

COMMENTS

COURTS: DISCRETIONARY POWER TO DECLINE JURISDICTION— FORUM NON CONVENIENS

Elliott v. Johnston, 292 S.W.2d 589 (Mo. 1956)

Plaintiffs, residents of Kansas, instituted actions in a Missouri court against another Kansas resident for damages resulting from an auto collision occurring in Kansas. The trial court determined that defendant and plaintiff's attorney, in order to gain tactical advantages against defendant's insurer, had colluded to effect service of process in Missouri, and therefore, on its own motion, dismissed the actions as burdensome to Missouri courts and citizens. Affirming the lower court's discretionary action, the Missouri Supreme Court held that the public factor of convenience to the court was itself sufficient reason for application of the forum non conveniens doctrine.¹

Forum non conveniens involves the exercise of discretionary power by a court to resist imposition upon its jurisdiction by dismissing a cause of action which could be litigated more appropriately in another forum.² This doctrine,³ presently applied in a dozen states⁴ and by

1. *Elliott v. Johnston*, 292 S.W.2d 589 (Mo. 1956).

2. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 869 (1935).

3. Blair, *supra* note 2, at 2 n.3, points out that while the use of the word "doctrine" has received substantial support, one might regard the phrase not as a doctrine but as a factual condition.

4. Nine jurisdictions have applied the doctrine of forum non conveniens by that name. California: *Price v. Atchison, T. & S.F. Ry.*, 42 Cal. 2d 577, 268 P.2d 457 (1954); Illinois: *Whitney v. Madden*, 400 Ill. 185, 79 N.E.2d 593 (1948); Massachusetts: *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 184 N.E. 152 (1933); Minnesota: *Johnson v. Chicago, B. & Q.R.R.*, 243 Minn. 58, 66 N.W.2d 763 (1954); Mississippi: *Strickland v. Humble Oil & Refining Co.*, 194 Miss. 194, 11 So. 2d 820 (1943); Missouri: *Elliott v. Johnston*, 292 S.W.2d 589 (Mo. 1956); New Jersey: *Anderson v. Delaware, L. & W.R.R.*, 18 N.J. Misc. 153, 11 A.2d 607 (1940); New York: e.g., *Rothstein v. Rothstein*, 272 App. Div. 26, 68 N.Y.S.2d 305, *aff'd*, 297 N.Y. 705, 77 N.E.2d 13 (1947); Oklahoma: *St. Louis-S.F. Ry. v. Superior Ct.*, 290 P.2d 118 (Okla. 1955). In addition, three states have held the principle to apply, but did not use the term forum non conveniens. Louisiana: *Union City Transfer v. Fields*, 199 So. 206 (La. App. 1940); Maine: *Foss v. Richards*, 126 Me. 419, 139 Atl. 313 (1927); New Hampshire: *Jackson & Sons v. Lumbermen's Mut. Cas. Co.*, 86 N.H. 341, 168 Atl. 895 (1933). Five other jurisdictions have indicated a willingness to follow the doctrine if and when a case arises which requires the exercise of the court's discretionary power. District of Columbia: *Rice v. Salmier*, 86 A.2d 175 (D.C. Mun. App. 1952); Indiana: *Hartunian v. Wolffick*, 122 N.E.2d 622 (Ind. App. 1954); Oregon: *Horner v. Pleasant Creek Mining Corp.*, 165 Ore. 683, 107 P.2d 989 (1940); Utah: *Mooney v. Denver & R.G.W.R.R.*, 118 Utah 307, 221 P.2d 628 (1950); Vermont: *Morisette v. Canadian Pac. Ry.*, 76 Vt. 267, 56 Atl. 1102 (1904).

Methods other than forum non conveniens that have been used to prevent a court from exercising jurisdiction in a given case include: (1) injunction to restrain plaintiff from bringing suit in a foreign jurisdiction (see Annot., 136 A.L.R. 1232 (1942); Note, 27 IOWA L. REV. 76 (1941)); (2) application of the commerce clause of the United States Constitution to prevent litigation unduly

