Land & Water Law Review

Volume 15 | Issue 2 Article 12

1980

Conflict of Laws - An Interest Analysis Approach to Wyoming's Borrowing Statute - Duke v. Housen - Baker v. First National Bank of Denver

Rod K. Sutherland

CASE NOTES

CONFLICT OF LAWS—An Interest Analysis Approach to Wyoming's Borrowing Statute. Duke v. Housen, 589 P.2d 334 (Wyo. 1979), reh. denied, 590 P.2d 1340 (Wyo. 1979), cert. denied, . . U.S. ____ , 100 S.Ct. 132 (1979); Baker v. First National Bank of Denver, 603 P.2d 397 (1979).

On April 4, 1970, Margaret Housen was introduced to "Pony" Duke at Miss Housen's home in Virginia. That night, following dinner, dancing and moderate drinking, the couple engaged in sexual intercourse in the front seat of Duke's pickup truck. On April 7, Housen met Duke in New York where they once again engaged in sexual intercourse. The next morning, on April 8, the couple again had intercourse before they left by truck, ostensibly for Wyoming. During the cross-country journey, Duke and Housen continued to engage in intercourse April 8 and 9, in Pennsylvania; April 9 and 10, in Iowa; April 10 and 11, in Nebraska; and April 20 and 21, again in New York. Finally, on the morning of April 21, 1970, Duke broke off the relationship, and informed Housen for the first time that he had gonorrhea, and that she had very likely contracted it from him. Housen then left New York for Washington, D.C. where laboratory tests taken April 22 confirmed the presence of gonorrhea infection. By 1973, the infection had developed into scar tissue adhesions requiring subsequent periodic surgery, and resulting in a reduced ability to bear children.

Housen filed her complaint on April 19, 1974, alleging that Duke was grossly negligent in infecting Housen with venereal disease. In his answer, Duke asserted that the action was barred by the statute of limitations. However, the trial court held that Wyoming's four year statute[1] did not begin to run until 1973, when the adhesions resulting from the infection were discovered. Thus, Housen was awarded $300,000.00 in compensatory damages and $1,000,000.00 in exemplary damages.

Duke appealed the district court's decision, alleging the trial court's error in holding that the claim was not barred

1. WYO. STAT. § 1-3-105 (1977).

by the statute of limitations. Duke asserted that the action was controlled by the Wyoming borrowing statute, which states: "If by the laws of the state or country where the cause of action arose the action is barred, it is also barred in this state."[2]

The defense was sustained by the Wyoming Supreme Court.[3] The court agreed with plaintiff's proposition that the statute of limitations of the place where the action is brought controls in the event of a conflict of laws. Yet the court declined to give the plaintiff's argument application since it felt that any conflict had been erased by the borrowing statute. Thus, it was reasoned that the borrowing statute was binding on the court. However, before the borrowing statute could be applied, it was necessary to determine where the cause of action arose. To do so, the court *assumed* that the defendant had passed on his infection to the plaintiff in New York, the state where the second and last acts of intercourse occurred. In this manner, it was reasoned that the cause of action arose in New York on April 8, 1970, and again in New York on April 21, 1970. Since the plaintiff did not file her complaint until April 19, 1974, the court held that the action was barred by New York's three year statute of limitations.[4]

In his concurring opinion,[5] Justice Thomas argued that Washington, D.C., not New York, should be the principal place of reference. Ignoring the majority's holding that the place where the plaintiff was tortiously wronged was the place where the cause of action arose, Justice Thomas reasoned that since the illness was identified in Washington, D.C., the cause of action arose there. It was also argued by the Justice that under the significant relationship test[6] the result would be the same—Washington, D.C. would be

2. WYO. STAT. § 1-3-117 (1977).
3. Duke v. Housen, 589 P.2d 334 (Wyo. 1979), *reh. denied*, 590 P.2d 1340 (Wyo. 1979), *cert. denied*, ... U.S. ....., 100 S.Ct. 132 (1979).
4. N.Y. CIV. PRAC. LAW § 214 (McKinney 1972).
5. Duke v. Housen, *supra* note 3, at 353 (concurring opinion).
6. The rule is that when an action involves more than one state, the law of the jurisdiction having the most significant relationship with the occurrence and the parties will be applied. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (1971).

the jurisdiction having the most significant relationship to the case, and would therefore be the place of the cause of action. Thus, its three year statute of limitations[7] would operate to bar the plaintiff's claim.

