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out that these same items could be purchased in a drug store by the same methods and that even in drugstores that do not employ the self-service method, the person that dispenses the merchandise is often an inexperienced clerk. This conflict is due to defective pharmacy laws that do not clearly define what may or may not be sold outside a drug store.¹⁴

In the present case, the majority failed to consider the effect on the purchaser when he buys patent medicines in a supermarket. The mere presence of the pharmacist in the drugstore promotes the confidence of the purchaser in the products which he selects. The public knows of the pharmacist's training and experience and may feel assured that the product he is buying is reliable. Furthermore, the purchaser may question and procure advice from a pharmacist which he cannot get from a super-market cashier. Had the court considered these factors and avoided the issue of self-service per se, it would have been able to reach the same result while effectively drawing a *material* distinction between super-market and drugstore sales.

Gary Sunshine

Forum Non Conveniens Applied to Suit Under FELA

"Generally speaking, forum non conveniens deals with the discretionary power of the court to decline to exercise a possessed jurisdiction whenever, because of varying factors, it appears that the controversy may be more suitably or conveniently tried elsewhere." Having thus defined forum non conveniens, the Supreme Court of the State of Illinois in *Cotton v. Louisville & Nashville R. Co.*¹ settled that State's judicial position by accepting the doctrine, and went on to review its application to suits maintained under the Federal Employer's Liability Act. The plaintiff, a Kentucky resident who had been injured in the defendant's

14. In New York, there is a bill presently before the legislature (N.Y. State Pharmacist, Jan., 1959, p. 11; Drug Topics, Feb. 2, 1959, p. 3), which would clarify this area, making it a misdemeanor for a manufacturer, wholesaler, or jobber to sell medicine to non-drug outlets. It also would prohibit self-service display of these items by restricting the sale to pharmacists and imposing on them the duty of acquainting the customer with the potentially toxic or habit-forming properties of the drug. The benefits of this bill seem obvious and it prompted the New York Times to write in an editorial on Monday, January 26, 1959:

In a time when some drug stores have been turned into glorified five-and-tens, when patent medicines are peddled on TV and dispensed in the supermarkets it is a good thing to work toward the restoration of safety and sanity in the sale and purchase of remedies. This bill is designed, primarily, to protect the public. It hopes to cut down "blind" buying. But in so doing it can also protect the pharmacist and give him a new dignity and responsibility.

1. 14 Ill.2d 144, 152 N.E.2d 385 (1958).

railroad yards in Kentucky, brought this suit under the Federal Employer's Liability Act in the City Court of E. St. Louis, Illinois. The defendant moved to dismiss the suit under the doctrine of forum non conveniens, asserting that he would present the testimony of eight witnesses to the accident and three doctors residing in Kentucky about 358 miles from the Illinois forum. The City Court denied the motion and the intermediate court affirmed granting leave to take further appeal. The Supreme Court, affirming, held that the doctrine of forum non conveniens may be applied to actions under the Federal Employer's Liability Act, but that it had not been an abuse of discretion in the instant case to deny dismissal.

The power of state courts to dismiss suits brought under the Federal Employer's Liability Act upon the ground of forum non conveniens has been the subject of a fluctuating evolution of judicial opinion.² Application of the doctrine to such suits was questionable primarily because of the supposed inconsistency with the broad venue privileges conferred on the plaintiff by that act,³ and an apprehension that jurisdiction would be denied solely because the suit was brought under a Federal Act. But in *Missouri ex rel. Southern Railway Co. v. Mayfield*⁴ the United States Supreme Court held that "state courts might deny access to its courts to persons seeking recovery under the Federal Employer's Liability Act if in similar cases the state for reasons of local policy denied resort to its courts and enforced its policy impartially." The *Mayfield* case thus freed the state to decide the availability of forum non conveniens according to its own law. Before Illinois, the doctrine had been adopted in New York⁵ and in several other states.⁶ In a number of others it has not yet been passed upon, or has been rejected.⁷

In Illinois as well as in most other jurisdictions the policy as to forum non conveniens questions is ordinarily to retain jurisdiction. "Unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed."⁸ A mere balance of convenience is not sufficient to grant the defendant's motion to dismiss the action. The underlying policy is that the plaintiff's freedom of choice should be carried out whenever possible, unless

2. See, Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); note, 1 BUFFALO L. REV. 21 (1951).

3. 45 U.S.C. §56.