the federal courts,⁵ tends to discourage forum shopping that is advantageous to the plaintiff but vexatious, burdensome, and harassing to the defendant, the foreign court, or both.⁶ Recognition and acceptance of the doctrine were delayed in the United States due to the reluctance of law courts to dismiss cases properly brought before them,⁷ and to an interpretation of the privileges and immunities clause in the Constitution⁸ which was thought to deny courts the discretionary power of refusing to exercise jurisdiction.⁹ It is now believed, however, that although a state may not deny access to its courts exclusively on the ground of foreign state *citizenship*, it may, irrespective of citizenship, give its *residents*¹⁰ a preferred position to non-residents without violating the privileges and immunities clause.¹¹ Hence, if the doctrine is applied indiscriminately against nonresidents, state courts seemingly have inherent power to invoke forum

burdensome to interstate commerce (Davis v. Farmers Co-operative Equity Co., 262 U.S. 312 (1923)); (3) restriction of venue of transitory actions by means of statute (see examples in Blair, *supra* note 2, at 9-12). See also Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 384-86 (1947).

5. Congress officially adopted the principle of forum non conveniens in 28 U.S.C. § 1404(a) (1952): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Although revision notes following this and a companion section, 1406(a), denote Congressional intent to codify the forum non conveniens doctrine, there presently is doubt regarding the success of this legislation to produce the desired result. See Kaufman, *Further Observations on Transfers under Section 1404(a)*, 56 COLUM. L. REV. 1 (1956); Keeffe, *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569 (1952); Note, 24 GEO. WASH. L. REV. 208 (1955).

The authority of federal courts to *transfer* a case to a more appropriate division or district enables them to avoid the dilemma often faced by state courts of having to *exercise* jurisdiction or *dismiss* the action altogether, conceivably leaving plaintiff without a remedy in the latter alternative. See Comment, 4 ST. LOUIS L.J., 198, 199 (1956).

6. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Heine v. New York Life Ins. Co., 45 F.2d 426 (D. Ore. 1930); Barrett, *supra* note 4.

7. Although admiralty and equity courts have applied forum non conveniens in practice if not in name, common-law courts have generally adjudicated all non-alien suits presented to them irrespective of venue considerations. See Annot., 32 A.L.R. 6, 8 (1924). See also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 513-14 (1947) (majority and dissenting opinions).

The British and Scottish courts have long subscribed to the doctrine of forum non conveniens. See Blair, *supra* note 2, at 20-21; Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 909-11 (1947); Dainow, *supra* note 2, at 881-85.

8. U.S. CONST. art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

9. This interpretation was founded primarily upon the opinion in Corfield v. Coryell, 6 Fed. Cas. No. 3230, at 552 (E.D. Pa. 1823), where it was announced in dictum that the right to institute and maintain any action in a state court is one of the privileges and immunities of citizens deemed fundamental by the Constitution. Supreme Court decisions which have endorsed this dictum are listed in Blair, *supra* note 2, at 389 n.45.

10. For the varying meanings of residence, see Reese & Green, *That Elusive Word, "Residence"*, 6 VAND. L. REV. 561 (1953).

11. State *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950); Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929); see Blair, *supra* note 2, at 18-19.

non conveniens, unless absence of specific statutory authorization to invoke the doctrine is construed as a bar to applying it.¹²

Most jurisdictions that have adopted forum non conveniens have used as the primary standard for its application the factor of private convenience to the parties, relegating to a supplementary position the element of public convenience to the court.¹³ New York, however, as a matter of public policy, dismisses foreign actions between non-residents,¹⁴ unless such dismissal will leave the plaintiff without another forum in which the controversy could be appropriately litigated.¹⁵ The New York position represents a difference in emphasis

The constitutional objection most frequently urged regarding the application of forum non conveniens has been violation of the privileges and immunities clause. Barrett, *supra* note 4, at 389. There remains a consideration of whether the exercise of this judicial preferentialism against *foreign corporations*, although not violating the rights of natural persons under the privileges and immunities clause, might violate the due process or equal protection of the law clauses of the fourteenth amendment, might conflict with the full faith and credit clause, or might constitute an unreasonable burden on interstate commerce. The reader is referred to Annot., 95 L. Ed. 1221 (1953), for an introductory treatment of these problems which are beyond the scope of this comment.

12. See *Ex parte State ex rel. Southern Ry.*, 254 Ala. 10, 47 So. 2d 249 (1950); *Mattone v. Argentina*, 123 Ohio St. 393, 175 N.E. 603 (1931); *cf. State ex rel. Southern Ry. v. Mayfield*, 362 Mo. 101, 240 S.W.2d 106 (1951); *Bourestom v. Bourestom*, 231 Wis. 666, 285 N.W. 426 (1939).