Justice McClintock, in his dissenting opinion,[8] also recognized the possibility that the transmission, incubation and injury could have occurred in any of the five contact states. The Justice reasoned that because there is no determinable state in which the cause of action arose, the borrowing statute could not apply. Justice McClintock further reasoned that "it might be logically consistent with § 1-3-117 to hold the action barred if, by the law of *all* the states where the action *might possibly* have arisen, the action is barred."[9] However, that could not be the situation here, since it is possible that the transmission of the infection might have occurred in Nebraska, or taken effect in Nebraska, or taken effect in Wyoming. In either case, a four year statute of limitations would apply,[10] thus saving the plaintiff's claim.

This note will examine the legislative intent behind borrowing statutes, explore the specialized problems which have arisen in this area due to Wyoming's acceptance of the territorial doctrine of conflict of laws, and advance solutions to those problems.

THE LEGISLATIVE INTENT

History and Philosophical Basis of Borrowing Statutes

Traditionally, American courts classified statutes of limitation as procedural, rather than substantive matters.[11] Therefore, the limitations issue was to be determined by the law of the "lex fori," where the suit was brought, regardless of where the cause of action arose.[12] Due to this pro-

7. D.C. CODE ANN. § 12-301 (1973).
8. Duke v. Housen, *supra* note 3, at 354 (dissenting opinion).
9. *Id.*, (emphasis in original).
10. NEB. REV. STAT. § 25-207 (1975); WYO. STAT. § 1-3-105 (1977).
11. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971); RESTATEMENT OF CONFLICT OF LAWS §§ 603-04 (1934); R. LEFLAR, AMERICAN CONFLICT OF LAWS § 127 (rev. ed. 1968).
12. *Id.*

cedural characterization, the courts chose not to apply the longer period imposed by the locus of the wrong when the period of the local statute had run.[13] Conversely, if the forum's statutory period had not yet run, the action was maintained though suit was barred in the foreign jurisdiction.[14] The theory was that the statute of limitations, being a procedural matter, operated as a limitation upon the remedy only: a plaintiff could enforce the right, which continued to exist, wherever the remedy could be found.[15]

It can be seen that under this traditional rule, the results of lawsuits depended on where the suit was brought, since a cause of action barred by the "lex loci" could still be sued on in those instances where the statutory period was longer in the forum state than in the state in which the cause of action arose.[16] For this reason, a majority of the states have enacted borrowing statutes[17] which provide that the limitation of the loci is imported or borrowed by the forum. In this manner, it is possible "to insure that a plaintiff . . . obtains thereby no greater rights than those given in the state where his cause of action arose. . . ."[18]

A second goal behind the enactment of borrowing statutes is the reduction of the forum court's workload.[19] In many cases the forum's limitations are longer than the limitations of the state where the cause of action arose. However, a borrowing statute is not used unless the forum's period is longer.[20] Thus, the longer limitation cannot operate to encourage plaintiffs to bring their actions to the forum.

13. Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 37, 38 (1962); H. GOODRICH AND E. SCOLES, CONFLICT OF LAWS § 85 (4th ed. 1964).
14. LEFLAR, *supra* note 11, at § 127.
15. McElmoyle v. Cohen, 38 U.S. (13 Pet. 312) (1839); A. DE CERVERA, THE STATUTE OF LIMITATIONS IN AMERICAN CONFLICTS OF LAWS ch. 1 (1966). However, many courts and scholars have determined that the practical effect of limitations statutes is substantive, not procedural, since they actually terminate enforceable rights. *See, e.g.*, Heavener v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973); Comment, *Statute of Limitations and the Conflict of Laws*, 28 YALE L. J. 492, 497 (1919).
16. LEFLAR, *supra* note 11, at § 128.
17. Ester, *supra* note 13, at 79-84.
18. Wilt v. Smack, 147 F. Supp. 700, 704 (E.D. Pa. 1957).
19. Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L. J. 1, 28 (1975).
20. *See* DE CERVERA, *supra* note 15, at 70; *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1263 (1950).

