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Conflicts -- Forum Non Conveniens in North Carolina

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judgment. Indeed, the litigation was too far advanced to warrant any constructive interference, either to find some injury that required protection or to send the case back to the state courts where it, perhaps, belonged from the start. The court should have considered the indispensability question waived as the Federal Rules clearly provide.[64]

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Conflicts—Forum Non Conveniens in North Carolina

The plaintiff with a transitory cause of action[1] has available a wide selection of forums for suit, limited only by considerations of obtaining service of process.[2] Hence, a defendant often finds himself fortuitously subjected to suit in a forum highly inappropriate for the conduct of his defense and without legitimate counter-balancing advantage to the plaintiff. To combat this unnecessary and oppressive burden in particular cases, courts and legislatures have devised various means by which the plaintiff is precluded from prosecuting his suit within certain inconvenient forums.[3] The doc-

[64] The Supreme Court has granted certiorari, 35 U.S.L. WEEK 3303 (U.S. Feb. 28, 1967) (no. 806).

[1] "Actions are transitory when the transactions on which they are based might take place anywhere, and are local when they could not occur except in some particular place." Brady v. Brady, 161 N.C. 325, 326, 77 S.E. 235, 236 (1913); Bunting v. Henderson, 220 N.C. 194, 16 S.E.2d 836 (1941). "[B]ecause of the history and forms of the common law, there are certain actions which are safely brought only in a particular locality. These are called local actions, and all others are transitory." Currie, *The Constitution and the Transitory Cause of Action,* 73 HARV. L. REV. 36, 66 (1959).

[2] In transitory actions the defendant may be sued in any jurisdiction where he may be found. McDonald v. MacArthur Bros. Co., 154 N.C. 122, 69 S.E. 832 (1910). Common law venue rules were designed to obtain jurisdiction over evasive defendants. See generally Foster, *Place of Trial in Civil Actions,* 43 HARV. L. REV. 1217 (1930). Note recent expansion of jurisdiction over defendants. *E.g.,* International Shoe Co. v. Washington, 326 U.S. 310 (1945); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[3] Congress has enacted a statute, 28 U.S.C. § 1404(a) (1964), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See generally Comment, 8 STAN. L. REV. 388 (1956), for a discussion of the statute's effect and scope, as well as references to numerous other periodical comments. As to actions in sister states to enjoin the plaintiff from proceeding in the inappropriate forum, see generally Messner, *The Jurisdiction of a Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial*

trine of *forum non conveniens* has been one of the most successful methods of affording this relief for defendants.[4]

The doctrine of *forum non conveniens* appears to have been first enunciated in the Scottish courts,[5] and was practiced occasionally in American courts during the 19th century.[6] The doctrine allows the trial court discretionary power to decline the hearing of a transitory cause of action if the forum is inappropriate for the trial.[7] However, it is not applicable unless there are at least two forums available to the plaintiff, the doctrine then providing the criterion for the choice between them.[8]

General application of *forum non conveniens* in state courts has not taken place until recent years.[9] Slow development of the doctrine

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Limits of the State, 14 MINN. L. REV. 494, 495-506 (1930); Comment, 29 U. CHI. L. REV. 740 (1962); Note, 27 IOWA L. REV. 76 (1941). The commerce clause of the U.S. Constitution has been used to restrain the plaintiff's choice of forum. See, *e.g.*, Denver & R.G.W.R.R. v. Terte, 284 U.S. 284 (1932); Davis v. Farmers' Co-op. Co., 262 U.S. 312 (1923). See generally Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935) [hereinafter cited as Dainow]; Comment, 46 COLUM. L. REV. 643 (1946).

[4] See generally GOODRICH, CONFLICT OF LAWS 15 (4th ed. 1964); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947) [hereinafter cited as Barrett]; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Comment, 42 CALIF. L. REV. 690 (1954); Comment, 29 U. CHI. L. REV. 740 (1962); Comment, 1964 U. ILL. L.F. 646.

[5] See, *e.g.*, La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs français," [1925] SESS. CAS. 332 (Scot. 2d Div.), *aff'd*, [1926] Ses. Cas. 13 (H.L.), where the lower court discusses fully the development of *forum non conveniens* in Scotland; Brown v. Cartwright, 20 Scot. L.R. 818 (1883).

