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PIERCING PEARSON

By Arthur John Keeffe†

I. INTRODUCTION

PESUMPTUOUS, 'tis of me, to be writing in this journal about the law to be applied when an airplane crashes. But I confess the subject fascinates probably, the ghoul in me—and your Editor made the mistake of asking.

It was Oscar Levant, was it not, who said that Zsa Zsa Gabor is a national asset because she does so much social work among the rich? Well, Charlie McCormick of Texas Law School was once nice enough to say that my straight talk was of similar value in that it "puts the fodder where the calves can get it."

No calf I ever knew needed fodder more today than the poor judges who have to listen to the air law bar prattle about theories in the Conflict of Laws applicable to airplane disasters when they should be talking about principles of Constitutional Law. The poor judges condemned, today, to try airplane disaster cases are as much to be pitied as those "society sinners" that Gilbert and Sullivan's Mikado, yesterday, condemned "to hear sermons from mystical Germans who preach from ten to four."

For days and days, year in and year out, the Conflict of Laws Buffs of our trade have been arguing that the law applicable to an accident has absolutely no relation to the place where it occurs. In the jargon of this New School, the place of the crash is "fortuitous."

The game is a good one because selection of the law applicable to a particular crash is about as predictable under their theories as rolling dice for a crap point. Worse it varies mutatis mutandis from state to state. Fifty variations of the law of Conflict of Laws! Each a State, none a Federal question! The combination of "contacts" or the "center of gravity" which, under this "new approach" is to determine the law to be applied is less reliable than a missile at Cape Canaveral. Sometimes you go into orbit; most times you are left on the pad. It never dawned on me that anyone would fall for these theories but alas, how wrong can a fellow be?

In 1961, the Court of Appeals of the State of New York stated in a dictum that no limitation should be placed on the amount of recovery allowable for damages to a New Yorker resulting from a plane crash on Nantucket Island notwithstanding the Massachusetts statute limiting recovery to $15,000.¹

As 1962 ended, the United States Court of Appeals for the Second Circuit accepted the theory in Pearson v. Northeast Airlines,² when it upheld a verdict for the New York personal representative of Pearson in the amount of $133,943.47. This decision was en banc by the nine active Judges of the Second Circuit and reversed a panel of three composed

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² 309 F.2d 553 (2d Cir. 1962).
of Chief Judge Lumbard, Retired Judge Swan and Judge Irving Kaufman, which, in a majority opinion by Judge Swan (Lumbard concurring and Kaufman dissenting), had reversed a jury verdict for Plaintiff. On the trial, District Judge McGolrey had allowed interest and entered judgment for $160,204.65. Both the panel and the En Banc Court of Appeals, following the Massachusetts rule, disallowed interest.

On February 18, 1963, the Supreme Court of the United States denied certiorari in Pearson. Since no implication of approval or disapproval can be drawn from the granting or denial of a writ of certiorari, the net result is that no lawyer or court in America today can predict the law to be applied when an airplane crashes. Moral: Never underestimate the power of the pen. However, in April 1963, the Supreme Court of the United States granted certiorari in two cases of the same name from the United States Court of Appeals for the Third Circuit, Van Dusen v. Barrack, Adm'x., which may force it to discuss the subject. These two cases involve the crash of an Eastern Electra at the Boston Airport. If the papers are to be believed, the Electra's motors sing like chickadees and attract flocks of birds into their prop-jet motors. In any event District Judge Francis L. Van Dusen was told "that the primary basis for liability on which the plaintiffs presently rely, is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved," and ornithologists are as important witnesses, if not more so, than engineers.

Some fifty-five actions were instituted in the United States District Court for the Eastern District of Pennsylvania against the United States, Eastern Airlines, Lockheed Aircraft Corporation, and General Motors. Pennsylvania, like New York, permits recovery of damages for wrongful death in an unlimited amount, whereas Massachusetts at the time of this crash (October 4, 1960) had a $20,000 limit. The defendants moved under Section 1404(a) of Title 28 to transfer the venue to the United States District Court for Massachusetts where some 114 personal injury and wrongful death actions arising out of the same crash are pending for trial. The Trial Judge, Francis L. Van Dusen granted the motion, but the Court of Appeals for the Third Circuit reversed6 on the ground that the personal representatives appointed by the Pennsylvania probate court had no standing to sue in Massachusetts. The Court of Appeals even suggested that the District Court might wish to reconsider transferring to Massachusetts two of the actions which were for personal injuries. In making its decision the Third Circuit relied on Hoffman v. Blaski7 and confined its opinion to the venue point under Section 1404(a).

Thus, these two cases (which arose in the Circuit on an application for a writ of prohibition against Judge Van Dusen's order to transfer) have been decided on the venue point only and on a preliminary motion before trial. We can only hope the Supreme Court will reach the conflict of laws point discussed by the District Court but chances are good that,

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4 31 U.S.L. Week 3259.
7 Ibid.
8 309 F.2d 833 (3rd Cir. 1962).
9 163 U.S. 335 (1960).
like the Third Circuit, the Court will dispose of the cases without reaching any substantive law points. A great deal depends upon how the cases are briefed and argued.

However, before the Supreme Court hears *Barrack* it may be well to pierce the smog created by *Kilberg* and *Pearson*.

II. *Kilberg*

Let’s begin by analyzing the decision in *Kilberg v. Northeast Airlines, Inc.* As Professor Brainerd Currie said, “By now almost everyone knows about *Kilberg v. Northeast Airlines* and almost everyone who knows about the case has his own opinion of it.”

There, you will recall Northeast crashed a plane on Nantucket Island in Massachusetts which then limited recovery for wrongful death to $15,000. To evade that statute, Kilberg’s personal representative framed a second cause of action in his complaint for unlimited damages on the theory that, when Kilberg bought his ticket in New York and boarded the plane, Northeast guaranteed him a safe passage. On a preliminary motion, the Court of Appeals of the State of New York affirmed the dismissal of this second so-called contract cause of action but the Court declared that under the first cause of action in the complaint, based on the Massachusetts wrongful death statute, Kilberg’s representative could recover unlimited damages.