This discretionary power of state courts gains added significance when considered with regard to the special venue provision of the Federal Employer's Liability Act (35 STAT. 65 (1908), as amended, 45 U.S.C. § 56 (1952)) and actions arising under it, for on various occasions it has been held that the availability of forum non conveniens in FELA suits is commensurate with a state's general policy to accept or reject the doctrine under local law. *Murnan v. Wabash Ry.*, 246 N.Y. 244, 247-48, 158 N.E. 508, 509 (1927); *State ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 3-4 (1950) (dictum); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387-88 (1929) (dictum). Notwithstanding these decisions, the current Missouri policy is to deny applicability of the doctrine in FELA actions (*State ex rel. Southern Ry. v. Mayfield*, 362 Mo. 101, 240 S.W.2d 106 (1951)) but to accept it in actions on non-statutory torts (*Elliott v. Johnston*, 292 S.W.2d 589 (Mo. 1956)). See Comment, 4 St. Louis L.J. 198 (1956).

It should be noted that the discretion of a court to decline jurisdiction in contract actions may be more restricted than in tort actions, since the rules governing damages in contract are more uniform than are those in tort. The result of this uniformity is that plaintiffs are less inclined to forum-shop seeking higher awards, and consequently the strain on convenience of the parties or the court is measurably alleviated. See cases listed in Annot., 48 A.L.R.2d 800, 803 n.17 (1956). See also Annot., 87 A.L.R. 1425, 1431-34 (1933); Blair, *supra* note 2, at 30-32. *But see Bata v. Bata*, 304 N.Y. 51, 56, 105 N.E.2d 623, 626 (1952).

13. *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *Price v. Atchison, T. & S.F. Ry.*, 42 Cal. 2d 577, 268 P.2d 457, *cert. denied*, 348 U.S. 839 (1954); *Weed v. Smith*, 15 N.J. Super. 250, 83 A.2d 305 (1951); *cf. Whitney v. Madden*, 400 Ill. 185, 79 N.E.2d 593, *cert. denied*, 335 U.S. 828 (1948).

But see Comment, 56 YALE L.J. 1234, 1237 (1947), stating that convenience of the parties has been emphasized less than convenience of the court.

14. See authorities listed in notes 15, 20 *infra*. *But see Hoolahan v. United States Lines Co.*, 189 Misc. 168, 70 N.Y.S.2d 356 (Sup. Ct. [Sp. T.] 1947).

New York's policy of applying forum non conveniens is apparently a matter of necessity in the face of overcrowded court dockets and inequitable burdens upon the local taxpayers.

15. See *Williamson v. Palmer*, 181 Misc. 610, 43 N.Y.S.2d 532 (1943); *Randle v. Inecto*, 131 Misc. 261, 226 N.Y. Supp. 686 (Sup. Ct. 1928).

An additional safeguard to the interest of the parties has been preserved by

on the two-fold standard that was crystallized by the Supreme Court in *Gulf Oil Corp. v. Gilbert*.¹⁶ It was there asserted that, given at least two forums where the defendant is amenable to process,¹⁷ plaintiff's selection of forum will not be respected if the defendant has shown that the effect of such choice is to burden or oppress him to an extent not necessary for plaintiff's pursuit of a remedy—but matters of public convenience are also to be considered in determining applicability of the doctrine.¹⁸ It follows that the standard adopted by a court as a basis for invoking the doctrine will determine upon which party will fall the burden of establishing the propriety or impropriety of the forum: Under the majority rule the defendant normally has the burden of showing cause why jurisdiction should not be exercised,¹⁹ *i.e.*, that he is being unduly harassed or inconvenienced. In New York, where emphasis is placed on the convenience to the public, the plaintiff must carry the burden of persuasion to estab-

allowing the court to accept jurisdiction if the plaintiff can establish special circumstances showing why jurisdiction should be invoked. See *Bata v. Bata*, 304 N.Y. 51, 105 N.E.2d 623 (1952); *Murnan v. Wabash Ry.*, 222 App. Div. 833, 226 N.Y. Supp. 393 (2d Dep't 1928); *Salomon v. Union Pac. R.R.*, 197 Misc. 272, 94 N.Y.S.2d 429 (City Ct. 1949).

16. 330 U.S. 501 (1947).