[6] See, *e.g.*, Pierce v. Equitable Life Assur. Soc'y, 145 Mass. 56, 12 N.E. 858 (1887); Gardner v. Thomas, 14 Johns. 134, 7 Am. Dec. 445 (N.Y. 1817); Morris v. Missouri Pac. Ry., 78 Tex. 17, 14 S.W. 228 (1890).

[7] Application of the doctrine has been more narrowly restricted in contract actions than tort due in part to the more consistent rules of damages in contract actions among jurisdictions. See Rhodes v. Barnett, 117 F. Supp. 312, 316 (S.D.N.Y. 1953); Anderson v. Delaware, L. & W.R.R., 18 N.J. Misc. 153, 11 A.2d 607 (Cir. Ct. 1940). In admiralty the doctrine is of long standing. See Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950). Where problems of service of process or the statute of limitations will be confronted by plaintiff in the foreign forum, state courts often condition the dismissal on defendants acceptance of service of process or waiver of the statute of limitations bar. See Wendel v. Hoffman, 259 App. Div. 732, 18 N.Y.S.2d 96 (1940). "While the plaintiff ordinarily controls choice of the forum, a court does not exercise jurisdiction if it is a seriously inappropriate forum for the trial of the action so long as an appropriate forum is available to the plaintiff." RESTATEMENT (SECOND), CONFLICT OF LAWS § 117(e) (Tent. Draft No. 4, 1957).

[8] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).

[9] In 1947, Barrett was able to state that the doctrine was accepted "in

is in part attributable to an interpretation of the privileges and immunities clause of Article IV of the United States Constitution[10] that would prohibit states from declining jurisdiction over cases where nonresidents are parties.[11] The Supreme Court has never spoken directly on point,[12] but recent widespread acceptance of the

barely half a dozen states." Barrett 389. Whereas, Trautman in 1960 stated that the Washington Supreme Court by recently rejecting the doctrine had placed itself in the minority. Trautman, *Forum Non Conveniens in Washington—A Dead Issue?*, 35 WASH. L. REV. 88, 93 (1960) [hereinafter cited as Trautman].

States accepting *forum non conveniens* or having indicated approval of the doctrine are: *Arkansas,* Running v. Southwest Freight Lines, 227 Ark. 839, 303 S.W.2d 578 (1957); *California,* Price v. Atchison, T. & S.F. Ry., 42 Cal. 2d 577, 268 P.2d 457 (1954); *Delaware,* Dietrich v. Texas Nat'l Petroleum Co., 193 A.2d 579 (Del. Super. Ct. 1963); *District of Columbia,* Byrd v. Southern Ry., 203 A.2d 37 (D.C. Ct. App. 1964); *Florida,* Atlantic Coast Line R.R. v. Cameron, 190 So. 2d 34 (Fla. Dist. Ct. App. 1966); *Illinois,* People *ex rel.* Chesapeake & O. Ry. v. Donovan, 30 Ill. 2d 178, 195 N.E.2d 634 (1964); *Indiana,* Hartunion v. Wolflick, 125 Ind. App. 98, 122 N.E.2d 622 (1954); *Iowa,* Bradbury v. Chicago, R.I. & P. Ry., 149 Iowa 51, 128 N.W. 1 (1910); *Kansas,* Gonzales v. Atchison, T. & S.F. Ry., 189 Kan. 689, 371 P.2d 193 (1962); *Louisiana,* Union City Transfer v. Fields, 199 So. 206 (La. Ct. App. 1940); *Maine,* Foss v. Richards, 126 Me. 419, 139 Atl. 313 (1927); *Maryland,* Texaco, Inc., v. Vanden Bosche, 242 Md. 334, 219 A.2d 80 (1966); *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 & Ref. Co., 194 Miss. 194, 11 So. 2d 820 (1943); *Missouri,* Loftus v. Lee, 308 S.W.2d 654 (Mo. 1958); *New Hampshire,* Jackson & Sons v. Lumbermen's Mut. Cas. Co., 86 N.H. 341, 168 Atl. 895 (1933); *New Jersey,* Wangler v. Harvey, 41 N.J. 277, 196 A.2d 513 (1963); *New York,* De La Bouillerie v. DeVienne, 300 N.Y. 60, 89 N.E.2d 15 (1949); *Oklahoma,* St. Louis-San Francisco Ry. v. Superior Court, 290 P.2d 118 (Okla. 1953); *Oregon,* Horner v. Pleasant Creek Mining Corp., 165 Ore. 683, 107 P.2d 989 (1940); *Pennsylvania,* Plum v. Tampax, Inc., 399 Pa. 553, 160 A.2d 549 (1960); *Texas,* Flaiz v. Moore, 359 S.W.2d 872 (Tex. Sup. Ct. 1962); *Utah,* Mooney v. Denver & R.G.W.R.R., 118 Utah 307, 221 P.2d 628 (1950); *Vermont,* Wellman v. Mead, 93 Vt. 322, 107 Atl. 396 (1919); *Wisconsin,* Lau v. Chicago & N.W. Ry., 14 Wis. 2d 329, 111 N.W.2d 158 (1961).