In other words, Chief Judge Desmond stated that the plaintiff could use the Massachusetts statute to give him standing to sue and yet not be bound by its $15,000 limit. Despite this favorable decision, Kilberg’s representative did not amend his complaint but settled by accepting less than $15,000 and discontinued his action. Kilberg’s experienced lawyer (Lee S. Kreindler of the New York bar) told Professor Currie he had accepted such a small settlement “because Kilberg was a young man with no dependents at the time of his death.” You can believe this explanation if you like, but to me, it indicates what little faith even Lee Kreindler had in Chief Desmond’s decision at that time. And who can say he or his client was wrong in making the settlement?

A. *Desmond’s Dictum*

Chief Judge Desmond’s statement in *Kilberg* as to the first cause of action was *dictum*. No question concerning it had been raised, briefed or orally argued by either Kreindler or William Junkerman, counsel for Northeast.” Professor Brainerd Currie agrees that the point should have been orally briefed and argues that Judge Fuld was justified in refusing to join Chief Judge Desmond’s opinion for this reason alone. Yet despite this, Currie says to criticize the Desmond opinion as mere *dictum*, “smacks too much of the formalities of the common law.” Currie also deplores the fact that Messrs. Cheatham, Goodrich, Griswold and Reese in the 1961 Supplement to their Conflicts case book “have adopted the unusual course of informing the student that the holding on this score

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12 Currie, supra note 10, at 7 & n.21.
13 Keeffe, supra note 11, at 972.
14 Currie, supra note 10, at 5.
was *dictum*. Normally case book editors leave it to the student to distinguish between *dictum* and *ratio decidendi*.

I will take second to none in deploring the intricacies and absurdities of the common law actions. It is without doubt the worst course our law schools present, and the few times I taught it, I concluded one should teach it with music and dancing as a sort of a Three Penny Opera. But on any true analysis, what Desmond said about the first cause of action in Kilberg's complaint was *dictum* and, with due respect, neither Judge McGohey at the District nor the Judges at the Circuit had any business relying upon its being the law of New York when they came to decide *Pearson v. Northwest Airlines*.

Mrs. Pearson, as her husband's personal representative sued Northeast, a Massachusetts corporation, in the United States District Court for the Southern District of New York. Pearson, like Kilberg, had been killed in the Nantucket crash. The two cases were as much alike as two peas in a pod. However, unlike Kilberg, Pearson was earning a substantial salary. Pearson's representative sued in the Federal court and recovered $133,943.47.

### B. Desmond's Reasons

Chief Judge Desmond in *Kilberg* gave two reasons why the plaintiff could stand on the Massachusetts statute in the first cause of action in his complaint and recover unlimited damages. First, he tells us the amount of damages recoverable is a procedural matter for the court of the forum. Second, he says that the public policy of New York permits unlimited recovery so that it may allow Kilberg's representative to sue but reject the Massachusetts limitation. Neither of the two reasons given by Chief Judge Desmond is sound.

#### 1. Damages Are Not Procedural

As to the first reason, Professor Currie says:

> The proposition that the measure of damages is a matter of procedure governed by the law of the forum is in conflict with overwhelming authority; and, indeed, once one concedes that for some reason the rights of the parties are governed by the law of a foreign state, it is difficult to justify rejection of the foreign law as to the measure of damages.

In truth, the first reason for *Kilberg* that the amount of damages is a procedural matter for the forum was so wrong, the Court of Appeals of the State of New York, in the words of Professor Currie "has felt constrained to withdraw this ground of its decision in *Kilberg*." In other words, it has confessed error.

#### 2. Public Policy v. Full Faith and Credit

The second reason is equally intellectually repulsive. Upon what basis under the Full Faith and Credit Clause, can the State of New York refuse to apply the law of the State of Massachusetts? Is the fact that the public policy of New York is *different* sufficient to permit New York to apply its own public policy and reject that of its sister state, Massachusetts?

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13 Currie, *supra* note 10, at 3 & n.10.
17 Currie, *supra* note 10, at 5.
In his recent study of the Full Faith and Credit Clause, Professor David E. Seidelson of The George Washington University Law School concludes that, "offense to a public policy of the forum should not be a justifiable ground for withholding full faith and credit from the law of a sister state." 19

But curiously (and this is what makes the Currie position so confoundedly confusing and inconsistent), even Professor Currie concedes that the second reason given by Chief Justice Desmond for his decision in Kilberg is "vulnerable to traditional criticism" 20 and at one point in his argument, he assumes "that no state would reject the law of the place of injury on the grounds of local public policy." 21

Professor Currie justifies the result by arguing that Kilberg is a New Yorker and the controversy is a New York suit with its center of gravity there. To me, this is so much malarky. Either the Massachusetts law is one to which New York must give full Faith and Credit or it is not.

The accident was at Nantucket and Northeast should pay or not pay in accordance with what it did or failed to do at Nantucket. No amount of law review articles can confuse this fact. Does anyone seriously believe that if New York limited liability to $15,000, the Court of Appeals of New York today would find the center of gravity at LaGuardia Airfield on Long Island? I grant you that yesterday New York did this very thing, namely limited liability for wrongful death occurring elsewhere in a state that permits unlimited recovery. 22 But if the law of the Foreign State was one to which New York was obligated to give full Faith and Credit, it was wrong then and wrong now in Kilberg.

Professor Currie is honest enough to declare that the public policy New York foists on Massachusetts is that of "requiring the wrong doer to provide full indemnity for the death" and, indeed, greatly to his credit, Professor Currie admits:

New York has no interest in applying its law and policy merely because the ticket was purchased there, or because the flight originated there. New York's policy is not for the protection of all who buy tickets in New York or board planes there. It is for the protection of New York people. 23 (Italics mine)

As thus analyzed, Kilberg is a bald claim that New Yorkers aboard any airplane that crashes elsewhere, have a right to recover damages in excess of those allowed by the state of the crash to its own and other citizens.

On this basis we have not one rule of law for the United States but fifty different rules and, to paraphrase Engine Charlie Wilson, a right in each state to approach the problem on the selfish and provincial basis of what is good for it is good for the United States.

