SUPREME COURT
OF THE UNITED STATES

In the Matter of:	:	
SUN OIL COMPANY,	:	No. 87-352
Petitioner,	:	
v.	:	
RICHARD WORTMAN AND HAZEL MOORE, ETC.	:	

Pages: 1 through 41

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I N D E X

IN THE SUPREME COURT OF THE UNITED STATES

SUN OIL COMPANY,

Petitioner,

v. No. 87-352

RICHARD WORTMAN AND HAZEL MOORE, ETC.

Washington, D.C.

Tuesday, March 22, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:40 o'clock p.m.

APPEARANCES:

GERALD SAWATZKY, ESQ., Wichita, Kansas; on behalf of the petitioner.

GORDON PENNY, ESQ., Medicine Lodge, Kansas; on behalf of the respondent.

P R O C E E D I N G S

(1:40 P.M.)

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Number 87-352, Sun Oil Company versus Richard Wortman and Hazel Moore.

Mr. Sawatzky, you may proceed whenever you are ready.

ORAL ARGUMENT OF GERALD SAWATZKY, ESQUIRE

ON BEHALF OF THE PETITIONER

MR. SAWATZKY: Mr. Chief Justice, and may it please the Court, the questions presented in this case are, first, whether the full faith and credit clause and the due process clause require Kansas, a quorum state, to apply the limitations laws of the States of Texas, Oklahoma, and Louisiana, where the claims arose in favor of class members residing in those states, and secondly, whether Kansas has failed in this case to apply the interest laws of those same states to those claims as required by this Court's decision in Phillips Petroleum Company versus Shutts, which was an identical case to this one except it did not involve the limitations issue.

Sun Oil sells gas from wells located in various states and pays royalty to landowners, thousands of landowners located in these states. In the 1970s Sun had received, filed for and received price increases from the

then Federal Power Commission subject to refund pending a determination of their legality, and once determined to be legal, royalty was paid on the suspended funds representing the increases to the royalty owners, and such payouts were made in July of 1976 and on another occasion in 1978.

Plaintiffs filed this suit in August of 1979 in Kansas state court seeking to collect interest on the principal payout of these suspended royalties on behalf of the class of these royalty owners located in these various states. Ninety-nine percent of the class members resided in states other than Kansas. Over 90 percent of the wells were located in Texas, Oklahoma, and Louisiana.

Now, in the first Wortman case in 1984 the Kansas courts held that Kansas interest law should be applied to all the claims in all the states and also held that the Kansas limitations statute, which it determined was five years, should apply to all the claims in all the states.

Thereafter, this Court decided Phillips versus Shutts in 1985, which required Kansas to apply the interest laws of the other states to the claims arising in those states if those laws were different, and it pointed out they probably were different.

On Sun's petition this Court then remanded the first Kansas Wortman case back for reconsideration in light of this Court's case of Phillips versus Shutts. And on

reconsideration the Kansas court, reviewing many decisions in these other states, and not finding anything directly on point, nevertheless held despite this Court's direction that the Kansas theory of equitable interest would be uniformly adopted in each one of these states.

Then on the limitations question when we again raised the constitutional objection that the limitations laws were substantive, certainly as substantive as interest laws, where the difference is between 6 percent and 10 percent, between liability and no liability, the Kansas court adopted what is a standard black letter conflicts rule that limitations goes, is remedial or procedural, therefore the law --

QUESTION: Mr. Sawatzky, may I ask you a question? It seemed to me that at least in your brief you didn't argue that Texas, Louisiana, and Oklahoma courts consider their shorter statutes of limitations as substantive.

MR. SAWATZKY: Your Honor, the -- I think I --

QUESTION: Do they -- have you cited any authority that would indicate to us that those states regard their statutes of limitations as substantive rather than procedural?

MR. SAWATZKY: No, Your Honor. Those states follow the common law rule, as Kansas does, as most states do, that the normal statute of limitations such as we have

involved here, are considered procedural or remedial for conflict of laws purposes. That does not mean to say that those states do not apply those laws to claims arising in each one of those states in such a manner as to terminate completely any claim or cause of action that has arisen in that state.

And my whole point, Justice O'Connor, is that the nature of a statute of limitations when it is applied by each one of these states is such that constitutionally it is substantive because it deprives a party of a claim.

QUESTION: Well, I can imagine certainly that a particular state could make a determination for itself that it wanted to treat a particular statute of limitations as substantive, but absent that, I wonder whether we should assume that it is.

MR. SAWATZKY: I think that in applying the constitution, Your Honor, we must look at what a statute of limitations does to a party and to a claim, and because of the history, the common law history by which this common law fiction arose, a fiction that limitations goes to the remedy and not to the right, which arose way back in McLemoyle versus Cohen.