[10] U.S. CONST. art. IV, § 2, cl. 1. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

[11] This interpretation seems to have originated from the early case of Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823), where Justice Washington by dictum concluded that access to a state court is a fundamental right protected by the clause. Succeeding cases seem to have approved the dictum. See, *e.g.,* Miles v. Illinois Cent. R.R., 315 U.S. 698, 704 (1942); Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907).

[12] In applying *forum non conveniens,* several courts have taken the position that any such discrimination is based on residence not citizenship, thus not violating the constitutional clause. Robinson v. Oceanic Steam Nav. Co., 112 N.Y. 315, 19 N.E. 625 (1889); Loftus v. Pennsylvania Rd. Co., 107 Ohio St. 352, 140 N.E. 94 (1923); Central R.R. v. Georgia Co., 32 S.C.

doctrine in state forums indicates a present belief by the judiciary that the constitutional provision is not violated so long as there is no arbitrary denial of forum access to noncitizens.

The application of *forum non conveniens* in the federal courts was conclusively sanctioned in 1947 by the Supreme Court in *Gulf Oil Corp. v. Gilbert.*[13] The Court affirmed the dismissal by the District Court for the Southern District of New York of suit brought by a Virginia resident for damages against a Pennsylvania corporation for a tortious act committed in Virginia. The Court spelled out certain factors, not exclusive, to be considered in the denial or grant of this relief. They included factors of public interest such as administrative difficulties and burdens of jury duty, as well as the private interests of the litigant involved, such as access to sources of proof and availability of witnesses.[14] The Court noted: "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[15]

Following the decision in *Gulf Oil Corporation,* Congress enacted a statute authorizing federal courts to transfer a civil action to any other district where it might have been brought for the "convenience of parties and witnesses, in the interest of justice."[16] This statute has substantially reduced the need for the doctrine of *forum non conveniens* in federal courts.[17]

Decisions in North Carolina either referring to or applying the principle of *forum non conveniens* are few. Various pronouncements of the court have confirmed the right of non-citizens to sue in North Carolina courts, citing the privilege and immunity clause of the Constitution.[18] These cases have been judicially interpreted else-

319, 11 S.E. 192 (1890). This reasoning appears to have been accepted by the Supreme Court in Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[13] 330 U.S. 501 (1947).

[14] For a thorough discussion of various factors considered by courts see Annot., 90 A.L.R.2d 1109, 1112 (1963); Annot., 48 A.L.R.2d 800, 814 (1956).

[15] 330 U.S. at 507.

[16] 28 U.S.C. § 1404(a) (1964). See note 3 *supra.* In Norwood v. Kirkpatrick, 349 U.S. 29 (1955), the Court noted that since under the statute transfer, not dismissal, resulted, a lesser showing of inappropriateness was necessary than that required by *forum non conveniens.*

[17] The doctrine may still be applicable where international parties are involved. Mobil Tankers Co., S.A. v. Mene Grand Oil Co., 236 F. Supp. 362 (D. Del. 1964).

[18] *E.g.,* Howle v. Twin State Express, Inc., 237 N.C. 667, 75 S.E.2d 732

where as placing North Carolina in a group of jurisdictions rejecting *forum non conveniens*.[19] This interpretation is questionable in that the court in these decisions faced solely the issue of a non-citizen's access to North Carolina courts.