With due respect, this approach is beneath the dignity of any Court that makes it and certainly not the kind of claim that so able and conscientious a professor as Brainerd Currie would stoop to support.

It is not that I quarrel with the result of the Kilberg dictum; far from

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20 Currie, supra note 10, at 5.
21 Currie, supra note 10, at 10.
23 Currie, supra note 10, at 16.
it. It is simply that in my judgment, neither Judge Desmond nor Professor Currie put the reasons for the result upon a basis that can command intellectual acceptance.

III. Pearson

There are at least four different reasons, each sure if the other fails, upon which the result reached by the Desmond dictum can be justified. Both the District Court and the Court of Appeals in Pearson v. Northeast Airlines, would have done well to have ordered a reargument for the exploration of these better reasons. Instead, while purporting to deplore a "mechanical" approach, the District Court and the Second Circuit slavishly followed the Desmond dictum under the dead hand of the reactionary rule of Erie v. Tompkins and Klaxon v. Stentor.

Even this result might not have been so bad if, as above stated, the Supreme Court of the United States had taken certiorari.

On a reargument, both the District Court and the Court of Appeals might well have concluded that Chief Judge Desmond's dictum was sound, had counsel been directed to brief and argue these four points:

First, whether Full Faith and Credit must be given to the $15,000 limitation of liability in the Massachusetts wrongful death statute?

Second, whether the State of Massachusetts has a constitutional right to permit Northeast Airlines to pay only $15,000 for having wrongfully taken the life of Pearson, worth $133,943.47?

Third, whether the Federal Government has not so occupied the field of air travel that a limitation of $15,000 for wrongful death of an airline passenger becomes unconstitutional as an unreasonable burden on the commerce of the United States?

Fourth, whether, in view of the fact that Erie v. Tompkins was decided without briefing or arguing the merits of Swift v. Tyson or the experience of the federal courts under it, the time has not come when the country can no longer live under it in cases, at least, such as Pearson, involving the rights of citizens of New York vis a vis citizens of Massachusetts?

A. The Full Faith And Credit Clause Properly Understood May Require The Desmond Result

Article IV of the United States Constitution provides:

Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

In 1953 the University of Chicago Press published a two volume work by Professor William Winslow Crosskey entitled, Politics and the Constitution.

In Volume I, Chapter XVII, Paragraph four at pages 541-557, Professor...
Crosskey discusses the Full Faith and Credit Clause and, upon documentation, reaches the following remarkable conclusions:

First, as the Clause came from the Committee on Detail "it covered all state legislative acts" and it was only after discussion among James Madison of Virginia, Hugh Williamson of North Carolina, William Samuel Johnson of Connecticut, James Wilson and Gouverneur Morris of Pennsylvania and Charles Pinckney of South Carolina that, on motion of Gouverneur Morris the language in the Committee draft "acts of legislatures," was change to "public acts."

Crosskey establishes that then, as now, the term "public acts" was used in contradistinction to "private acts." His conclusion is that it is a "virtual certainty that the word 'public' was deliberately put into the Full Faith and Credit Clause for the specific purpose of excluding from it the 'private acts' of the states, which were widely regarded in 1787, as one of the great abuses of the time."

Based on Crosskey's research, it is clear that while the term "public acts" covers acts of the legislatures, it does not cover all of these.

The question, therefore, arises whether a Massachusetts statute limiting liability for wrongful death to $15,000 is a "public" Act within the meaning of the Full Faith and Credit Clause?

Second, the Articles of Confederation carried the Clause in Article IV: "Full Faith and Credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." (Emphasis mine) Crosskey points out that the underscored language in the full Faith and Credit Clause of our Constitution is identical in wording.

From his study of the dictionary meaning of "Full" and "Faith" and "Credit," Crosskey concludes that in the 18th century, as now, to give full, faith and credit, "meant to provide that full appropriate effect should be given, in each State to the Legislation, judicial Precedents, and court Judgments and Decrees of every other State."

He reaches this conclusion by translating the phrase "to give Faith" as meaning "'to recognize one's proper obligations' toward them." "Credit" adds nothing and was at one point dropped by the Committee on Detail but subsequently restored. Based on remarks of James Wilson, in Armstrong v. Carson's Executors, Crosskey concludes that "'to give full Faith and Credit to,' must have meant 'to give Effect to.'" And the word "full," Crosskey concludes means "answering in every respect to what is required" usually in the sense of "a full performance of a contract," meaning the kind of performance required by relevant laws.

From this analysis, Crosskey declares that contrary to what has been supposed, the Full Faith and Credit Clause does not require mechanical application of the law of another State and adoption of "whatever 'Effect' might arbitrarily be given by a foreign state to its own law."

Crosskey remarks: "In the so-called 'mixed' cases of the conflict of laws, such a requirement would mean, with respect to statutes and judicial precedents, only irresoluble conflicts; and it would not be rational or satisfactory in the case of judgments, either."

Thus, Crosskey concludes that under the Full Faith and Credit Clause of our Constitution, in the absence of Congressional action, "the meaning

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29 1 U.S. (2 Dall.) 302 (1794).
must have been that such 'Effect' was to be given in each State, to the Legislation, judicial Precedents, and court Judgments and Decrees of every other state as answered *in every respect* to what was required by the *standing* national law applicable to such cases.

*Third,* Crosskey points out that "the standing national law of the United States" in 1787 was considered to be "the Common Law of England" and to include "the law of nations," one department of which "dealt specifically with the effect to be given in judicial decisions, to the legislation, judicial precedents and court judgments and decrees of nations, or states, other than that of the particular court concerned." William Murray, the first Earl of Mansfield who served as Chief Justice of the King's Bench of England from 1756 to 1788 (thirty-two years immediately before the Constitution of the United States was ratified in 1789) developed this branch of the English common law and it became known as "Conflict of Laws."