Prior to that time, Justice Storey -- I am getting back into history now, but it goes right to the very essence of this case. And that is that Justice Storey in

LeRoy versus Crowninshield analyzed this common law fiction and from every aspect he concluded in effect that a limitations law by its nature was substantive because it affected the substantive rights of the claimant.

QUESTION: Well, that certainly wasn't the holding of this Court in the Wells case, was it?

MR. SAWATZKY: No, it wasn't. In the Wells case, Your Honor, there was absolutely no reexamination and no constitutional analysis of limitations statutes or their purposes.

QUESTION: Well, Justice Jackson certainly put forward an argument in his opinion in that case.

MR. SAWATZKY: Yes.

QUESTION: But it didn't carry the day, did it?

MR. SAWATZKY: It didn't carry the day, Your Honor, because the majority opinion in Wells simply rotely adopted the old McLemoyle line of cases, and if you look back at McLemoyle, likewise it did not analyze the question. One would think that before we rotely adopt an old rule for the sake of old times and antiquity that we ought to look at the reason behind the rule and see if the rule stacks up in light of the purposes of our constitution.

And if we do go back, you will note that McLemoyle and Wells recited the common law fiction that limitations goes to the remedy and not to the right. Well,

that is pretty well accepted by scholars that that remedy, common law remedy type of thing was basically something to preserve English sovereignty over England's people and its courts.

Now, when Justice Storey, really the only analysis made in the early days was by Justice Storey in the Crowninshield case, and he examined it by reason and logic and said, in effect, the common law rule is wrong, but it is the law, and I will apply it to the case, but that case did not involve the Constitution.

And if you come to the Constitution, where Kansas must respect the laws of Texas which affect people's rights, and like any other substantive law, then we have an issue which is not, which is not simply a question of the common law of England. We have a constitutional purpose. Limitations --

QUESTION: Do you think we have to overrule a whole string of cases to hold for you on this?

MR. SAWATZKY: I don't really think you have to, Your Honor. I think it would be the best thing --

QUESTION: Just ignore them, or what?

MR. SAWATZKY: I think it would be the best thing that this Court could do to overrule them, because it is an old English common law fiction which has been applied without discrimination.

QUESTION: Well, don't you have a Court of Appeals case on your side?

MR. SAWATZKY: Yes, we do. We have the Ferens case.

QUESTION: The Third Circuit?

MR. SAWATZKY: The Third Circuit.

QUESTION: What did they say?

MR. SAWATZKY: They said that constitutionally under the full faith and credit clause and the due process clause in particular, the common rule in effect, the common law rule should be disregarded because one state should apply the law of another state.

QUESTION: They must have felt that there weren't any cases and this Court finding them that would hold otherwise.

MR. SAWATZKY: Well, I think, Your Honor, you are coming to one aspect of my case. Perhaps I bit off a bigger chunk than I should chew by saying that some of these old cases are wrong, which I think they clearly are, but in Keaton versus Hustler Magazine, this Court said under a due process analysis it would reserve the question of whether or not one state must apply the limitations law of another state where the forum state's only connection was the presence of a suit, the bringing of a suit.

QUESTION: Do you think in some of the old cases

did that very situation obtain?

I mean, how could Hustler have reserved that question if there were a lot of cases historically that had addressed that very situation?

MR. SAWATZKY: Well, yes. That --

QUESTION: Had they?

Had they or not?

MR. SAWATSKY: There had absolutely been no cases discussing, analyzing the due process clause in connection with this problem. The Wells case did not consider it. Certainly McLemoyle didn't. It was long before the --

QUESTION: So it's the constitutional issue that Hustler reserved, you think?

MR. SAWATZKY: It is perfectly open and right here for this Court in this case.

QUESTION: How is the due process argument different from the full faith and credit argument?

MR. SAWATZKY: Well, you look at the due process analysis in the Shutts case itself and in the cases cited by Shutts, and that is that parties are entitled to expect that their activities and their rights and legal obligations will be governed by laws of the jurisdiction where they undertake their activities, and where the alleged wrong or the breah occurs, and that this lends

predictability to the law, and this is an element of the fairness incorporated in and an absolute part of the due process clause. Fairness that the parties reasonably expect that this law where they perform their activities will be applied, but not --

QUESTION: Predictability is important when you are going to govern your actions by it.

MR. SAWATZKY: Absolutely, Your Honor.

QUESTION: But how do you govern your actions differently if you know that there is a five-year statute of limitations rather than a nine-year one? Do you make time go faster or make it go slower? There is nothing you can do about a statute of limitations. It doesn't affect your --

MR. SAWATZKY: The statute of limitations, as this Court has pointed out many times and is generally recognized, is a statute of repose that gives people certainty in their affairs, and if you want to go to a state and conduct your activities with a limitation of two or three years instead of five of six years, that is your option.

