on notes secured by mortgages given pursuant to the sale of land. The Supreme Court held it applicable to the federal courts sitting in the state.⁸ Again the result is in harmony with the outcome-determination test, but

2. 326 U.S. 99 (1945).

3. *Id.* at 109. The court also said: "Since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for the purpose, in effect, only another court of the state, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." *Id.* at 108.

4. 313 U.S. 487 (1941).

5. "Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Id.* at 496.

6. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 635; COOK, *The Federal Courts and the Conflict of Laws*, 36 ILL. L. REV. 493, 504 (1942); HILL, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 544 (1958).

7. 330 U.S. 183 (1947).

8. "If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment." *Id.* at 191.

some writers would not require such conformity where the only state interest in the proceeding is the regulation of the use of its judicial machinery, and not of substantive interests.⁹

Guaranty Trust, applying the local statute of limitations in a diversity case, is strong authority for the proposition that even federal procedure, where outcome-determinative, should conform to the state rules.¹⁰ Other cases have held that certain of the Federal Rules of Civil Procedure are not applicable where they could change the outcome of the litigation.¹¹ Since *Guaranty Trust* the single most significant question has been to what extent *Erie* will usurp federal procedural rules.¹²

Assuming for the moment that state law will govern in all of these areas, a plaintiff suing in an Indiana federal court will receive everything Indiana as a forum state can give him, *i.e.*, substantive law, conflict of law rules and procedure. If he sues in a California federal court, he receives California law. Thus, because of *Erie*, the applicable law is determined by the place of trial. Place of trial, therefore, is in a sense the ultimate outcome-determining factor. But does this mean that, according to *Guaranty Trust*, place of trial too must be determined according to state law? Not necessarily. Outcome-determination as defined by *Guaranty Trust* would conform the outcome to that which would occur in the *forum state*. Thus the doctrine would not begin to operate until the forum is selected. It is another question whether outcome-determination should be extended so as to require the same outcome as would have occurred if diversity jurisdiction did not exist. If such were the case it would be necessary that the forum be the same as would have been selected by the plaintiff at the state level.

Nevertheless, it is submitted that under *Guaranty Trust* place of trial can be outcome-determinative. The requirement that the outcome conform to that which would occur in the state court implies that the plain-

9. *E.g.*, where plaintiff is claiming a right which arose under the laws of another state. See HART & WECHSLER, *op. cit. supra* note 5 at 668.

10. The court said: "It is therefore immaterial whether statutes of limitations are characterized either as 'substantive' or 'procedural'" *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

11. In *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), there was conflict between a Kansas statute which provided that the statute of limitations was tolled when the summons was served and Rule 3 of the Federal Rules of Civil Procedure which provides that a civil action "is commenced by filing a complaint with the court." Plaintiff filed his complaint before the limitations period had expired, but summons was served after the expiration. The Supreme Court held that the Kansas rule should be followed as a policy consistent with outcome-determination.

See generally Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins*, 24 J. AM. JUD. SOC'Y 57 (1940); Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Note, 62 HARV. L. REV. 1030 (1949).

12. See 1 MOORE, FEDERAL PRACTICE, 1030; 66 HARV. L. REV. 1516 (1953); Note, 51 NW. U.L. REV. 338 (1956).

tiff be able to sue in the state court. If he could not sue in the state court an outcome could not be reached there. Outcome-determination would require, therefore, that there be no outcome in the *federal* court of that state. The doctrine requires that if a plaintiff could not sue in a state court, he should be unable to sue in the federal court of the same state.

The recent case of *Jaftex Corp. v. Randolph Mills, Inc.*¹³ presents the possibility of just such a situation. The case is the latest of many lower federal court decisions on the problem of whether "doing business" should be defined by federal or state law for the purposes of federal jurisdiction over a corporation in a diversity case.¹⁴ There is a decided split as to whether *Erie* requires the courts to adhere to the state definition.¹⁵ The problem has not yet been resolved by the Supreme Court.¹⁶

Jaftex Corp. was an original defendant in an action to recover for personal injuries caused a young girl when pajamas she was wearing, made with material processed by Jaftex Corp., caught fire and burned rapidly. Jaftex sought to implead Randolph Mills, the ultimate manufacturer of the cloth. Randolph Mills contended that it was not subject to service of process in New York, because it was not doing business there.