Crosskey concludes that "the Full Faith and Credit Clause was a forward-looking clause, one in the very van of the jurisprudence of the time"; and to see, it "completely modernized," the initial part would read as follows: "Such effect *shall* be given, in each State, to the legislation, judicial precedents, and court judgments and decrees of every other state, as will answer, *in every respect,* to what is required by the rules and principles of the conflict of laws," even though, the Supreme Court in 1941, held the contrary.\(^{30}\)

*Fourth,* as "extraordinary" as this step "of making this whole department of 'the law of nations,' a branch of constitutional law" was, for several very good reasons, Crosskey establishes that it was "deliberately taken" and it is an "inexorable command" of the Constitution.

The Committee on Detail asked for a Clause reading: "Full faith shall be given in each state to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State." As pointed out, *supra* the original motion of Gouverneur Morris to revise it, was prompted by a fear that private acts of bankruptcy would have to be respected.

But there were other points made in the discussion and other motions to revise. Madison, for instance, wanted a provision under which the judgment obtained in one state could be executed in another. Edmund Randolph of Virginia, a member of the Committee on Detail, objected violently and proposed this revision:

> Whenever the Act of any State, whether Legislative, Executive or Judiciary, shall be attested and exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done.

As Crosskey points out, under this Clause, as well as under the first Clause proposed by the Committee on Detail, "the whole branch of private law" enacted by a State would have become "inalterable" by any other State or by the Congress for the nation.

The strong nationalists in the Convention, therefore, opposed the Randolph motion. As Crosskey says they "were unwilling to put any branch

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\(^{30}\) *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941).
of private law beyond the possibility of legislative revision" but they "were quite as anxious as Randolph to put the states under a uniform compulsory system within the whole field of the interstate conflict of laws."

It was at this point that Gouverneur Morris proposed this Clause:

Full faith ought to be given in each State to the public acts, records, and judicial proceedings of every other State; and the Legislature [i.e. Congress] shall by general laws, determine the proof and effect of such acts, records and proceedings. (Italics Crosskey's)

Both the Randolph and Morris proposals were sent to the Committee on Detail which was then composed of John Rutledge, Edmund Randolph, Nathaniel Gorham, James Wilson and William Samuel Johnson. Except for the substitution of Johnson for Oliver Ellsworth, the Committee membership was identical with that which had proposed the first draft.

Three days later, on September 1, 1787, the Committee on Detail recommended:

Full faith and credit ought to be given in each State to the public Acts, Records, and judicial Proceedings of every other State, and the Legislatures [Congress] shall by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another. (Italics Mine)

Thereupon, Gouverneur Morris moved to substitute the word "thereof" for the phrase, "which judgments obtained in one state shall have in another."

Edmund Randolph, again, objected on the ground that Morris' motion was defining "the powers of the [national] Government" in "so loose" a manner as to give it the opportunity to usurp "all the state powers."

But William Samuel Johnson and James Wilson supported Gouverneur Morris. Wilson declared "that if [Congress] were not allowed to declare the effect [of the state acts, records, and judicial proceedings] the provision would amount to nothing more than what [already took] place among all Independent Nations."

The Convention then voted six States to three in favor of Morris' proposal.

As Crosskey observes, the Convention lodged plenary power in Congress, while binding the States, and the device was to impose upon the Congress "a mandatory direction" to legislate. As finally drafted it does "not say Congress shall have power" to prescribe; it said "Congress shall prescribe."

James Wilson also pointed out that the use of the merely hortatory "ought" in place of the originally recommended "shall" had weakened the introductory part of the clause to the point, where the conflict of laws, as between states would no longer be part of the Constitution. Accordingly, "shall" was substituted for "ought to" and "Congress" for "Legislature."

Thereafter, Madison tells us that the Clause was approved by the Convention "without a count of the States" and thereby, Crosskey concludes that:

the observance of all the rules and principles of the Conflict of Laws, as between our states, was made one of the 'inexorable commands' of the Constitution 'inexorable,' that is, as against everyone, except Congress; for the
plain meaning of the concluding part of the clause is that Congress shall be 
free, despite the constitutional status given to the subject, to legislate within 
the field. (Emphasis Crosskey's)

From the above, it is clear that the Constitutional Forefathers intended 
that the law of nations as part of federal common law would control as to 
what laws of one state were to be binding on another. But alas, what few 
Supreme Court decisions we have either look the other way or are incon-
sistent and confusing. In 1953, this abominable state of the law caused 
Crosskey to exclaim:

In general, it may be said that, whereas a single uniform system of nation-
wide rules of the interstate conflict of laws is what was intended; what we 
actually have today is forty-eight different systems, varying unimportantly, 
but very troublesome; from state to state, with the Supreme Court's sys-
tem of largely unpredictable interferences, in the name, sometimes, of "full 
Faith and Credit" and, sometimes of "due process of law," superimposed on top 
of these. And the result, as might be expected, is a vast chaos of complexity 
and uncertainty, instead of the simple nation-wide system for which the 
Constitution provided and still provides.

If either the District Court or the Court of Appeals for the Second 
Circuit in Pearson, had ordered argument and briefing of the constitutional 
history of the full Faith and Credit Clause, the research of Crosskey would 
doubtless have been found to be valid. If so, then, the Desmond dictum 
would command respect as a National law and not as a provincial State 
one.

B. Massachusetts May Not Have A Constitutional Right To 
Permit Northeast Airlines To Pay A Mere $15,000 For 
Having Wrongfully Taken The Life Of Pearson

Of course, New York could have permitted the personal representative 
of Kilberg to sue under New York law for the Massachusetts accident. 
To do this, the Court of Appeals would have had to reverse its decision 
in Whitford v. Panama Railroad.\textsuperscript{23} In an opinion much praised by Con-
flict of Laws Buffs, Judge Traynor gave the California wrongful death 
statute extra-territorial application to an Arizona accident. At the time 
Arizona had no Lord Campbell's Act and death actions did not survive. 
Characterizing survivorship as a procedural question for the forum, Judge 
Traynor allowed the California personal representative to sue.\textsuperscript{24}

If Arizona has a constitutional right to prevent the survival of tort 
actions, then California ought to respect that law in torts occurring in 
Arizona whether involving Californians, Arizonians, Texans or anyone 
else.

The real question is whether Arizona can constitutionally prevent the 
survival of tort actions and whether in this day and age either California 
or New York needs Lord Campbell's Act to permit the personal represen-
tative of the deceased at his domicile to sue for damages for wrongful 
death.