Borrowing statutes also serve to mitigate the effect of the forum's tolling statute. Since the traditional rule calls for the application of the forum's own procedural rules, as long as the defendant is absent from the forum, the forum's statute of limitations will not run.[21] Under the traditional rule, then, an absent defendant could be subject to perpetual liability.[22] However, where the effect of the borrowing statute is to adopt the limitations rule of the foreign state, other rules affecting the application of that limitation, including the foreign tolling provisions, are likewise adopted.[23] The possibility of perpetual liability is thus circumvented.

PROBLEMS OF JUDICIAL INTERPRETATION

Although the policies underlying borrowing statutes are well defined and generally accepted, the actual effect has been not to simplify, but to compound the choice of law problem.[24] In interpreting these statutes, the courts have created a decisional chaos rarely surpassed in any other branch of the law. This confusion is created by the language which makes the choice of law reference depend on "where the cause of action arose." The cases decided present a wide variety of rulings as to where a cause of action may be deemed to arise.[25]

Obviously, the question is not always merely academic. In light of the *Duke* decision, it can be seen that the determination of the place where the cause of action arose is one of the most important and most perplexing problems raised by this statute.

Before the borrowing statute could be applied, it was necessary that the *Duke* court determine where the cause

21. In the United States, absence of the defendant from the forum was initially rejected as a reason for interrupting the running of the statute of limitations. Rock Island Plow Co. v. Masterson, 96 Ark. 446, 132 S.W. 216 (1910). Today all states interrupt the running of the statute of limitations during the time that the defendant is absent from the state.
22. Milhollin, *supra* note 19, at 29.
23. LEFLAR, *supra* note 11, at § 128. *Accord*, Bonnifield v. Price, 1 Wyo. 223 (1875).
24. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 51, 52 (1st ed. 1971).
25. DE CERVERA, *supra* note 15, at 74-80; Ester, *supra* note 13, at 50.

of action arose. The court recognized the traditional rule that the law of the place where the plaintiff sustains injury is the place of the cause of action.[26] Since there was no evidence as to when or where plaintiff had been infected, the court began with the basic proposition that the transmission of the infection had occurred in each of the states where plaintiff and defendant had intercourse.[27] In chronological order, each of the states was examined as follows:

> April 4 and 5, 1970, in Virginia.[28] Virginia's two year statute of limitations was deemed to have barred the action in that state. By statutory law, the statute of limitations would attach "from the date the injury is sustained." The limitation would run until April 5, 1972, thus barring the action filed April 19, 1974. A judge-made exception to the statutory enactment allowed that the limitation begins to run upon the date of the last exposure. It was reasoned by the court that if the judge-made rule was followed, the cause of action would have arisen in New York, the place of the last exposure, on April 22, 1970.
>
> April 7 and 8, 1970, in New York.[29] Consistent with New York case law, the state's three year statute of limitations was held to have attached at the time injury was first produced. By operation of New York's limitation, the action is barred.
>
> April 8 and 9, 1970, in Pennsylvania.[30] After a careful reading of the authorities, the court determined that Pennsylvania's two year statute of limitations attaches upon discovery of the tortious wrong. Therefore, no cause of action arose in Pennsylvania since it was in Washington, D.C. where plaintiff's infection was discovered.

26. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934). This mechanical method makes the choice of governing law depend entirely upon the place of the wrong. This territorialist theory was prescribed by the original RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934).
27. Duke v. Housen, *supra* note 3, at 345.
28. *Id.*, at 348-50.
29. *Id.*, at 345-48.
30. *Id.*, at 350-51.

April 9 and 10, 1970, in Iowa.[31] Iowa, like Pennsylvania, follows the rule of discovery. Since the infection was discovered in Washington, D.C., no cause of action arose in Iowa.

April 10 and 11, 1970, in Nebraska.[32] Nebraska also follows the majority rule that a cause of action arises once the injury is sustained. Under that rule, the action would be barred by the state's four year statute of limitations. The court did point out that a federal court believes Nebraska would follow the discovery rule in a case where plaintiff was negligently subjected to continual infection. However, under the rule of discovery, the cause of action would have arisen in Washington, D.C.

April 20 and 21, 1970, in New York.[33] Again, consistent with New York case law, the state's three year statute of limitations was held to have attached at the time injury was first produced. By operation of New York's limitation, the action is barred.

April 22, 1970, in Washington, D.C.[34] Lastly, Washington, D.C. was eliminated as the place where the cause of action arose because no tortious act was committed there.