The court found that Randolph Mills would have met either state or federal test of doing business, but held that it was the federal standard which should apply in diversity cases.

In our conclusion in the absence of definitive direction that the policy we here deal with is to be considered so much a part of the make-up of a federal court that it is not lightly to be superseded, and the settled policy that federal courts should apply

13. 282 F.2d 508 (2d Cir. 1960).

14. It is difficult to discover from the instant opinion as well as the district court opinion, 171 F. Supp. 117 (1959), the particular provision requiring "doing business" which the courts are construing. Service of process was apparently effected through Rule 4(d)(3) of the Federal Rules of Civil Procedure, which provides:

Service shall be made . . . upon a domestic or foreign corporation or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Since that provision deals only with the manner of service the applicable substantive requirements remain unclear. As a rule the cases have assumed that the state jurisdictional requirements will apply. See HART & WECHSLER, *op. cit. supra* note 5 at 960.

15. See *Kenny v. Alaska Airlines*, 132 F. Supp. 838 (S.D. Cal. 1955), for a classification of the cases according to holding.

16. See Note, 74 HARV. L. REV. 1662 (1961); Note, 14 VAND. L. REV. 967 (1960); Notes, 6 VILL. L. REV. 404 (1961); Note, 67 YALE L. REV. 1094 (1958).

state substantive law in diversity cases does not go to the extent of requiring the contrary.¹⁷

Thus it is possible, under this holding,¹⁸ that a corporation which could not be served with process under a more restrictive state definition of "doing business"¹⁹ could be served in that state under the federal standard.

Moreover an especially anomalous situation has arisen if it is assumed that the court in *Jaftex* construed a state statute which provided the substantive requirements for service of process.²⁰ The application of a state statute satisfied the *Erie* doctrine, but the statute was given a federal content. Thus the court in *Jaftex* failed to completely effectuate the *Erie* principle which requires not only the application of state law but a state definition of that law as well.

A similar effect is produced on the outcome-determination doctrine by the application of section 1404(a) to diversity cases.²¹ The statute provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."²² The case of *Gulf Oil Corp. v. Gilbert*,²³ decided a year before the enactment of 1404(a), established the doctrine of forum non conveniens in the federal courts. The Supreme Court dismissed a case brought in a New York district court when the cause of action arose in Virginia, the plaintiff and all the witnesses lived in Virginia, and the defendant did business there. The case has been cited as legislative history of 1404(a), and along with the Reviser's Note following 1404(a),²⁴ has led the courts to assume that the doctrine of forum non conveniens was the basis of the section.²⁵

Thus the similarity between 1404(a) transfers and the state doctrine

17. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 512 (2d Cir. 1960).

18. Although the court found that Randolph Mills was "doing business" under either standard its emphasis on the applicable standard under *Erie* hardly justifies calling that part of the decision dictum.

19. The only "federal standard" is apparently the constitutional requirement of due process defined in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945): "[I]n order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Thus it must be at least as liberal as any state standard.

20. See note 13 *supra*.

21. See generally Brown, *Factors to be Considered in Determining a Motion to Transfer Under 28 U.S.C. 1404(a)*, 26 INS. COUNSEL J. 117 (1959); Kaufman, *Further Observations on Transfer Under Section 1404(a)*, 56 COLUM. L. REV. 1 (1956); Note, 36 IND. L.J. 344 (1961).

22. 28 U.S.C. § 1404(a) (1952).

23. 330 U.S. 501 (1947).

24. The Section "was drafted in accordance with the doctrine of forum non conveniens" Reviser's Note following 27 U.S.C.A. § 1404(a) (1950).

25. See Comment, 41 CALIF. L. REV. 570 (1954).

of forum non conveniens is relevant to the outcome-determination test, since they are applied under similar circumstances. But the circumstances are not identical. The factors which determine the application of the doctrine of forum non conveniens in the various states differ at least slightly from those which are applied in the federal courts under 1404(a).²⁶ Indeed, many states do not even recognize the doctrine of forum non conveniens.²⁷ In addition, the two devices do not render the same result. Transfer is the result under 1404(a), and dismissal is the result under forum non conveniens. The doctrine may not even be comparable, as suggested by Professor Currie,²⁸ but it is sufficient for this discussion to show that section 1404(a) has no counterpart at the state level, and thus upsets outcome-determination.