QUESTION: Do you think anybody ever conducted affairs in one state versus another because they knew they had a shorter statute -- do people really advert to statutes of limitations when they conduct their primary

conduct? I can't imagine that.

MR. SAWATZKY: Well, I don't think anybody has made a study out of it, Your Honor, but that is one of the elements that goes into your expectancy.

QUESTION: Part of a favorable climate for business, perhaps?

MR. SAWATZKY: Well, the point is, though, that in any action there are affirmative defenses, let's say unclean hands or something else. Normally we say that this, because this law affects the rights of the parties, affects this claim in this case substantively, it wipes it out, or it increases it, therefore it is subject to the due process clause, and you look to the law of the state and jurisdiction that has an interest in that.

QUESTION: But one can certainly make the argument in the case of the statute of limitations that the primary interest it serves is that of a state, the state's court system in not trying to process stale claims which are very difficult to figure out who is right and who is wrong, and that if Texas feels they want a shorter statute of limitations, it is a state interest there that is being vindicated, but if the Kansas court system feels they don't have that same reservation, then why not let Kansas apply its longer statute?

MR. SAWATZKY: Of course, in our case, you

understand, Kansas supplied its longer statute, not a shorter statute --

QUESTION: Yes.

MR. SAWATZKY: -- to bar something, and so this argument technically would not apply, but -- and so I wouldn't need to rebut that particular argument, but I think from the standpoint of logic and common sense, this argument which has been made does not bear analysis, because the interest as far as stale claims is concerned, the parties are interested in it. Whether or not there is evidence in this case that has been lost bears upon the parties and upon that claim. Now, our courts all the time, every day handle cases where the evidence is difficult.

Whether a statute of limitations has run or not run or whether any evidence has been lost or not lost, the state where this occurs does not have an interest in the freshness or the staleness of that claim per say because of all these factors. The interest and the impact is upon the parties.

Professor Loeffler, who has been involved in this situation and studied this for many, many years, succinctly summarizes it in the Mercer Law Review article which we cite in our reply brief, where the Uniform Commissioners on State Laws studied the problem, and back in the fifties they proposed a uniform rule that the

shorter statute would apply, adopting this very argument that the Chief Justice has mentioned. But this turned out to be very unsatisfactory, and his analysis in this article and by the commissioners showed the weaknesses in that, just as I think that I have tried very poorly to mention.

And as a result they adopted, they concluded that, yes, limitations laws are substantive, and because they are substantive, the law which should be applied in our uniform law proposal is that you look to the law just like any other substantive law of the state where the activity occurred and the claim arose.

QUESTION: And that -- taking it both ways, whether the forum state statute is longer or shorter.

MR. SAWATZKY: That is correct. That is what they concluded. They disregarded or they discarded what they had formerly proposed, and they studied this, and they know about it.

Now, the same thing has occurred in England that gave rise to this whole problem and has led to all this inconsistency and all this quorum shopping which --

QUESTION: May I interrupt --

MR. SAWATZKY: Yes, sir.

QUESTION: -- just to go back to Professor Loeffler's article? Was he recommending a conflicts of law rule or a constitutional law rule?

MR. SAWATZKY: His function and his role, Your Honor, was in the conflict of laws area, and was proposing that as a uniform rule.

QUESTION: I have a vague recollection that he is very reluctant to constitutionalize the law of conflicts of laws.

MR. SAWATZKY: But if you read the article and read the study, and similar scholars, and conclude, Your Honor, that this is substantive, that they are correct in saying it is substantive, once you say it is substantive, our constitution requires us to apply it in that manner. Their role is not to take over the function of this Court. Their role --

QUESTION: Mr. Sawatzky, what do you do with Texas itself says when it enacts its statute of limitations: the reason we have these statute of limitations is, we don't think our courts can find the facts very accurately or efficiently when the claims are older than this. Now, if other courts want to take a shot at it, if they think they can do better, we don't care.

Texas says that. Our statutes of limitations are jus procedural. Then you would acknowledge that neither the full faith or credit clause nor the due process clause would require the forum to apply them, or would you still say the forum had to apply them?

MR. SAWATZKY: I would still say, Your Honor, that that would apply. Number One -- for two reasons. First of all, Texas doesn't really say that. They may sai it is procedural, but that is because of this old common law fiction. And secondly, if they did go further and say that because it is procedural it affects our ability to handle these claims --

QUESTION: It is in the statute. They have actually --

MR. SAWATZKY: In the statute. I say it would be unconstitutional because it would not reflect reality, because the reality is that the administrative upkeep of the courts, the procedure in the courts is not really affected by whether a statute is longer or shorter. And Professor Loeffler points that out very well.