In brief summary, the court reasoned that the laws of Pennsylvania, Iowa and Nebraska were foreclosed from application because of the reference made by those laws to Washington, D.C. (the place of discovery); yet it chose to eliminate Washington, D.C. as the place where the cause of action arose. This paradox can be explained by the court's adherence to the notion that where and when a cause of action arises are *in pari materia;* that is, the cause arises when, as well as where, the significant event to a suable claim occurs.[35]

31. *Id.*, at 351.
32. *Id.*, at 351-52.
33. *Id.*, at 345-48.
34. *Id.*, at 352-53.
35. *Id.*, at 341, quoting with approval Bruner v. Martin, 76 Kan. 862, 93 P. 165, 166 (1907).

The circularity of this reasoning has often been pointed out.[36] A court can only reason that a cause of action arises "where" as well as "when" an event occurs by looking at the law of the state within the borders of which the event occurred. But this answer is not of any assistance when determining which state's law to apply. Only by assuming the solution in advance can one say that a cause of action arises "where" an event occurred because the event occurred there.

The tautology is even more obvious in cases in which the "time" of accrual is at issue. As in the *Duke* case, if the plaintiff was infected in New York, and later traveled to Washington, D.C., did the cause of action accrue in Washington, D.C. when the infection was discovered, as provided by the laws of Washington, D.C., or did it accrue in New York at the time of infection, as provided by New York law?

It is interesting to note that had the majority subscribed to the time-place distinction, the plaintiff's action may have been sustained.[37] The majority, concurring and dissenting opinions all adhered to the authority of the original conflicts *Restatement*, Section 377.[38] As noted in the concurring opinion, that section sets forth the rule that:

> 2. When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.

Rather than assume that the cause of action arose in New York, the majority could just as easily have determined that the cause of action, the place where the "deleterious substance" took effect, arose in either Nebraska on

36. *See, e.g.*, DE CERVERA, *supra* note 15, at 137, where it is explained that the concept of the accrual of action is used to determine the applicable statute of limitations, and also to determine when a cause of action begins to run.
37. *See* Duke v. Housen, *supra* note 3 at 354, 356 (McClintock, J., dissenting).
38. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

April 10 and 11, or in Wyoming on April 17, where the plaintiff visited the defendant at his home.[39] Both Nebraska and Wyoming follow the rule that the statute of limitations does not attach until plaintiff discovers the wrongful invasion.[40] Since the discovery occurred in Washington, D.C. on April 22, 1970, by operation of either state's four year statute of limitations[41] plaintiff would have had until April 22, 1974 to file her action. Since the action was filed April 14, 1974, the action would have been timely, and plaintiff's action would have been sustained.

INTEREST ANALYSIS

Functionalism in Lieu of Territorialism

From the foregoing, the chaotic and irrational impact of the borrowing statute is readily apparent. Moreover, it seems ludicrous to apply the statute of limitation of the place where the cause of action is deemed to have arisen. In *Duke*, the issue to be determined was where plaintiff sustained her injury. However, there was no evidence as to where that might have been. Even so, the court felt compelled to hold that the cause of action arose in some definite place. The territorial "arising" language of the borrowing statute is meaningless here. In a case such as this, in which the defendant is probably not suable in the state whose period is borrowed, it is difficult to see how a "cause of action" can "arise" there in any meaningful sense.[42]

Conceivably, where a cause of action arises may be a fortuitous circumstance which has no reasonable or relevant interest in the issue involved. In *Dindo v. Whitney*,[43] the parties were involved in an automobile accident while travel-

39. Brief for Appellant at 8, Duke v. Housen, *supra* note 3.

40. Sylvania Electric Products v. Barker, 228 F.2d 842 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Banner v. Town of Dayton, 474 P.2d 300 (Wyo. 1970); Town Council of Town of Hudson v. Ladd, 37 Wyo. 419, 263 P. 703 (1928).

41. NEB. REV. STAT. § 25-207 (1975); WYO. STAT. § 1-3-105 (1977).

42. Moreover, the holding could constitute a violation of the due process clause. Due process is violated if a court applies the law of a state having no substantial connection with the facts. *See, e.g.*, Home Insurance Co. v. Dick, 281 U.S. 397 (1930).