As Theodore H. Unterman of the New Jersey bar points out, there is 
good reason to believe "a complete misunderstanding has existed in the

\textsuperscript{23} 23 N.Y. 465 (1864).
\textsuperscript{24} Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); See also Currie, Survival of 
Actions: Adjudication versus Abatement In the Conflict of Laws, 10 Stan. L. Rev. 209 (1957) and 
American courts on this subject for too many years." Students of the common law, such as Unterman, believe our early American courts either deliberately or due to poor reporting, never understood that England did allow recovery for wrongful death.

As Mr. Unterman also points out, there was an "economic unwillingness" on the part of our young states "to accept the burdens recognized by English municipalities." Without doubt, there was also a desire to subsidize toll, canal and railroad companies at the expense of individual citizens—a method that denies equal protection of the laws.

Furthermore, laws such as Arizona's preventing tort actions surviving the victim's death or Massachusetts' limiting recovery today to $15,000 or $20,000, are fundamentally unjust. If the state takes your property for a road, the Fifth Amendment applicable to the states through the Fourteenth compels the state to give you "just compensation." The same principle should permit the personal representative of a man killed in Arizona or Massachusetts to sue for "just compensation." By limiting recovery, the state takes money from the decedent's estate for the benefit of operators of automobiles and airplanes.

When a man such as Pearson worth $133,943.47, is wrongfully killed in Massachusetts, his personal representative should be paid that amount, not limited to $15,000. This is why the Massachusetts statute is called "a back-up statute." It encourages an automobile driver who hits someone to back up and kill him so as to take advantage of the statutory limit for wrongful death actions. A more fundamentally unjust statute is hard to imagine. Irrespective of the law of conflict of laws, it is not entitled to full Faith and Credit because the limitation in it is unconstitutional.

And, of course, the same principle should apply to the allowance of interest. Judge McGohey was right in allowing Pearson interest in accordance with national law, irrespective of what the New York or Massachusetts statutes provide. If Northeast wrongfully kills Pearson, his estate should be compensated as of the date of the accident. To do this, when the jury determines the value of his life at the time of the accident, we must add interest to it to the date of judgment.

The Court of Appeals for the Second Circuit is in a very inconsistent position when it follows Desmond's dictum as to liability but the inconsistent New York decisions as to interest.

Furthermore, treating the question under Erie and Klaxon as a purely state matter of choice of laws, the Court of Appeals becomes a mere automaton for the state. In its refusal to allow interest, the Court of Appeals is made to decide one way on liability and the reverse as to interest. It is put in a pathetic position.

In short, it seems reasonably clear that, if either the District or the Circuit Court had ordered the lawyers before them in Pearson to brief and orally argue the point, either Court could not help concluding that Massachusetts has no constitutional right to take Pearson's life, valued at $133,943.47 by an American jury, and pay him $15,000 without interest from the date of the taking.

Such a result involves an unfair subsidy by the Pearson family to Northeast Airlines; really to the insurance company that insures Northeast

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unless Northeast obtains a reduced premium for insurance in Massachusetts. More probably Northeast pays premiums based on experience and in this manner it profits by having a $15,000 limit for wrongful death in Massachusetts. In any event the total savings is probably peanuts to both.

Permitting Northeast to pay $15,000 for taking Pearson's life, valued at $133,943.47, violates the Fifth Amendment in that, constitutionally speaking, if Massachusetts cannot take property for public use without "just compensation," a fortiori it cannot take human life for private use without "just compensation."

But even, granting that the Fifth Amendment does not in haec verbae forbid Massachusetts from limiting damages for wrongful death to $15,000, one must say that both the American Bill of Rights and the Fourteenth Amendment carry certain Natural Law rights against the states. Certainly, it is a Natural Law right that calls for protection in Pearson as well as a constitutional one.

Under the 14th Amendment, such a taking denies Pearson the "privileges and immunities" of an American citizen and it denies him "equal protection of the laws" in that other Americans in other States wrongfully killed can recover the value of their lives.

Both the District Court and the Circuit Court would have been better advised to put their decisions upon this basis. Why? Because the result in Pearson is itself unconstitutional unless citizens of other States including Massachusetts and citizens of other countries may sue in Massachusetts and elsewhere and recover the fair value of their lives free from the arbitrary $15,000 limit of Massachusetts.

It is not the American way to pay Pearson $133,943.47 and hold everyone else to the Massachusetts limit of $15,000. To do so, denies both privileges and immunities and equal protection.

Parenthetically for simple folk and the none too bright, let me emphasize "privileges and immunities" and "equal protection." There is no denial of "due process of law." Long ago "substantive due process" was discarded as a relic of the pre-Franklin Roosevelt Court. There is no violation of "due process" involved but there is a deprivation of "equal protection" and the "privileges and immunities" of an American citizen who has a right to sue for compensatory damages when wrongfully killed and has a right to be able to sue for as much damages as any other citizen of the United States. After all, we may have to wait a bit for One World, assuming we want it, but One United States came to us in 1789; we fought to keep it in the 1860's and succeeded. Let's not give it up in the 1960's.

New York lacks the Constitutional power to do such a manifest injustice. It is the Slaughter House Cases all over. There by a five to four decision of which the nation has become ashamed, the City of New Orleans gave the butcher business to certain politically favored carpetbaggers.

By Kilberg New York attempts to allow a New Yorker to recover unlimited damages and in Pearson, the Federal Court follows it blindly. But the net result is that, by a selfish judicial decree, New York asserts a right to allow its citizens to escape from a Massachusetts law. It does this with-

\[\text{84th} 83\text{ U.S. (16 Wall.) 36 (1872).}\]
out questioning the fairness or constitutionality of the Massachusetts law.

Speaking only as an American, is this anyway to run a ball team?

C. Occupation Of The Field Of Aviation By The Federal Government

In form Pearson v. Northeast Airlines was a straight diversity case. Query, was it? The action sought damages for the crash of an airplane at Nantucket Island and the evidence to be offered related to the rules and regulations of the Civil Aeronautics Board and the Federal Aviation Agency. The tort law of Massachusetts must take a back seat to them.