A further problem with respect to this procedural device concerns the applicable law after transfer.²⁹ Since transfer itself has changed the outcome, further application of that test is meaningless. But *Erie* does restrict the applicable law to state law; the question is, which state law? The leading case is considered to be *Hedrick v. Atchison T. & S. F. Ry.*,³⁰ in which it was held that after transfer the statute of limitations of the transferor state continued to control. But that holding has not been completely accepted.³¹

In summary, there is an essential conflict between outcome-determination and the notion of an independent system of federal procedural rules which fix the place of trial in diversity cases. One may ask, therefore, whether *Jaftex* attempts to resolve the conflict. The court in *Jaftex* does rely heavily on *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,³² which was itself a significant movement away from outcome-determination. The case involved a suit for personal injury caused by the defendant's negligence. The defendant alleged that he was the plaintiff's employer and that the state workman's compensation act provided

26. *Ibid.*

27. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 389 (1947).

28. "The device of change of venue is available only on the intrastate level; it is not available in the solution of the problem at the interstate or international level, which is the problem to which the doctrine of forum non conveniens is addressed. This, again, is because of the defect of power which distinguishes the interstate situation. No court has power to transfer a case to a court of another sovereign. The problems with which the doctrine of forum non conveniens deals cannot be solved by transfer, or change of venue."

Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 423 (1955).

29. See Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955); Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960); Note, 60 YALE L.J. 537 (1951).

30. 182 F.2d 305 (10th Cir. 1950).

31. See *Reynolds v. Baltimore & O. R. Co.*, 185 F.2d 27 (7th Cir. 1950).

32. 356 U.S. 525 (1958).

the plaintiff's only remedy. Under state practice the defendant's status as an employer within the meaning of the act was to be determined by the trial judge, while under federal practice the question would have gone to a jury. The court found that:

It may well be that in the instant personal injury case the outcome should be substantially affected by whether the issue of immunity is decided by a judge or jury. Therefore, were "outcome" the only consideration, a strong case might appear for saying that the federal court should follow state practice.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the seventh amendment, assigns the decisions of disputed questions of fact to the jury. . . . Thus the inquiry here is whether federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.³³

Thus the Supreme Court would classify certain federal procedure as "essential characteristics," and *Jaftex* is consistent to the extent that it defines "doing business" as "a part of the make-up of the federal system."³⁴ But there remains the problem of defining an "essential charac-

33. *Id.* at 537. But the court later said:

We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury. But clearly there is not present here the certainty that a different result would follow . . . or even the strong possibility that this would be the case . . .

Id. at 539. This apparent afterthought lessens the effect of the holding on *Guaranty Trust* and the outcome-determination test.

34. But perhaps they are not entirely consistent. Professor Hill, in his article, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. Rev. 427, 604 (1958), interpreted *Byrd v. Blue Ridge* as substituting two independent tests for outcome-determination:

Under the first of these tests a state rule is examined in order to determine, on the one hand, whether it is "merely a form and mode of enforcing" a claimed right or, on the other hand, whether it is "intended to be bound up with the definition of the rights and obligations of the parties." The inquiry now to be made

teristic," and more important, the effect which the standard has on outcome-determination.

Actually the court in *Jaftex* overlooked the significance of its holding on the outcome test:

Since the practical result of the holding below [that *Erie* requires adherence to the New York standard, and that Randolph Mills did not meet it] is thus only that Randolph Mills must be sued separately in North Carolina, rather than with the other defendants here, it follows that the parties can have no interest whatsoever in the possible outcome of suit in a New York court and the outcome-determinative test is quite anomalous.³⁵

When suit is brought in the North Carolina District Court, *Erie* will require the application of North Carolina law, including conflicts law. It is another question whether the laws of the two states would actually differ with respect to this case, but that is irrelevant for the purposes of this discussion. The fact remains that if the federal standard is applied, New York law will govern; if the state standard is applied, North Carolina law will govern. The outcome could easily be different.