And if you assume that what I am saying is correct, and I think it is correct, then a state's artificially saying that something is true that is not true cannot possibly govern the operation of our constitution.

So we come again to the -- I was mentioning the law of England that gave rise to this whole problem. The Law Commission made a study and concluded, yes, limitations laws by their nature are substantive. Therefore the law in England now is, pursuant to Parliament, that the law of the place where the occurrence happened or the

claim arose governs, whether longer or shorter, when the action is brought in England.

Now, there are also movements under foot to revise the Restatement of Contracts, Conflicts, second, section 142, which recognizing this problem, because you see, in the Ferens case, when the Ferens case, the Third Circuit held that this basically was a constitutional problem, and we had a situation where an accident in Pennsylvania and barred by the Pennsylvania statute was brought in Mississippi, where they have a longer statute, in federal court.

So it is brought in federal court, and the consequence of our old common law rule was that it is procedural and therefore you apply the law of Misssippi, which was six years.

Well, then under the forum non conveniens statute you bounce it back to federal court in Pennsylvania, where it was barred, of course, if it had been brought there by the statute, and suddenly you have a claim that is alive in Pennsylvania that was really dead in Pennsylvania, and this points out the whole illogic and irrationality of this common law fiction that says that a claim which is dead and unenforceable in the state which created it, and it is gone, nevertheless lives and survives well in any state that fortuitously may have or later enact a longer statute

of limitations, and allow this kind of forum shopping and hopscotching among the states in litigation to occur. And this is especially a problem in class actions such as this particular case, because what we will have is a forum state that has a law favorable to one particular class or one particular interest, so a class action will migrate to that state, and that state will then with the longer statute apply the law everywhere and perhaps apply its own law to the other states like Kansas has here and become a magnet state and a state which applies national law which it creates.

QUESTION: Where I don't follow you, Mr. Sawatzky, is, I don't see how we can tell a state that its statute of limitations must be substantive, and once you accept that then your scheme doesn't give us any more certainty than the existing scheme. You would still have to examine each state's statute of limitations to decide whether they really intend it to be substantive or not. All you are doing is shifting the presumption, I suppose.

MR. SAWATZKY: If a state were to design a statute of limitations so that it would bear a real relationship to lost evidence and to stale claims and which could demonstrably improve the administration of cases in this Court, that might be one thing.

But that is not what we have here. We just have

general statutes of limitations which by their nature are statutes of repose for the benefit of people because we live in a world of time and space where we draw lines on the map that give jurisdiction, and we draw lines in time which say we go on to something new, and people are entitled to rely on that.

And it is important in civilization, ever since the early 17th century under the King James Statutes, which originated most of these statutes of limitations, and the way they operate is to operate substantively. Scholars generally --

QUESTION: How do you get different statutes of limitations in the same state, depending on whether it is personal injury, trespass to real property, personal property, that sort of thing?

MR. SAWATZKY: This again is a combination of objects by the state. For example, libel and slander might be one year in most states but two years or longer in some other states, even though the evidence of libel may be maintained for years and years, but there is something about the public policy entitling people to repose, and saying to people that have claims and know about them, you assert these in a certain time or they are lost, and the defendant, the other party is entitled to be free and go about his business and not worry about it.

And there are different times for different types of activities, different wrongs or different breaches of contract. So again these are for the substantive repose of the litigants and to allow life to go on, and they are substantive because they affect the particular claim. They terminate it entirely when it is applicable.

Now, under the present rule, procedural rule we can bring a case in Nevada, for example, against the Howard Hughes estate and be barred by limitations by the claim arising there, but the plaintiff then may march over to Texas and bring an action and say, you have a longer statute, and I am not barred by the judgment there. You not only do not give full faith and credit to the limitations law, but you don't give full faith and credit to the judgment because it didn't bar it on the merits. It was just procedural.

And then if Texas for some reason should find it barred, you jump over to another state. Now, that's an actual case cited, from Texas, cited by respondents, and this business of substance and procedure is just an awful mess. Now, I am not proposing that this Court need to get involved in delineating when a state for its own purposes may call something procedural or substantive.

Statutes of limitation by their nature are substantive, and constitutionally under due process under

the Ferens case, under the expectations of the parties under the due process clause, they are entitled to rely upon the law of the state, that bundle of substantive rights which was created in that state where that claim arose.

Now, the Schreiber case -- excuse me, the I mentioned the Ferens case and I was really thinking of the Schreiber case in the Tenth Circuit before where the Schreiber case allowed the action to be perpetuated in Kansas when it was barred in Kansas by being filed in Mississippi.