Pearson was an action involving commerce of which the federal courts have federal question jurisdiction as they do of actions under the Fair Labor Standards Act.

Not only this, but actions such as Kilberg in the state court, should be removable to the federal court on the ground of federal question. The United States has occupied the field.

I grant that attempts to date to so remove airplane disaster cases have been uniformly unsuccessful, but what few decisions there are, are by District Courts and there are excellent reasons for holding the reverse.

Furthermore, one can argue that the application to airplane travel of a state limitation of liability statute is an unreasonable restraint of Commerce. After all, the Supreme Court of Colorado recently held that application of its Anti-Discrimination statute was an unconstitutional burden on Commerce. The Supreme Court reversed on the grounds that Colorado's statute accorded with the public policy of the United States so that its law did not “burden” air commerce. It did not, however, dispute the correctness of the principle of law enunciated by the Colorado Court.

In almost every one of these airplane disaster cases, the United States can be sued for any negligence by the Tower under the Federal Torts Claims Act. Suit must be in federal court. True, that act contains a provision anchoring the federal court's hearing the case to the law of the place of the accident, but query, does this provision apply at all in a federal question case? Is the provision itself constitutional?

The more one thinks of airplane disaster cases, the more one must conclude that the problems are purely problems of federal law for the federal courts to resolve. And, all courts, state and federal's being so overcrowded, common sense in judicial administration compels their trial before one federal court at the place of the crash. It was a tragic mistake that neither the District Court nor the Circuit Court asked Counsel to brief and orally argue whether the Court's jurisdiction was not more appropriately based on federal question jurisdiction rather than on diversity.

It is very much the business of the Federal Government to see that citizens of the United States and aliens who fly in airplanes are conducted safely and that airlines comply with safety regulations promulgated by the CAB and FAA.

This being true, is it not ridiculous to say that Massachusetts has a

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right to limit to $15,000 a claim for damages for wrongful death of a life worth $133,943.47? What could be a more unreasonable burden on “commerce”?

D. Need For Overruling Or At Least Limiting Erie v. Tompkins

Erie v. Tompkins was decided in 1938. Tompkins was injured by a passing freight train while walking a longitudinal path along the railroad’s right of way. In a suit in the federal court in New York, Tompkins, a Pennsylvania resident, recovered a judgment despite the fact that under the law of Pennsylvania as expressed by decisions of its highest court, he was not entitled to recover.

The decision, of course, was just. A railroad that permits passers by to use its right of way as a walk, has no business to deny liability on the ground of trespass when sued for injuries. The Erie railroad had left a freight door open that hit Tompkins. It argued its only duty was to refrain from gross negligence.

Reversing, the Supreme Court of the United States declared that a Federal Court, sitting in New York, was bound to follow the state law. Since under New York law, Pennsylvania law was then applicable as the place of the tort, the United States District Court was obligated to follow it, right or wrong.

Although the point was not briefed or argued and the case could have been disposed of on its facts, Mr. Justice Brandeis declared that the case posed the question whether Swift v. Tyson should any longer be the law of the land. There Tyson had accepted a bill of exchange to pay for land in Maine. The holder of the bill endorsed it to Swift who sued Tyson in the Federal Court in New York. Tyson defended by showing that the land had been misrepresented and thus the bill lacked consideration. In a great opinion, Mr. Justice Joseph Story in 1842 held that the defense of Tyson was worthless against Swift, a bona fide purchaser of the bill and an holder in due course.

Previously, Chancellor Kent had decided in a similar case that a defense such as Tyson’s was good. If Story were to have been bound to follow the law of New York, he would have had to decide for Tyson.

However, Kent was sitting in Chancery and after Story’s decision, the case before him was appealed to the Supreme Court of Errors of New York, and Kent was reversed. The law of New York thus became uniform with the national law as laid down by Story in Swift v. Tyson.

Not content with Erie, which binds Federal Courts to decisions of the highest court of a State, the Supreme Court of the United States has followed Erie by chaining the the Federal District Court to the decisional law of a state as expressed in the decisions of the lowest court in the state judicial system.

In the field of the Conflict of Laws, the Supreme Court of the United States has chained the Federal District Courts to the Conflict of Laws decisions of the Forum, right or wrong. Thus, if Story were sitting in Swift v. Tyson today, he would be obligated to follow the contrary de-

38 Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).
cision of Chancellor Kent in the Intermediate Court even though the
Highest Court of New York was to reverse it tomorrow.

The District Court sitting in *Erie v. Tompkins*, today would be bound
by New York Conflict of Laws rules right or wrong as the Court of the
Forum. And this is so even though the Forum had no contact with the
accident and could not be a "center of gravity" or anything like it.

To rational men and to every United States District Judge with whom
I have ever discussed the matter, *Erie v. Tompkins* makes no sense. Thus,
byme one legal ruse or another our Federal Courts evade the rule: the
Federal District and Circuit Courts by finding the state law what they
think it should be; the Supreme Court of the United States by refusing
to grant certiorari in any diversity case, even those coming from a Court
of Appeals that reverses a District Court on state law points.

To say that the present state of the law in Federal Courts under *Erie v.
Tompkins* is a mess, is the understatement of 1963. One must ask him-
self, how a great Court, like the Supreme Court of the United States, ever
fell into this error? The answer would be comic were it not so tragic.

My friend, William Winslow Crosskey, tells the story in all its horrid
details. In 1909, Professor John Chipman Gray at the Harvard Law
School attacked Story's decision in *Swift v. Tyson.* His argument was
that a Federal Court sitting in diversity under Section 34 of the original
Judiciary Act was obligated to follow the decisional law of the state,
right or wrong because there was no Federal Common Law. The 34th
Section of the Judiciary Act reads:

\[
\text{The laws of the several states except where the Constitution, Treaties, or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.}
\]

Gray's book was followed in 1923 by the publication in the *Harvard
Law Review* of an article by Professor Charles Warren of Harvard en-
titled "New Light on the History of the Federal Judiciary Act of 1789."