17. Although recent cases fail to disclose an occasion where a dismissal has resulted in a case being permanently barred because of the running of the statute of limitations, this inherent danger lurks with every dismissal of an action by a state court. See *Price v. Atchison, T. & S.F. Ry.*, 42 Cal. 2d 577, 268 P.2d 457, *cert. denied*, 348 U.S. 839 (1954) (plaintiff's remedy on one issue was preserved only by defendant's agreement to be sued); *Bagaroz v. Meneghini*, 8 Ill. App. 2d 285, 131 N.E.2d 792 (1955) (court refused to dismiss action where the only other available jurisdiction was in Italy).

18. Matters affecting the private convenience of the parties were listed as: availability of witnesses and documents, power of the court to obtain service of process, increased costs resulting from litigation away from the natural forum, possibility of acquiring a view of premises, and ability of the court to enforce any judgment. As stated by the Court, unless the balance of these factors weighs heavily in defendant's favor, plaintiff's choice of forum should not be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Elements relating to public convenience included: administration of a congested court schedule, the burden of increased taxes and additional jury duty on the local populace, the additional workload imposed on judges, the inconvenience of applying the law of a foreign jurisdiction, and the desirability of avoiding conflicts of laws by having local controversies decided in local courts according to the *lex loci*. *Ibid.* See also Blair, *supra* note 2, at 23, 34.

Other factors that courts have used in deciding whether or not to decline jurisdiction are: considerations of substantial justice and equity (*Thistle v. Halstead*, 95 N.H. 87, 58 A.2d 503 (1948)), and the inextricable union of right and remedy under a foreign statute (see Blair, *supra* note 2, at 27-29).

19. See *Heine v. New York Life Ins. Co.*, 45 F.2d 426 (D. Ore. 1930) (court dismissed suit between German citizens and a New York corporation when defendant established the great cost and inconvenience involved in transporting numerous business records across country); *Kantakevich v. Delaware, L. & W.R.R.*, 18 N.J. Misc. 77, 10 A.2d 651 (Cir. Ct. 1940) (court refused to dismiss action when defendant was unable to show that litigation in New Jersey caused him greater inconvenience than it would in the "more convenient" forum). See also *Cox v. Pennsylvania R.R.*, 72 F. Supp. 278 (S.D.N.Y. 1947); *Mooney v. Denver & R.G.W.R.R.*, 118 Utah 307, 221 P.2d 628 (1950).

lish affirmatively the propriety of the forum before a court will exercise its jurisdiction.²⁰

The application of forum non conveniens in the principal case represents the first instance in which a Missouri court has applied the doctrine.²¹ This marks a retreat from the former position taken by the court in *State ex rel. Southern Ry. v. Mayfield*,²² where the doctrine as applied to FELA actions²³ was held to be contrary to state policy toward its citizens, resident or nonresident, and hence violative of the Constitution.²⁴ The utilization of the doctrine in the instant case also constitutes the only known example outside New York where the basic standard for its application was the public factor of convenience to the court.²⁵ However, considering that the court stated the real parties in interest were plaintiff's attorney and the defendant on one side and defendant's insurer on the other,²⁶ it is not clear whether the standard employed by the court was intended to establish a precedent that, in cases by nonresidents on a foreign cause of action, the plaintiff will have the burden of showing why the court should exercise its conceded jurisdiction.

20. See *De La Bouillierie v. De Vienne*, 300 N.Y. 60, 89 N.E.2d 15 (1949); *Langfelder v. Universal Laboratories, Inc.*, 293 N.Y. 200, 56 N.E.2d 550 (1944); Annot., 48 A.L.R. 2d 800, 831 (1956).

A motion to dismiss the action on the ground of forum non conveniens may be raised by the court sua sponte. *Burdick v. Freeman*, 120 N.Y. 420, 24 N.E. 949 (1890) (dictum); *Waisikoski v. Philadelphia & R. Coal & Iron Co.*, 173 App. Div. 538, 159 N.Y. Supp. 906 (1916) (dictum); *Collard v. Beach*, 81 App. Div. 582, 81 N.Y. Supp. 619 (1903) (dictum). Although the better rule is that a motion to decline jurisdiction should be seasonably made, some courts have allowed a plea of forum non conveniens to be interposed after the trial has commenced, and in a few instances the motion has been raised successfully for the first time on appeal. See cases in Annot., 48 A.L.R.2d 800, 821-23 (1956); Annot., 32 A.L.R. 6, 78-80 (1924); *Barrett*, *supra* note 4, at 418.