43. 429 F.2d 25 (1st Cir. 1970).

ing together through Quebec. The Vermont plaintiff sued the New Hampshire defendant, and the defendant asked that the court apply Quebec's shorter period. Holding for the plaintiff, the court said: "The parties involved have only the most fortuitous relations to Quebec. Quebec's only interests underlying its statute of limitations are to protect its *own* citizens from 'stale' claims."[44]

Of course, preference for lex loci law is an approach that can greatly simplify the judicial task in choice of law cases. The mechanical rule is a virtue, and its simplicity provides some justification for its use. In ultimately rejecting the rule,[45] the courts were not able to deny this virtue. Rather, they recognized that other policy factors should also be considered.[46] Thus, the justification of simplicity was subordinated to the mandate of conflict of laws—that of providing "methods of choice which will facilitate the fair and sensible accommodation of conflicting state policies."[47]

This functional approach has been most commonly termed "interest analysis." By this method, emphasis is placed on the factual contacts which the case has with the respective states, and on their importance with reference to each issue being contested.[48]

Interest analysis begins with the premise that those rules of law adopted by a community reflect that com-

44. *Id.*, at 26 (emphasis added).
45. LEFLAR, *supra* note 11, at §§ 99, 131.
46. Leflar lists five basic factors to be applied in choice of law issues: "(A) Predictability of results; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; (E) Application of the better rule of law." LEFLAR, *id.*, at § 96. *Accord*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (1971).
47. Cavers, *Comment: The Two "Local Law" Theories* (1950), in SELECTED READINGS ON CONFLICT OF LAWS 124 (compiled by the Association of American Law Schools, 1956).
48. "It gives the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation." Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954). *Accord*, Babcock v. Johnson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), where the court rejected the mechanical conflict of laws rule applicable to tort actions and initiated the formulation of a new choice of law rule based on "a comparison of the relative contacts and interests . . . vis-a-vis the issue presented." 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

munity's public and private interests.[49] It follows, then, that to impose upon a forum handling a choice of law case a rigid obedience to a mechanical conflicts rule would amount to forcing the forum to automatically apply or reject rules of law in deliberate ignorance of their underlying interests.[50] This would be irrational in terms of the interests involved, and at times unfair to the individual litigants.

Once the territorial contacts approach gives way to a rational evaluation of relevant interests, attention may be given to the relationship between the underlying purpose of a law and its functional realm of coverage.[51] In this manner, the states' competing laws may be identified and evaluated so that an intelligent decision may be made as to which law should be applied.

Examining the legislative history of the borrowing statute, it is apparent that the statute lends itself to an interpretation consistent with interest analysis. Traditionally, the choice of law process involved first a choice of jurisdictions, followed by an inquiry as to what is the relevant substantive law of the selected state.[52] In other words, it was assumed by the framers of the borrowing statute that the place where the cause of action arose would be the jurisdiction whose law would be borrowed. Since it was originally intended that "cause of action" be synonymous with the law being borrowed, it follows that the borrowing statute may be given a functional, rather than a territorial, interpretation.[53]

The separation of the limitations issue from the other substantive issues presented is best accomplished by use of

49. A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW 63 (1970).
50. *See* Tate, Book Review, CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, 39 TUL. L. REV. 163, 169 (1964).
51. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L. J. 1087, 1123, 1127 (1956).
52. LEFLAR, *supra* note 11, at § 100.
53. *See, e.g.*, Thigpen v. Greyhound Lines, Inc., 11 Ohio App.2d 179, 229 N.E.2d 107 (Ct.App. 1967) (refused to apply limitations of place of injury without reference to "the degree of nexus" that place has to the action, even though the forum statute borrowed the limitation of the place where the action "arose.")

the technique, "dépecage," where each issue presented in the case is analyzed separately.[54] Thus, each state's conflicting rules of limitation are identified and separated from the other rules. Then the policies underlying the limitations are weighed. The law of the state having the greatest interest in the application of its statute of limitations is then borrowed.