In the Ferens case, they said you can't do that, you can't jump over to Mississippi and come back to Pennsylvania and let the case continued because the Constitution requires that you look to the law where the claim arose and prevent this kind of nonsense, jumping back and forth between the states and applying hit or miss, fortuitously somebody's jurisdiction's longer statute of limitations.

Now, I have mentioned the lack of finality. It is an object of the full faith and credit clause, of course, in particular to obtain finality in litigation, as this Court has held, Justice White in particular.

Another thing that has happend as a result of this old McLemoyle rule is that borrowing statutes were

created by the states because there was a constitutional void. It doesn't seem right, this whole mess did not seem right to many states, and they enacted borrowing statutes to apply the statutes of limitations of these other states.

QUESTION: Is there an interest argument here, what rate of interest?

MR. SAWATZKY: Yes, there is.

QUESTION: Are you going to leave that to your brief?

MR. SAWATZKY: I am going to argue that right now, Your Honor.

(General laughter.)

QUESTION: That's a good idea.

MR. SAWATZKY: Because the Kansas court on remand after being directed by this Court to look to the laws of these other states -- I will mention Texas as a prime example.

In Texas the Stahl case held in exactly this kind of a case that the Texas statutory 6 percent rate applied. The Stahl case cited the Shutts case in Kansas as a case awarding interest. The Stahl case mentioned the higher federal rate of interest in the federal statute but it did not adopt the higher rate that Kansas had proposed in its Shutts case, which the Texas court cited. It did not adopt the higher federal rate from the federal statute which

Kansas had adopted. And no case since then has done so.

There is no law in Texas that says in this case or in this kind of a case a rate higher than 6 percent applies, and yet Kansas under the guise of predicting that the Texas courts would adopt the Kansas theory if presented to it, said we will apply the same law in Texas because we think that's what they would find.

QUESTION: And the rate?

MR. SAWATZKY: The rate that Kansas found was the federal rate, a rate that ranged up to 18 to 20 percent.

QUESTION: And they thought the Texas courts would apply that?

MR. SAWATZKY: Yes, they did.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sawatzky.

We will hear now from you, Mr. Penny.

ORAL ARGUMENT OF GORDON PENNY, ESQUIRE

ON BEHALF OF THE RESPONDENT

MR. PENNY: Mr. Chief Justice, and may it please the Court, I believe the Court granted certiorari in this case to consider these interesting and important choice of law questions, and they are difficult and subtle, and they should not be regarded lightly.

But I think it's important not to become so deeply involved in the intricacies of the choice of law that

we lose sight of the fundamental question in this case, and in my opinion the fundamental question is, are our courts, our institutions of justice capable of redressing an enormous interstate ripoff by a large national corporation at the expense of about 3,000 people located in several states, or does the expense of individual suits and the fact that the victims are located in many of the states mean that the courts can do little for them, and that the defendant can take and use their money with no real fear of accounting?

The facts in this case show that Sun used money belonging to the plaintiff class members for several years and paid no compensation for its use. This is money -- is not money that Sun thought they might own. It was money which Sun never could own. It either belonged to the royalty owners, our clients, or it had to be refunded back to pipeline.

QUESTION: Well, Mr. Penny, with all respect, I didn't think that was why we took the case. We concede what the merits are. I thought we were here to decide whether the Kansas court should -- what statute of limitations should be applied and what interest rate should be applied to those claims arising in other states.

MR. PENNY: I believe you are right, Justice O'Connor. I will get on to that.

QUESTION: So do you plan to talk about those?

MR. PENNY: Yes, I do.

QUESTION: While I have you interrupted, what if Texas, for example, passed a law that made it crystal clear it considered its shorter statute of limitations to be substantive? Do you think the full faith and credit clause might require Kansas to apply that Texas law?

MR. PENNY: Yes, I do, Justice O'Connor, if Kansas did not have enough other contacts with the litigation to make its application of its own statute of limitations reasonable.

I think the -- I would like to talk a little bit now about substantive and procedural. I am not sure that the labels are very important here, but they are more than labels, and this is evident by the fact that when you get a -- when the case is dismissed because it is brought too late for the statute of limitations, when it is an outlawed claim, that is not treated anywhere that I am aware of as a judgment on the merits.

Statutes of limitations have been considered procedural rather than substantive because they have nothing to do with the substance of the lawsuit, nothing to do with whether it is just or unjust. They are just either too old or still fresh enough to try.

Substantive laws governing liability have entirely

to do with whether a claim is just or unjust. I guess statutes of limitation in that -- in their application are completely arbitrary. They draw a line -- in this case Sun says we are approximately two months too late on a part of the claims in this case. They don't allege that they are damaged in any way by our two-month delay. The records have not gone anywhere. Witnesses haven't died. Their computers haven't burnt up. There is no damage. But that is the way statutes of limitations work.