21. 292 S.W.2d at 591.

Leading Missouri cases apparently rejecting the principle of forum non conveniens were distinguished in the *Elliott* case either on the ground that the defendant parties in those cases had some nexus with Missouri and its courts, at least for purposes of the suit, or that the court did not actually apply the maxim of forum non conveniens but spoke of "comity" and about fraud in the procurement of service of process. *Ibid.*

22. 362 Mo. 101, 240 S.W.2d 106, *cert. denied*, 342 U.S. 871 (1951). This case, the first decision in Missouri actually employing the phrase forum non conveniens, was distinguished by the principal case on the ground of state policy; i.e., since Missouri allowed its own citizens to bring actions under FELA, this privilege could not constitutionally be denied to citizens of foreign states. See note 12 *supra*.

23. See note 12 *supra*.

Cases which have applied the ruling of the Supreme Court and held that actions brought in pursuance of FELA may be dismissed under forum non conveniens include: *Price v. Atchison, T. & S.F. Ry.*, 142 Cal. 2d 577, 268 P.2d 457, *cert. denied*, 348 U.S. 839 (1954); *Johnson v. Chicago, B. & Q.R.R.*, 243 Minn. 53, 66 N.W.2d 763 (1954); *St. Louis-S.F. Ry. v. Superior Ct.*, 276 P.2d 773 (Okla. 1954). See also *Mooney v. Denver R.G.W.R.R.*, 118 Utah 307, 221 P.2d 628 (1950).

24. 362 Mo. at 107-09, 240 S.W.2d at 108-09. See also note 12 *supra*.

25. For a summary of New York's policy regarding forum non conveniens, see Annot., 48 A.L.R.2d 800, 831-36 (1956).

26. 292 S.W.2d at 594.

Having established that the principal case has added Missouri courts to the growing list of jurisdictions applying the doctrine of forum non conveniens as a limitation on forum-shopping, the only remaining consideration is the propriety of using a liberal interpretation of the instant case as a model for applying the doctrine in future litigation involving transitory tort actions. As mentioned previously, all the states, save one, that apply the doctrine do so generally as a method for promoting convenience to the parties rather than primarily as a device for judicial selectivity.²⁷ The immediate effect of using one standard in preference to the other is merely to determine which party shall have the burden of showing whether the court should or should not exercise jurisdiction. It is believed, however, that differentiating in favor of the New York public convenience standard produces the ultimate result of reducing possible uncertainty as to when the doctrine will be applied,²⁸ and provides a more consistent and more efficient dissemination of justice without accompanying prejudice to the interest of the litigating parties. The utilization of the public convenience standard will encompass not only all cases that would be included by an application of the private interests standard, but will also cover situations such as the principal case that otherwise might escape the discretionary power of the court and cause both unnecessary expense and prolonged delay in judicial administration.

CRIMINAL LAW—"TAINTED TESTIMONY" AS BASIS FOR AWARD OF NEW TRIAL

Mesarosh v. United States, 352 U.S. 1 (1956)

Shortly before the Supreme Court was to review petitioners' convictions for conspiracy to violate the Smith Act,¹ the Solicitor General informed the Court that his office had recently received information that one of the government witnesses, a paid informer, had given highly dubious testimony² in other proceedings concerning matters

27. See text supported by notes 13, 16-18 *supra*.

28. Uncertainty regarding the applicability of forum non conveniens in any particular suit has been one of the primary objections to extension of the doctrine. See Dainow, *supra* note 2, at 888-89. This uncertainty is lessened, if not eliminated, however, by the establishment of a uniform policy to decline jurisdiction on forum non conveniens unless special circumstances warranting deviation from this policy are presented to the court.

1. 18 U.S.C. § 2385 (1952) provides that anyone who knowingly advocates or actively promotes the violent overthrow of the United States government shall be subject to fine or imprisonment, or both, and shall be ineligible for government employment for five years following conviction.

2. All but one of the other proceedings occurred subsequently to the trial of petitioners. The witness in the principal case was said to have (1) testified before the Senate Permanent Subcommittee on Investigations that one Louis Bortz had been delegated the job of assassinating Senator Joseph McCarthy; (2) filed a petition in a state court to set aside a previous plea of guilty to charges