In this article, Warren announced the unexpected discovery of an
hitherto unknown original draft by Oliver Ellsworth of Section 34 of the
Judiciary Act, reading as follows:

\[
\text{And be it further enacted, that the Statute of the several states in force for the time being and their unwritten or common law now in use, whether by adoption from the Common Law of England, the ancient statutes of the same or otherwise, except where the Constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the trials at common law in the courts of the United States in cases where they apply.}
\]

As Professor Crosskey puts it, "the discoverer of this important docu-
ment immediately contended that it proved what he had apparently al-
ready believed anyway," namely, that contrary to Story's decision in
*Swift v. Tyson*, Section 34 compelled Federal District Courts, sitting in
diversity to follow not only state statutes but also state decisional law.

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41 1 Stat. 92 (1789).
42 37 Harv. L. Rev. 49 (1923).
43 Ibid., at 87.
In 1928 the attack on *Swift v. Tyson* continued when, Professor Felix Frankfurter then of the Harvard Law School, published in the *Cornell Law Quarterly* an article entitled "Distribution of Judicial Power Between United States and State Courts." Selecting a group of cases at random, Professor Frankfurter concluded that "*Swift v. Tyson* did not promote uniformity. . . . Evidence is wanting that state courts yield their own law." Thus, the stage was set to rub *Swift v. Tyson* off the books. It had become a Harvard Law School Party Line.

In deciding *Erie*, Mr. Justice Brandeis relied heavily on the conclusions of Professor Warren as to the meaning of Section 34 of the original Judiciary Act and on the conclusions of Professor Frankfurter as to the experience under *Swift v. Tyson*.

Mr. Justice Pierce Butler dissented in *Erie v. Tompkins*. Mr. Justice McReynolds joined his dissent. In so doing, Mr. Justice Butler doubted the validity of the Warren research and asked that, before so monumental change be made in American law that the case be put down for reargument.

The majority in *Erie* denied Mr. Justice Butler's request for reargument. In this respect the case ranks as one of the most intolerant the Supreme Court has ever made. It was a decision made without briefing or oral argument as to the validity of *Swift v. Tyson*. Mr. Justice Brandeis had become convinced by the writings of his friends, Gray, Warren and Frankfurter. His mind was made up. He waited for a case where he could reverse *Swift v. Tyson* and *Erie v. Tompkins* was it.

What has happened since? First, the conclusions of Charles Warren and the suspicions of John Chipman Gray have been demolished by the research and analysis of William Winslow Crosskey in his *Politics and the Constitution* published in 1953. Accepting Warren's principal argument as valid, namely that the word "laws" in Section 34 in the phrase "the laws of the several states" includes both statutory and decisional law, Crosskey contends that the original draft accords with the meaning Story gave it in *Swift v. Tyson*. He points out that in both Ellsworth's original draft and in Section 34, as enacted, "the laws of the several states" are not to be the law "where the Constitution, Treaties, or Statutes of the United States shall otherwise require or provide." As discussed supra, the Full Faith and Credit Clause embodies the rules of the Conflict of Laws into the Constitution and, in diversity cases, these rules prevent federal courts from following blindly state law, statutory or decisional. Moreover, both the original draft and Section 34, as enacted, confine the application of "the Laws of the several States" to "cases where they apply." In other words, had the Crosskey research been available in 1938 and had the request of Mr. Justice Butler for reargument been granted, the interpretation that *Erie v. Tompkins* gave to Section 34 of the original Judiciary Act would have been repudiated on the spot.

The conclusions of Professor Frankfurter that *Swift v. Tyson* did not promote uniformity were examined in 1931 by Professor Yntema of Michigan and Professor Jaflin and in 1949 by myself. After examination of many cases, both Professor Yntema and I

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44 13 Cornell L.Q. 499 (1928).
reached the same conclusion. Professor Frankfurter was dead wrong. *Swift v. Tyson* was conducive to uniformity and experience under it was good, not bad. But we are not the only ones who have deplored the decision in *Erie v. Tompkins*. Crosskey concludes, after exhaustive research, that *Erie* is “totally irreconcilable” with the Supreme Court’s position as “the nation’s juridical head” and that “the decision stands revealed, both in its manner and substance, as one of the most grossly unconstitutional governmental acts in the nation’s entire history.”

The late, great John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit in 1949 declared it was “absurd to hold in a suit on contract between citizens of different states that a federal court must apply the law of the state of the party charged with the breach because suit had to be brought against him in that state.”

Professor Charles McCormick of Texas Law School with Professor Hewins attacked the *Erie* decision in 1938. Professor McCormick commented that Brandeis had seized the opportunity in *Erie* “to destroy root and branch the heresy of general law.” And in a classic remark, Professor McCormick dubbed Brandeis’ argument in *Erie*, as to the alleged unconstitutional course pursued by the federal courts under *Swift v. Tyson* as the “Achilles heel” of the opinion.”

The list is a long one of those who have attacked *Erie v. Tompkins* as a colossal error: Judge Charles Clark of the Court of Appeals for the Second Circuit,4 Professor Arthur Corbin of Yale Law School,49 Walter Wheeler Cook50 and many others. In truth, outside a few misguided souls at Cambridge, Massachusetts, *Erie v. Tompkins* has had almost no defenders.

Under these circumstances and, with all this new research to be studied, is it too much to hope, that if the District and Circuit Courts in *Pearson* had directed that the validity of *Erie v. Tompkins* be at last briefed and orally argued, either or both Courts would have concluded, at the least, that the *Erie* rule, as enunciated in the *Field* and *Klaxon* cases, supra, had no application to a case such as *Pearson*?

IV. Court Calendar Congestion and Venue of Air Disaster Cases

From my study of the briefs in *Van Dusen v. Barrack*,31 I raise the question of the desirability of permitting the United States District Court for the Southern District of New York to carry on its calendar actions arising out of the Nantucket Island crash of Northeast Airlines.

The jury calendars of both our state and federal courts, especially in our large metropolitan centers, are far behind despite desperate efforts to bring them up to date. For instance, in the Southern District of New York the calendar is on the average thirty-five months behind. There is a range of delay in eighty per cent of the cases between fifteen and fifty-

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two months. The Eastern District of Pennsylvania is an average of thirty-seven months behind. The range for eighty per cent of the cases is from nineteen to forty-six months.