The attack on Kansas' application of its own statutes of limitation is made on a couple of different grounds, and I would like to talk about the Fourteenth Amendment ground first.

As I read the cases of this Court, the Fourteenth Amendment would not require Kansas to apply the statute of limitations of another state. In Hague versus Allstate and Phillips versus Shutts this Court determined what modest restrictions there are on the state's application of its own substantive law. It seems to me that in application of a law which is part of the state's policy, part of the state's machinery for regulating its judicial process that the restrictions on the state's actions should be even more modest.

Due process of law as Mr. Sawatzky discussed has a great deal to do with the expectation of the parties, and

for the last 150 years I suppose any reasonably well informed potential litigant in this country would expect that the statute of limitations of the forum would apply in any lawsuit brought against that person.

QUESTION: Of course, by that standard you would never be able to overrule any case that says old process is due process, in effect, because people are used to living under that regimen.

MR. PENNY: Well --

QUESTION: Perhaps that is not a disadvantage.

MR. PENNY: It is not a disadvantage as far as I am concerned. It is somewhat of a circular argument, and I acknowledge that. It seems like there are a lot of them in this area.

QUESTION: And others.

MR. PENNY: You say and others?

QUESTION: And others, yes.

MR. PENNY: Oh, I see.

It simply doesn't seem to me that Kansas is required by the Constitution to surrender control over its own courts to other states. And that is what we would have if Kansas is required to apply statutes of limitations of other states.

Kansas has interests in this case which make application of its statutes of limitation and other

procedural rules reasonable rather than unreasonable. I think in the administration of its court system there is a whole package of procedural rules. I think Kansas has an interest in maintaining the integrity of this package and of the scheme which it as a sovereign state has in regulating litigation in its own courts. It has an interest in regulating Sun Oil Company, which is qualified to do business and does do business in Kansas.

I think there is an interest here in cooperating with other states to furnish a forum where this -- where these 3,000 approximately claims can be litigated in one action that would save judicial resources and simplify the task.

And of course Kansas has an interest in regulating the oil and gas business which is an important commercial activity in Kansas.

The other prong of the attack is full faith and credit, and as I understand this attack on Kansas -- on the application of the forum statute of limitations, is that it somehow impairs other states' interests or offends other states in the Union.

It is difficult for me to see how this can be when the other states involved here consider their statutes of limitations to be procedural. They affect only the remedy. None of the other states cancelled Sun's

debt. Louisiana, perhaps, where we concede the statute of limitations had expired on the part of the claims. Louisiana didn't cancel Sun's debt. Louisiana simply says, we consider this a claim for rent. We have historically applied a three-year statute of limitations. You are more than three years.

Sometimes this state's -- the state's interest in -- sometimes it is hard to tell what a state's policy might be from the statute or what the intention was, but when Oklahoma, one of the states involved here, adopted the uniform statute of limitations on foreign claims -- I believe that was in the fifties -- this was a uniform act that was not universally popular. Only three states, including Oklahoma, ever adopted it.

And its general scheme was to make the shorter statute of limitations apply to bar the claim. However, when Oklahoma adopted this uniform law, they took out one word and inserted another to make it mean that when the statute of -- the statute of limitations shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever last bars the claim.

Oklahoma was there expressing in that context their policy and decision that whichever last bars the claim should prevail.

QUESTION: That is a plaintiff's state.

MR. PENNY: Excuse me, sir?

QUESTION: That's a plaintiff's state.

MR. PENNY: Apparently so.

As this Court has said, the statute of limitations represents a policy about the privilege to litigate. The shelter of the statute of limitations in such a way as to benefit a potential defendant is simply a by-product or a fall-out of that.

I think this is recognized intuitively, and it has been recognized specifically by this Court.

We have a question in petitioner's brief as to this being nonsense to have a right without a remedy. This has been with us a long time, and I think the courts have always recognized this. Rights without remedies are of some good. They can be offset. They do furnish consideration for a new promise to pay. There may be a change of state policy, in which case your remedy comes alive again, as in the Chase Securities case cited in our briefs.

These cases we do not believe are barred by either Texas or Oklahoma law if those states' laws were to apply.

We cite in our brief the longer statutes of limitations of those states, that is, the statutes dealing with recovery on written contracts. These are on written contracts, the oil and gas leases. Although our recovery

was probably based more on the theory of unjust enrichment, it was unjust enrichment by Sun keeping the money it owed our clients under the written contracts for longer than it should have.

Maybe one of the thorniest problems in this case is the Kansas courts' determination of the other states' law. When this case was -- not this case, when the companion case, Phillips, was here before the majority opinion questioned the Kansas courts' finding all the law the same.