Thus the essential conflict between outcome-determination and federal determinants of place of trial has not yet been resolved. The alternatives are to overrule *Jaftex* and give complete effect to outcome-determination, or to eliminate that standard and free determinants of place of trial from state law. Either alternative would require a reexamination of the purposes of diversity jurisdiction and of the *Erie* doctrine.

If *Jaftex* represents a prevailing opinion against surrendering the individuality of the federal courts in diversity cases it seems improbable that the first alternative will come about, yet it cannot be discounted. Since the Constitution expressly provides for diversity jurisdiction³⁶ there should be no objection to conforming federal procedure to state require-

it would seem, is whether the particular rule is "really" substantive or "really" procedural. . . .

The classification of a state rule as one pertaining to "form and mode" would not of itself end the matter. For the outcome determinative principle survives as a "policy" and whether this policy shall prevail depends on the strength of competing policies, if there be any.

In the later *Jaftex* case the court retains the concept of outcome-determination as only a "policy," but it is at least arguable that any rule which fixes jurisdiction was "intended to be bound up with the definition of the rights and obligations of the parties" and thus should be tied to the state definition. This was not the result in *Jaftex*.

35. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 514. Since the jurisdictional issue involved a third-party plaintiff and defendant it is possible that the court meant that the *original* plaintiffs and defendants "can have no interest whatever in the possible outcome of suit in a New York court" between the *third-party* plaintiff and defendant. The context indicates that the court was referring to the interest which *Jaftex Corp.* and Randolph Mills as third-party litigants could have in a New York proceeding.

36. U.S. Const. art. III, § 2.

ments if that is necessary to effectively adjudicate diversity cases. If diversity jurisdiction requires "outcome-determination" it can be achieved, regardless of any usurpation of "essential characteristics."

It would be necessary first, however, to define more exactly the concept of outcome-determination. Does it mean only that the outcome in any given federal court should conform to that which would occur in the state court of the same state? Or does it mean that the outcome should be the same as would have occurred in the absence of diversity jurisdiction? If the former concept is settled upon it would be relatively easy to effectuate it. Federal determinants of place of trial could still exist. It would be necessary to modify them only to insure that, in every case, the state in which trial is held is one in which the plaintiff could have sued at the state level.

The latter concept of outcome-determination however, would require a revision which would be much more drastic. The result of the revision must be that the plaintiff has the same choice of forums [and therefore the same choice of law] as he has at the state level. The only way to bring about that result is to completely eliminate the application of federal determinants of place of trial to diversity cases. Thus Congress must provide that state law as to service of process control in any diversity case. The present federal venue provision for diversity cases³⁷ would then be unnecessary. Federal venue restricts place of trial to fewer forums than those available to the plaintiff in the state courts, because a plaintiff can sue in any state court if he can invoke its jurisdiction.³⁸ It would also be necessary to eliminate the application of section 1404(a) change of venue to diversity cases. The applicable state law of forum non conveniens would govern.

The necessity of such a complete elimination of federal determinants of place of trial precludes the possibility of working with the present laws. The courts could not, for instance, apply the federal venue and transfer provisions to diversity cases in any way consistent with outcome-determination. If Rule 4(d)(7) of the Federal Rules of Civil Procedure, which provides that service of process may be made in a manner prescribed by a local statute, were used to serve process the courts could require that the local interpretation be given to the applicable state statute, but Rule 4(d)(3) remains and could conflict with a state statute. Although Rules 4 and 5 of the Federal Rules deal primarily with the manner of service, that too can be outcome-determinative. For example, Rule 4(d)(1), which allows personal service at the defendant's "dwelling house or usual place of abode with some person of suitable age and

37. 28 U.S.C. § 1391(a) (1952).

38. See the accompanying note, *Federal Venue and the Corporate Plaintiff*.

discretion then residing therein . . .," could conflict with a local "in hand" requirement.³⁹ Nor would it be possible to retain the current place of trial rules and attempt to use the law which would have applied had the plaintiff chosen a state forum, for it could not be determined what forum he would have selected.