Before examining a more recent case, it would be well to set out a brief methodology by which one might apply interest analysis to the limitations issue presented in *Duke*. As the *Duke* court noted, two basic policies are commonly thought to underlie statutes of limitation: repose for defendants and judicial economy.[55] These policies, among others, are analyzed as to each state involved. For example, if it could be found that no other state had a competing policy interest underlying its statute of limitations, the Wyoming court would then be fully justified in applying its statute of limitations if it could show that the application of its limitation would be necessary to fulfill its *enumerated*[56] policies. On the other hand, a true conflict situation may arise when each of two or more states' domestic rules pointing to different results has an underlying policy which would be meaningfully advanced by their application. In a situation such as this, the forum may either weigh the competing interests,[57] or focus on trends in the development of the law[58] so that the "better law" may be given effect.

The basic premise of interest analysis is that every legislature enacts laws for the benefit of its citizens.[59]

54. LEFLAR, *supra* note 11, at § 109; Note, *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U.L. REV. 299, 320 (1974).
55. "They are pragmatic devices to save courts from stale claim litigation and spare citizens from having to defend when memories have faded, witnesses are unavailable by death or disappearance and evidence is lost." Duke v. Housen, *supra* note 3, at 340.
56. Only those asserted policies and principles which are genuinely held and adequately supported by available evidence should be considered. Otherwise, illusory interests might be applied on the sole basis of unfounded speculation. SHAPIRA, *supra* note 49, at 147.
57. *See* Baldwin v. Brown, 202 F. Supp. 49 (E.D. Mich. 1962).
58. WEINTRAUB, *supra* note 24, at 39, 285.
59. Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958).

Thus, it can be seen that Wyoming has no domiciliary interest in applying its longer limitations period in the case at bar, since to do so would be contrary to the well-being of its citizen, "Pony" Duke. Virginia has no domiciliary interest to serve by application of its limitations either, since its shorter statute would prevent its citizen from recovering her damages. Likewise, of the remaining contact states, none have an applicable domiciliary interest since each state's statute of limitations also expresses the policy of repose for the defendant, yet no domiciled defendant is present to benefit from the application of that policy.

This unusual situation, where no state can protect its domiciliary interest by applying its statute of limitations, was first identified as the "unprovided-for" case by Professor Currie.[60] Thus, just as the territorial rule was thwarted without a known lex loci, it appears that the application of interest analysis is similarly frustrated in the absence of primary (domiciliary) interests to be applied.

At this point, it would be useful to view the policies behind limitations and torts in a broader perspective. Since there are no primary interests to be protected, it is necessary to inspect the possible altruistic interests of compensation and deterrence.[61]

Clearly, Wyoming would not be able to apply its tort policies of compensation and deterrence. To provide the nonresident plaintiff with compensation would be contrary to Wyoming's primary interest in protecting its defendant-citizen. Neither can Wyoming justify the application of its statute as a deterrent since the evidence shows that no tortious wrong occurred within its borders.[62]

However, each of the remaining contact states can reasonably claim an interest in applying its altruistic

60. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 152-53 (1963).
61. Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125 (1973).
62. Duke v. Housen, *supra* note 3, at 340.

policies. Of these remaining contact states, none has a domiciliary defendant to protect, and none is hampered by the definite lack of a tortious wrong within its borders. Yet, because none of these states can properly claim to be the lex loci, and thus claim a superior interest, we are left with four states holding an equal interest in the application of their limitations period, only one of which would allow the plaintiff's action.

The author suggests that this problem could easily be solved by placing the burden of proof on the issue of which substantive law should apply upon the defendant. This solution seems desirable where, as in *Duke*, negligence on the part of the defendant is clear, and it is only the issue of which law to apply that is in doubt, so that the choice must be made between letting the loss due to failure of proof fall upon the innocent plaintiff or the culpable defendant.[63] Therefore, if the defendant were unable to carry his burden, the court would then borrow the law of the state that would allow the plaintiff to recover.[64]

In this manner, it is possible to make an honest analysis of which state's period of limitation is to be applied, despite a lack of evidence as to where the wrong had accrued. However, a more complete analysis may be made where the lex loci is known. *Baker v. First National Bank of Denver*[65] presents such a fact situation.