Kansas has looked at these substantive laws of the other states again and has come to the same conclusion. Typically, historically a decision of this type by a state court has been entitled to great respect from this Court, and there are, I think, good reasons for that. Sometimes it is very difficult for a state court to decide what a neighboring state court might do if faced with a particular fact situation.

Maybe there is no clearcut answer. It has to be decided, though, and the question is, once it is decided, does another court then second guess or look again? The law --

QUESTION: Well, you had here a Texas case that had used the lower interest figure, didn't you?

MR. PENNY: Yes, sir.

QUESTION: And in the face of that the Kansas court said, no, the next time around they are going to use a higher one.

MR. PENNY: Yes, the Stahl case was -- which did apply 6 percent interest, was an unusual case. That was all that Stahl ever asked for in that case. It was -- it was a declaratory judgment action brought by Phillips, the oil company, which had paid Stahl certain principal amounts. Phillips requested a judgment that it was not liable for any interest on the amounts already paid out, and in addition also asked for that money back.

Stahl counterclaimed for 6 percent interest, and it was allowed by the Court. There is no suggestion that he ever asked for any more.

In addition to the Stahl case there have been in Texas a great ferment of cases involving prejudgment interest since the Stahl case was decided. They are cited in our brief, but Cavnar versus Quality Control Parking is one of the cases in which the Texas Supreme Court said, from now on our -- in cases of this type we are going to have prejudgment interest, and it will be at the same rate as the legislative -- as the statute on postjudgment interest presently is.

QUESTION: Those are personal injury cases you are referring to.

MR. PENNY: Yes, sir, personal injury. And then later there is a -- there are several more Texas courts -- Court of Appeals cases, some going both ways. February 10th, the Texas court decided a case called Perry Roofing Company versus Olcott, which is in a supplemental brief which I believe was filed yesterday, in which the Texas Supreme Court cleared the question up and said, we will -- unless you can -- well, let me back up a little bit.

Their ruling was, if you have a case on a contract, and by looking at the face of the contract you can tell how much money is due on the contract, then their 6 percent interest rate applies. They have judicially limited the application of that 6 percent statute.

On all other cases, as I understand the Texas ruling, they are granting prejudgment interest at a rate corresponding to the bank prime rate compounded daily. This is strictly by the action of the Texas Supreme Court, and the Cavnar case, I believe, was 1985. All those cases are in our brief.

I think if the Kansas court missed the application, missed the mark on the Texas law, it didn't miss it by very far. The Federal Power Commission rate which the Kansas court found applicable is also based on the bank prime rate, and it is a floating rate, though, rather than being set at the date of judgment as is the Texas rule under Cavnar.

In Louisiana there has been new legislation which would indicate the Kansas court was not far off the mark there either.

QUESTION: A little bit off the mark?

MR. PENNY: I would say that the prediction missed by some amount. Louisiana Civil Code Article 2000 -- this is not cited in our brief but is in the latest Kansas case of Phillips versus Shutts, Shutts versus Phillips, Louisiana Civil Code Article 2000, a statute on prejudgment interest which is declared to be retrospective and prospective adopted effective January 1 of 1985 calls for 12 percent interest on money due in Louisiana if there is no other contract.

Maybe the -- if the Kansas court missed the -- missed the prediction by a ways on the Louisiana substantive rate of interest, it did the same as the federal courts did in Boutte versus Chevron, which were federal cases involving exactly this same type of money. It came up in Louisiana and the federal courts there said -- this was at a time when Chevron still held the money and hadn't paid it out. In fact, the rate increases were not yet final.

The landowners were trying to collect the money before the rate increases were final.

QUESTION: So the Kansas court was a little bit wrong. Should we say, well, it is only a little bit so we

affirm? Or do they have to do it over again?

MR. PENNY: Well, Your Honor, I think probably the way to finality of judgments is to affirm if a good faith effort was made by the Court to arrive at what the other state's court law is.

QUESTION: Or would be?

MR. PENNY: Right.

QUESTION: At the time of this judgment was the Louisiana law the way you say it is now?

MR. PENNY: Yes, it was. This 12 percent statute had been adopted, was adopted --

QUESTION: Well, they just didn't look at the Louisiana Code then.

MR. PENNY: No. No, I will agree with that. It is not the code.

QUESTION: How about Texas?

MR. PENNY: The Texas law, the Cavnar case, I believe, came down in 1985.

QUESTION: It came later.

MR. PENNY: Yes. And the --

QUESTION: Oklahoma?

MR. PENNY: The Texas Supreme Court judgment applying it to all types of cases or really confirming that it applies to all types of cases just came last month.

QUESTION: Well, the Supreme Court of Kansas

opinion is June 8th, 1987. That should be after the Texas case you refer to, the Cavnar case, shouldn't it?

MR. PENNY: Yes, it was after the Cavnar case.

QUESTION: I see.

How about Oklahoma?