Also inconsistent with rejection of *forum non conveniens* was North Carolina's general application of the corporation internal affairs rule.[20] Under this rule the court refused to interfere with the internal management of business matters of foreign corporations, thereby referring the plaintiff to the foreign forum.[21] However, the North Carolina legislature passed a statute in 1955 prohibiting state courts from dismissing actions solely because they involve the internal affairs of a foreign corporation.[22] The legislature recognized the courts' discretion to dismiss the action but directed that other factors such as convenience of the parties and ability to grant adequate relief be considered by the court. The authors of the statute commented:

> While the doctrine of nonintervention in the internal affairs of a foreign corporation is still frequently asserted, the courts have increasingly taken jurisdiction in cases which that doctrine would seem to deny. At this date it is believed that a test more nearly approaching 'forum non-conveniens' should govern the court's

(1953); McDonald v. MacArthur Bros. Co., 154 N.C. 122, 69 S.E. 832 (1910).

[19] Barrett 388 n.40; Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method,* 1960 DUKE L.J. 1, 9 n.28; Trautman 94 n.22.

[20] See Reid v. Norfolk Southern R.R., 162 N.C. 355, 78 S.E. 306 (1913); Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906); Howard v. The Mutual Reserve Fund Life Ass'n, 125 N.C. 49, 34 S.E. 199 (1899); *cf.* Belk v. Belk's Dep't Store, Inc., 250 N.C. 99, 108 S.E.2d 131 (1959).

[21] The internal affairs rule has now been essentially absorbed into the doctrine of *forum non conveniens* in most jurisdictions. See Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518 (1947); see generally Note, *Forum Non Conveniens as a Substitute for the Internal Affairs Rule,* 58 COLUM. L. REV. 234 (1958).

[22] N.C. GEN. STAT. § 55-133(a) (1965), which provides:

> No action in the courts of this State shall be dismissed solely on the ground that it involves the internal affairs of a foreign corporation but the court may in its discretion dismiss such an action if it appears that *more adequate relief can be granted* or that the *convenience of the parties would be better served* by an action brought in the jurisdiction of its incorporation or in the jurisdiction where the corporation has its executive or managerial headquarters or, because of the circumstances, in some other jurisdiction.

(Emphasis added.)

decision and that a statute making that apparent would represent a sound innovation.[23]

In 1949, the legislature enacted a statute specifically granting North Carolina courts discretion to dismiss any civil action over which such court has jurisdiction for the convenience of parties and witnesses and in the interest of justice, provided that the cause of action arose out of the state and both the plaintiff and defendant are nonresidents.[24] The question remains open as to whether the statute will preclude the dismissal of actions where one or both of the parties are residents, or the cause of action arose within the state. When faced with the issue our court may well interpret the statute as limiting rather than enabling, thereby holding that lower courts are prohibited from dismissing cases because of inconvenient forum unless the prerequisites specified in the statute are met. This would be an unfortunate though quite legitimate interpretation.

"For the convenience of parties and witnesses and in the interest of justice,"[25] trial courts should retain the discretion to dismiss actions brought before the inappropriate forum. To view N.C. GEN. STAT. § 1-87.1 (1953), as an enabling statute embodying the principle of *forum non conveniens* for use in the more obviously appropriate circumstances would be consistent with efficient administration of justice and the general purpose of the statute.

The North Carolina Supreme Court has recognized the right of lower courts to dismiss actions over which they have jurisdiction in numerous instances by application of the internal affairs rule.[26] Many of these cases involved residents as parties.[27] Likewise, the legislature has recognized this same discretion of lower courts by

[23] Belk v. Belk's Dep't Store, Inc., 250 N.C. 99, 105, 108 S.E.2d 131, 136 (1959).

[24] N.C. GEN. STAT. § 1-87.1 (1953), which provides:

For the convenience of parties and witnesses and in the interest of justice, any judge of any court in this State may dismiss without prejudice any civil action over which such court has jurisdiction if the court shall find that:

(1) The cause of action arose out of the State, and

(2) The defendant is a nonresident of this State, and

(3) The plaintiff is a nonresident of this State or the deceased person in behalf of whose estate the action has been instituted was at the time of his death a nonresident of this State.

[25] *Ibid.*

[26] See note 20 *supra* and accompanying text.