That this method of reconciling place of trial and outcome-determination has never been seriously advocated possibly is evidence that writers have never carried outcome-determination to its theoretical conclusion, but more probably it means that such a conclusion was immediately rejected when conceived. The rhetorical question is asked by Professors Hart and Wechsler: "Once we conclude that the *summum bonum* of diversity litigation is a federal court which perfectly mirrors the courts of the state in which it is sitting, is it possible to attribute *any* rational purpose to the diversity clause?"⁴⁰ Again Professor Hart says:

Thus far the Supreme Court's decisions on these matters seem to be founded on no higher principle than that of eliminating every possible reason for a litigant to prefer a federal to a state court. The principle having no readily apparent stopping place, the reach of the decisions is unclear. What is more important is the triviality of the principle. The more faithfully it is carried out the more completely the constitutional and statutory grants of diversity jurisdiction are emptied of intelligible meaning.⁴¹

These opinions represent a basic dissatisfaction with outcome-determination, and presumably, with the result which that theory in either form would bring to determinants of place of trial in diversity cases. The other alternative, therefore, the freeing of place of trial from state law, is more likely. But by implication this means a rejection of outcome-determination, since place of trial is itself outcome-determinative. Thus a more meaningful standard involving the *Erie* doctrine must be developed, and the purposes of diversity jurisdiction must be reviewed as to their appropriateness in this contemporary period.⁴²

39. See *Doyle v. Moylan*, 141 F. Supp. 95 (D. Mass. 1956).

40. HART & WECHSLER, *op. cit. supra* note 5 at 635.

41. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 (1954).

42. There has in fact been a great deal of writing on this problem. See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 287 (1946); Frank, *Historical Basis of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948); Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1927); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958); Meader, *New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383 (1960); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 234-40 (1948).

If upon such a review it is determined that place of trial can be free from state law, Congress need not enact new legislation for that purpose. In many respects place of trial is already free, as shown above. Moreover, because diversity jurisdiction allows federal determinants of place of trial to exist does not mean that federal determinants are required. Thus there may be policy reasons for retaining Rule 4(d)(7), for example, which allows the use of local methods of service of process.

Congress could, however, enact new place of trial laws according to the dictates of other policy considerations. Current problems arising from the present venue provision could be corrected. For example, the current provision that venue in diversity cases can only exist where "all plaintiffs or all defendants reside"⁴³ precludes trial when all of the parties are from different states, perhaps the one situation most suited for diversity jurisdiction.⁴⁴

If place of trial can be freed from state law a truly enlightened use of diversity jurisdiction would be possible. Assuming that a new concept of diversity jurisdiction would still require that state law be used, the particular state law is no longer dependent on the essentially fortuitous selection of a place of trial. Once the parties are in court, venue can be changed to whatever state offers access to appropriate law and the most convenient location for the parties. It would be possible to take advantage of the "best forum" available—something which could never be done at the state level because of the inability of any state court to transfer a case to another state.

But consider an even better possibility under a theory of diversity jurisdiction which allows federal determination of place of trial. Why would it be necessary that the applicable conflict of law rules be those of the forum state, whichever state is finally selected? If there were such a requirement the "best forum" could often be only a compromise between the most convenient location and the law most applicable. On the other hand, if the place of trial could be selected solely on the basis of convenience to the parties, with the applicable law being selected according to a federal law of conflicts, a true "best forum" would be created.⁴⁵

In summary, federal determination of place of trial in a diversity

43. 28 U.S.C. § 1391(a) (1952).

44. The problems which are caused by the restriction of the Territorial limits of service of process to the boundaries of the forum state are pointed up by Prof. Barrett in his article, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954). He suggests that nationwide service of process be permitted in the federal courts, with revised venue provisions fixing the place of trial.

45. The desirability of being able to select a "best forum" is more apparent at the state level, where "long-arm jurisdiction" statutes give the plaintiff an increasing number of available forums. See the accompanying note, *A Reconsideration of "Long-Arm" Jurisdiction*.

case conflicts with outcome-determination, the current interpretation of *Erie v. Tompkins*. A reconciliation of the conflict requires both a more exacting definition of outcome-determination and a decision as to whether it is an accurate interpretation of *Erie v. Tompkins* in the light of the purposes of diversity jurisdiction. If it is decided that outcome-determination should be retained, then certain adjustments to present place of trial rules must be made. If a new interpretation evolves, allowing place of trial to be freed from the states, it will make possible a more intelligent and enlightened use of diversity jurisdiction.