MR. PENNY: Okay. Oklahoma has -- I am honestly embarrassed that this statute is not cited in our brief. Oklahoma has a statute. It is not 6 percent, but it is 12 percent. It is a statute specifically dealing with late payments of oil and gas royalties, and it has been around since 1980. It is Title 52, Section 540.

QUESTION: And the Kansas court just borrowed the federal rules, the federal rate?

MR. PENNY: The Kansas court applied the federal rule to --

QUESTION: Saying that these other states would do the same thing.

MR. PENNY: Yes.

QUESTION: Is it clear that they would not do that? I mean, is it clear from the Texas case law that given a case that specifically involved this kind of a situation they wouldn't use the federal agency's rule rather than --

MR. PENNY: No, I don't think it's -- I don't think it's that clear, Justice Scalia.

In this case --

QUESTION: You think there is some possibility that they got it entirely right?

MR. PENNY: Yes, I think it was a good faith effort, and I think if one of these cases comes before one of the other courts, Texas, Oklahoma, or Louisiana, I think it's quite likely they would do exactly as the Kansas court did.

QUESTION: In spite of a statute.

MR. PENNY: Yes.

QUESTION: In Oklahoma it says, here's the interest rate on overdue royalty. We nevertheless will apply the federal rate.

MR. PENNY: I think that would make it more difficult. However, Kansas had a general interest rate statute as well which the Kansas court decided not --

QUESTION: Have you got a citation for the Oklahoma statute that you didn't have in your brief?

MR. PENNY: Title 52, Section 540.

QUESTION: May I ask if that statute was called to the attention of the Kansas Supreme Court by either party to the litigation?

MR. PENNY: It was not, Your Honor, and maybe this is incompetence on our part.

QUESTION: You at least had a theory that the

federal rule applied.

MR. PENNY: Yes.

QUESTION: And they opposed it. What did they claim?

MR. PENNY: They claimed 6 percent. Oklahoma has a general statute or a general interest state of 6 percent.

QUESTION: But isn't there an issue in here of not only postjudgment but prejudgment interest?

MR. PENNY: Yes, sir. I have been talking all throughout about prejudgment interest, and the only place the --

QUESTION: I thought there was some argument that these other states wouldn't give prejudgment interest at all.

MR. PENNY: Yes, there was that claim made.

QUESTION: Well --

MR. PENNY: It would be, espeically with respect to Oklahoma, the claim was made that there would be no prejudgment interest.

QUESTION: That was a common law rule, wasn't it?

MR. PENNY: Yes. I think that would be very difficult to maintain inside of the particular statute they have on there, and again, I --

QUESTION: May I ask about the Oklahoma statute? I understand -- neither party cited it, and I understand your theory was that the federal rule applied.

Were you aware of the statute at the time the case was argued in Kansas?

MR. PENNY: I was not aware of the statute until yesterday.

QUESTION: I see, and you don't know whether your opponent was or not?

MR. PENNY: No. It was never cited to any court considering --

QUESTION: What about the Louisiana statute?

MR. PENNY: The Louisiana statute was cited by the Kansas court in the Shutts versus Phillips case.

QUESTION: How about in this case?

MR. PENNY: In this -- the Kansas court's opinion in this case referred -- mostly just referred to the Shutts case, which had been decided a month earlier.

QUESTION: Well, how come they said Louisiana would apply the federal rule?

MR. PENNY: There was a case in Louisiana called Boutte versus Chevron, in which the federal court said, whenever this money is paid out -- it was dicta in the case, but the federal court did say, Chevron, you don't have to pay the money out until the rates become final, but when

you do pay the money out, you will pay them to the royalty owners at the same -- together with the same rate of interest as you are required to by your Federal Power Commission undertaking.

There was also a federal court case in Texas, Sid Richardson Oil and Gas Company, in which the federal judge said the same thing, that when the money goes out it will go out with the same rate of interest.

Here I think the Court has two options on this determination of other states' law. One would be to affirm the Kansas decision which is made in good faith. Whether it is exactly like state law turns out to be two or three years later or a year or two later probably doesn't happen very often, even when a federal court predicts what a state court is going to decide, or a federal court predicts what another -- a neighboring state court will decide.

The other option, I think, would be to find that the Kansas determination was erroneous, although I submit by a very small amount, and enter judgment for interest in accord with the Oklahoma statute, the Texas Cavnar rule on prejudgment interest, and the Louisiana civil code section.

If there are no other questions, I will finish.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Penny.

The case is submitted.

(Whereupon, at 2:39 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 87-352

CASE TITLE: Sun Oil Co. v. Richard Wortman & Hazel Moore

HEARING DATE: March 22, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United states.

Date: 3/28/88

Margaret Daly

Official Reporter

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