[27] Reid v. Norfolk Southern R.R., 162 N.C. 355, 78 S.E. 306 (1913); Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906); Howard v. The Mutual Reserve Fund Life Ass'n, 125 N.C. 49, 34 S.E. 199 (1899).

its enactment of N.C. GEN. STAT. § 55-133 (1965), which acknowledged the courts' practice in corporate affairs cases, directing only that other factors be taken into consideration in its application. Note that N.C. GEN. STAT. § 55-133 (1965) was enacted *later* in time than N.C. GEN. STAT. § 1-87.1 (1953), arguably signifying that the legislature did not intend to limit the court's right to dismiss an action over which it has jurisdiction. Therefore, to recognize this same discretion to dismiss an action not prescribed in N.C. GEN. STAT. § 1-87.1 (1953), on the basis of inconvenient forum would have ample precedent by the courts' application of the internal affairs rule.

To limit the doctrine of *forum non conveniens* to the prerequisites of N.C. GEN. STAT. § 1-87.1 (1953) may be unfavorably discriminatory to residents. Suppose, for example, a Florida resident brings an action in North Carolina against a North Carolina corporation doing substantial business in Florida for a tortious act committed in Florida. Assume that due to difficulties of evidence the corporation can present a successful defense only in the Florida forum. Under a literal interpretation of N.C. GEN. STAT. § 1-87.1 (1953), the corporation will be forced to defend in the North Carolina court.[28] However, if the defendant were a Virginia corporation the court could dismiss the action, thereby encouraging a hearing in the more convenient forum.

Jurisdictions that will dismiss actions wherein a resident is a party, by application of the doctrine of *forum non conveniens,* are few indeed.[29] Without question these factors weigh heavily in favor of retaining the action within the forum. The North Carolina statute reflects an enlightened policy in its adoption of the principles of *forum non conveniens* for actions meeting the prescribed conditions. Nevertheless, North Carolina can only enhance its reputation for efficient administration of justice by allowing its lower courts

[28] This assumes that North Carolina will consider the act of incorporation in the particular case within the state as constituting legal residence. Where a domestic corporation is doing nation-wide business, it would not be uncommon for its legal residence to be a particularly unattractive forum for various suits.

[29] Excluding instances where the internal affairs rule was applicable, research revealed only four jurisdictions within the United States having ruled on point. Winsor v. United Air Lines, Inc., 154 A.2d 561 (Del. Super. Ct. 1958); Giseburt v. Chicago, B. & Q.R.R., 45 Ill. App. 2d 262, 195 N.E.2d 746 (1964); Gonzales v. Atchison, T. & S.F. Ry., 189 Kan. 689, 371 P.2d 193 (1962); Gore v. United States Steel Corp., 15 N.J. 301, 104 A.2d 670, *cert. denied,* 348 U.S. 861 (1954).

to exercise discretion beyond that specified by statute in the disposition of actions brought before an inappropriate forum. The court should be free to relieve a harassed defendant and to encourage litigation in a forum better suited to a just result.

GERALD M. MAYO

Constitutional Law—First Amendment Protection of the Right to Demonstrate—the "New" Limitations

Petitioners in *Adderley v. Florida*[1] were among a group of students engaged in integration efforts in Leon County, Florida. On the day following the arrest of some of their fellows, approximately two hundred students including the thirty-two petitioners marched to the Leon County jail. There they stood and sat upon the jail premises, dancing, singing and clapping. In so doing they partially obstructed a jail entrance and a jail driveway used by the sheriff and his officers to transport prisoners, and by tradesmen servicing the jail but not generally by the public. The sheriff, after notifying the demonstrators that he was the legal custodian of the jail, ordered them to leave or be arrested for trespass. Many left, but 107 remained and were arrested. This included petitioners, who were convicted of a violation of a Florida trespass statute.[2] After the Florida appellate court denied rehearing,[3] the Supreme Court granted certiorari.[4] Upon hearing, a five justice majority determined that the convictions should be affirmed. The opinion, written by Justice Black, made it clear that otherwise valid state trespass convictions under properly worded statutes, nondiscriminatorily applied, will not be invalidated because the purpose of the trespass was the assertion of civil rights, and that in the case of trespass on public lands, the court will test the propriety of regulation, not by the purpose[5] of the trespass, but by the *use* to which the property is dedicated.

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[1] 385 U.S. 39 (1966).

[2] FLA. STAT. ANN. § 821.18 (1965). "Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specifically provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars."

[3] Adderley v. State, 175 So. 2d 249 (Fla. 1965) (per curiam).

[4] Adderley v. Florida, 382 U.S. 1023 (1966).

[5] *I.e.* "To petition . . . for redress of grievances," U.S. CONST. amend. I.