In *Baker*, a Colorado bank brought an action to foreclose a mortgage on real property located in Wyoming. The defendant, also a resident of Colorado, had executed the mortgage to secure the payment of a note given by him to the plaintiff-bank. The mortgage contained a promise to pay the indebtedness in Colorado, with the proviso that the mortgagee could enforce the mortgage "according to Wyo-

63. *Cf.* Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948), where two defendants negligently shot at a game bird and the plaintiff was struck by one shot, which might have been fired by either gun. Rather than dismiss the action against both for lack of proof against either, the court placed the burden of proof upon the two defendants, and so permitted recovery against both.
64. In this case, the law borrowed would be that of Nebraska.
65. 603 P.2d 397 (Wyo. 1979).

ming statutes governing mortgage foreclosures." Although the plaintiff did not file this action until after the six year Colorado statute of limitations[66] had run, the action would still have been timely under Wyoming's ten year statute of limitations.[67] The court held that by operation of Wyoming's borrowing statute, the relief sought concerning the note was barred by Colorado's limitation period. The majority declined to address the issue whether the mortgage foreclosure action was barred, since the borrowed Colorado law provided that the mortgage lien was extinguished once the indebtedness secured by the lien was barred by a statute of limitations.

In their dissenting opinions,[68] Justices McClintock and Thomas argued that any issue concerning Wyoming real property must be resolved by Wyoming law; that to apply a foreign state's law to Wyoming land violates the principle of state sovereignty. Thus, since the action to foreclose could not be enforced by a Colorado court, there was no cause of action upon which Colorado's limitation could operate. Although the dissenting Justices believed the note was subject to Colorado's limitation period, neither thought it proper to likewise decide the foreclosure issue under Colorado law.[69]

Applying the principle of "dépecage" once again,[70] it is possible to separate the issue of whether the action on the note is barred from the issue of whether the act of foreclosure is barred. Applying interest analysis, the focus will be upon determining which state's period of limitations can most appropriately govern each issue. Every rule of law may have a different purpose and should be analyzed separately.[71]

66. COLO. REV. STAT. § 13-80-110 (1973).
67. WYO. STAT. § 1-3-105 (1977).
68. Baker v. First National Bank of Denver, *supra* note 65, at 399-402 (dissenting opinions).
69. "[T]he mortgage is an independent contract, . . . and, as such, may be foreclosed even though the action on the note is barred." Lundberg v. Northwestern National Bank of Minneapolis, 229 Minn. 46, 216 N.W.2d 121, 123 (1974), *cited in* Baker v. First National Bank of Denver, *supra* note 65, at 401 (McClintock, J., dissenting, with whom Thomas, J., joined).
70. *See* note 53, *supra*.
71. Reese, *Depecage: A Common Phenomenon in the Choice of Law*, 73 COLUM. L. REV. 58, 60 (1973); *see, e.g.*, Manos v. Trans World Airlines, Inc., 295

Addressing the issue of the note, it can be seen that the policies underlying Colorado's domestic rule are applicable in light of that state's contacts with the parties and the transaction. Here, the forum jurisdiction could only conclude that only Colorado had any concern with the matter.

Unlike the *Duke* decision, where the court's analysis and result were clearly contrary to interest analysis, the methodology and final result in *Baker* closely corresponded to that of interest analysis. The *Baker* court could have applied the older rule that the place of making the contract determines where the cause of action arose.[72] Instead, it chose to apply the more popular rule that the cause of action arises where the contract was to be performed.[73] The latter rule is based on the assumption that the place of performance has a more significant connection with the contractual transaction than does the possibly unrelated place where the contract happened to have been made.[74]

In this respect, the place of performance rule is more consistent with interest analysis than is the rule of the place of making. However, even though the place where the contract was to be performed is an important factual contact in deciding choice of law questions, it may not in every case be the all-important contact. It is entirely possible that a contract calls for performance to be rendered in two or more states. In this event, it would be necessary for a court to make a selection between possibly conflicting statutes of limitation. It is suggested that the limitation period selected would be the one that would sustain the contract, unless the

F. Supp. 1170 (N.D. Ill. 1969), Manos v. Trans World Airlines, Inc., 295 F. Supp. 1116 (N.D. Ill. 1968) (suggesting that each of five issues might be decided by the rule of a different state); GOODRICH, *supra* note 13, at 176, ("Separate issues in the same case may call for the application of the laws of different states because of the relationship which the state has to a particular issue.")

72. RESTATEMENT OF CONFLICT OF LAWS § 32 (1934) (general), §§ 33-47 (applying the rule to various problems and special types of contracts).