On the other hand the jury calendar for the United States District Court of Massachusetts averages only sixteen months behind with a range of eighty per cent of the cases from eight to thirty-two months.

Certainly Boston, Massachusetts where the Electra crashed is by far the more desirable place for trial merely on the basis of these statistics. The same would hold true for both Kilberg and Pearson.

These are hard practical facts of which the Conflict of Laws theorists cannot be expected to be aware. But in the every day world where airplane crash cases are tried, this is a really important matter. When legal actions are so delayed, a great injustice is done. When an action for damages for the death or injury of a family bread winner is delayed, the injury to the family is intensified and magnified. Justice delayed, is justice denied.

No one needs a course in procedure to conclude that there is a great saving in time of counsel, witnesses, court and jury if all the cases arising out of the same crash are tried together at the scene of the crash. As the brief on certiorari of defendants, Eastern, General Motors, and Lockheed points out, it will cost more to try disaster cases in several different places and the increased cost will be borne "not only by large corporations but by individuals as well, such as those involved in accidents of automobiles or private aircraft and, also, the United States under the Federal Torts Claims Act."

The Solicitor General in his brief on certiorari complains bitterly of the refusal by the Court of Appeals for the Third Circuit to transfer the forty-five actions pending in the Eastern District of Pennsylvania to the United States District Court for Massachusetts to be tried with the 114 cases pending there.

The importance of the question presented by this case is plainly apparent, affecting as it does all representative actions. If the holding below is allowed to stand, the possibility of consolidating multiple claims arising out of major disasters—such as airplane accidents—will be virtually eliminated. To borrow this Court's words, that holding "would practically scuttle the forum non conviens statute" with respect to representative actions and would "provide a shelter" for such actions 'in costly and inconvenient forums.'

At the same time, adoption of the lower court's construction of 28 U.S.C. 1404 (a) would, by foreclosing transfer and consolidation for trial before a single tribunal, saddle federal trial courts with an unnecessary workload in a vast number of multiple lawsuit situations arising out of a single occurrence and thus make even more difficult the proper, efficient and expeditious administration of the federal court system.

The Solicitor General states that as of December 31, 1962, "there were pending in the various federal district courts over 420 Federal Tort Claims Act cases arising out of airplane crashes or mid-air collisions." Two hundred and seventy-four of these arise out of six airplane disasters and are filed in multiple jurisdictions. This is more than sixty per cent of the

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PIERCING PEARSON

420 total. One of the six accidents has led to as many as nineteen different district court actions.

The Director of the Administrative Office of the United States’ Courts in his 1962 Annual Report notes that multiple jurisdiction suits involving production of the same documents and witnesses would cause “chaos” if all the multiple courts were to proceed to trial at the same time.

From a jurisprudential point of view the argument for trial of these large air crash cases by one judge at the place of the crash is unanswerable. Trial elsewhere is a racket that should be broken up. Not only can we not afford the luxury of it, but the cases are definitely brought elsewhere than the place of the crash to avoid laws there believed to be unjust.

Granted the laws are unjust, this method is dishonest in that it seeks to avoid establishing that the law of the place is unjust. Moreover, it converts this country from one country with one rule of law, into fifty countries with fifty different and conflicting state laws applicable to an airplane crash in one. The Kilberg-Pearson approach is too high a price for this country to pay.

But I am being a theorist. It is too much, perhaps, in our generation to expect the legal profession to be so sensible and efficient as to give domiciliary personal representatives standing to sue at the place of the crash and collect all suits there for trial together in one federal district court. It is not, however, too much to hope that the Supreme Court of the United States in deciding Barrack will so declare. This is the issue presented to it under Section 1404 (a) of Title 28, the venue statute.

V. CONCLUSION

My conclusion is that the air law bar does not read very well or else it would have assisted the busy Judges who heard Kilberg and Pearson by briefing and orally arguing the validity of the four points set forth above. Perhaps, it is the price we pay for the adversary system that leaves to chance the arguments lawyers are to make or overlook or choose to conceal.

Speaking as a crackpot Professor, it does not sit too well with the Professorial trade for their studies to be overlooked and, in the case of Erie, have assumptions made which have been shown to be false by one Professor after another.

The majority of Conflict of Laws Buffs have not been of great assistance in that they have persisted in overlooking the Constitutional Law aspects of cases such as Kilberg and Pearson. Perhaps, this is due to the fact that our law schools today are becoming as departmentalized as a General Motors assembly line.

But before I close, let me say the faults I see in Pearson are common to all our trade.

On April 30, 1963, the American Law Institute published Tentative Draft No. 1 of a Study of the Division of Jurisdiction Between State and Federal Courts. It proposes new statutes which will revolutionize diversity jurisdiction. The statutes are very well drawn to accomplish their purposes by the Reporters, Professor Richard H. Field of the Harvard Law School and Professor Paul J. Mishkin of the University of Pennsylvania Law School.

The study proposes the following:
1. No longer can you bring an action against a citizen of another state in the federal court of a state of which you are a citizen.

2. Nor can any corporation sue in federal court of any state in which it is "permanently established" with respect to matters that arise in that state.

3. No one who lives in one state and commutes to work in another may sue in the federal court of either state.

4. However, federal court jurisdiction is to be expanded to permit nationwide service of process where multiple defendants necessary for a just adjudication of a plaintiff's claim are dispersed beyond the reach of any one State Court and cases of this type can be removed from State to Federal Court.

The Study of the American Law Institute is a document of 220 pages, yet it assumes without briefing that it is constitutional under Article III of the Constitution thus to limit and destroy diversity jurisdiction and in the choice of law sections, it assumes that *Erie v. Tompkins* is sound, that experience under *Swift v. Tyson* was bad and that the only reason for establishing a diversity jurisdiction was the fear that a man from Massachusetts would not get a square deal in a Virginia State Court or vice versa.

All of which goes to prove that Jeremy Bentham was right. When you have a weak case, don't argue it. Assume its validity and go on from there.

It is not only the air law bar that does not read.