73. Cantonwine v. Fehling, 582 P.2d 592 (Wyo. 1978); Bliler v. Boswell, 9 Wyo. 57, 59 P. 798 (1900), *reh. denied*, 9 Wyo. 277, 61 P. 867 (1900) (where the place of performance is suggested to the effect that had the claim been barred by the statute of limitations of such place, the action would also have been barred at the forum), *cited in* Baker v. First National Bank of Denver, 603 P.2d 397, 399 (Wyo. 1979). *Accord*, RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 206 (1971).

74. LEFLAR, *supra* note 11, at § 144.

enforcement of the contract would be contrary to social policy.[75]

The third traditional rule, now regarded more highly than the other two, allows the parties to include in their contract a provision as to which law shall govern.[76] Yet the court determined that the choice of law provision referring to Wyoming's laws included Wyoming's borrowing statute as well as its limitations period. In other words, the bank made a self-defeating choice of law. Although it is a likely construction that the bank did not intend for the borrowing statute to apply, the court properly applied the rule that any ambiguity is to be interpreted against the draftsman.[77]

It is interesting to note that the Wyoming court gave any consideration at all to the choice of law clause. Even though Colorado was admittedly the lex loci (as to the contract issue), the Wyoming court appeared to be willing to enforce the choice of law clause. Had the Colorado bank not made a self-defeating choice of law, Wyoming's law would have been found applicable, despite the fact that to do so would have been to derogate the territorial notion the Wyoming court so desperately clings to.

Given that Colorado has the greater interest in applying its statute of limitations to the action on the note, it is then necessary to weigh Colorado's interest with Wyoming's interest in applying its limitation period to the issue of judicial foreclosure. The majority of the court chose to apply a Colorado statute which provides that if the action on the note is barred, then the action on the foreclosure is also barred.[78] This rule corresponds with that of *Balch v. Arnold*,[79] where the Wyoming Supreme Court held that the

75. *Id.*, at § 150.
76. WEINTRAUB, *supra* note 24, at 269-275. *See also*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971); UNIFORM COMMERCIAL CODE § 1-105(1). *Cf.* Pritchard v. Norton, 106 U.S. 124 (1882) (standing for the rule that if two states having contacts with the parties or the contract differ on the enforceability of the contract, the law should be applied that the parties intended to be applied).
77. *See, e.g.*, Hardware Wholesalers, Inc. v. Heath, 10 Ill.App.3d 337, 293 N.E.2d 721, 725 (1973).
78. COLO. REV. STAT. § 38-40-112 (1973).
79. 9 Wyo. 17, 59 P. 434 (1899).

right to foreclose is barred when the action on the debt is barred.

This situation provides the clearest case of a false conflict.[80] Here, the respective legal standards of each jurisdiction are functionally similar and lead to the same conclusion—the ultimate result of litigation is bound to be substantially the same. In such situations the forum should normally invoke domestic law as a matter of course.[81] It should be noted, however, that the law of the situs need not always be applied to solve all questions that may arise with reference to the land. The situs court may determine that the law of the foreign jurisdiction ought to be applied because relevant choice-influencing considerations call for that choice. However, in a false conflict situation where the application of either law would lead to an identical result, the application of situs law would serve to simplify title search by allowing a possible bona fide purchaser to more easily discover the status of the title, rather than requiring him to ferret out the foreign law, gain an understanding of its nuances, and apply it to the problem at hand.[82]

CONCLUSION

Stated simply, the mechanical interpretation of the borrowing statute places controlling reliance upon one fact which has no relation to the purpose of the conflicting statutes of limitation and consequently results in many decisions which frustrate the purposes and policies behind the laws. Reference to Wyoming's borrowing statute is not only proper but necessary when dealing with a choice of law issue. Were the Wyoming Supreme Court to apply interest analysis, the "arising" language could be interpreted in a manner which would advance the policies underlying the statute.

80. *See* EHRENZWEIG, CONFLICT OF LAWS 311 (1962).
81. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960).
82. LEFLAR, *supra* note 11, at § 165 (suggesting that the presence of a bona fide purchaser could give rise to the situs state's dominant interest in applying its law despite another state's interest).

It is possible that in either the *Duke* case or the *Baker* case, interest analysis would provide the same result already reached by the court. The purpose behind interest analysis is not to provide a greater variety of results, but to allow a court to express more openly, a realistic reasoning.

Rod K. Sutherland