4. 340 U.S. 1.

5. *Murnam v. Wabash R. Co.*, 246 N.Y. 244, 158 N.E. 508 (1927).

6. *Price v. Atchison T. & SF R. Co.*, 42 Cal.2d 577, 268 P.2d 457 (1954); *Vargas v. A.H. Bull S.S. Co.*, 25 N.J. 293, 135 A.2d 857 (1957); *Johnson v. Chicago B & Q. R. Co.*, —Minn.—, 66 N.W.2d 763 (1954); *St. Louis-San Francisco Ry. Co. v. Superior Court*, —Ok.—, 276 P.2d 773 (1950); *Mooney v. Denver & RG.R. Co.*, 118 Utah 307, 221 P.2d 628 (1950).

7. *Ex Parte State ex Rel. Southern R. Co.*, 254 Ala. 10, 47 S.2d 248 (1950); *Atlantic Coast Line R. Co. v. Wiggins* 77 Ga.App.756, 49 S.E.2d 909 (1948); *Missouri ex rel. Southern R. Co. v. Mayfield*, 362 Mo. 101 240 S.W.2d 106 (1951).

8. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946).

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serious inconvenience or injustice to the defendant will result.⁹ With the availability of modern transportation facilities, mileage differences are inconclusive.¹⁰ It has been held insufficient for the defendant merely to state that he has twenty witnesses to transport; he must also show the materiality of the evidence.¹¹ Transportation of witnesses has been held insufficient without a further showing because of the possible successful use of depositions.¹² On the other hand the plaintiff's need for able counsel has been held a sufficiently valid reason for bringing suit in a different jurisdiction.¹³ Despite the fact, pointed out in the dissent, that in Illinois more than 17% of all jury time, over a three month period, was spent on actions against railroads based upon injuries received in other states, the majority felt that plaintiff's selection of the forum constituted a sufficient basis for the retention of jurisdiction.¹⁴ The policy of Illinois has been to keep its courts open to residents and non-residents alike.¹⁵

In New York however, forum non conveniens tends to focus upon the convenience of the court rather than that of the parties. But when either the plaintiff or the defendant is a resident the court is bound to try the action.¹⁶ With respect to corporations the doctrine is controlled to a large extent by sections 224 and 225 of the General Corporation Law. Section 224 provides in effect that all residents or domestic corporations may maintain any action against a foreign corporation. Section 225 permits a foreign corporation or non-resident to maintain an action against a foreign corporation in four situations only, the broadest being the fourth, "[w]here a foreign corporation is doing business within the state." In the United States Supreme Court case, *Douglas v. New Haven R. Co.*,¹⁷ the Court in upholding section 225 stated, "There are manifest reasons for preferring residents in access to the often overcrowded courts both in convenience and in the fact that broadly speaking it is they who pay for the maintaining of the courts concerned." Under section 225 should the claim have no relation to business done in the state, it is discretionary with the court whether it should take jurisdiction of the claim.¹⁸ Furthermore, by a long line of authority in New York, the courts have refused in their discretion to entertain jurisdiction: (1) over a cause of action arising in a foreign state where both the plaintiff and defendant are non-residents,¹⁹ (2) where it would be futile to retain

9. *Naughton v. Penn. R. Co.*, 85 F.Supp. 761 (E. D. Penn 1949).

10. *Buchanan v. N.Y. Cent. R. Co.* 148 F.Supp. 732 (E.D. Penn 1957).

11. *Chicago Rock Is. & Pac. R. Co. v. Hughes Breeding Inc.*, 232 F.2d 584 (10 Cir. 1956).

12. *General Portland Cement Co. v. Perry*, 204 F.2d 316 (7 Cir. 1953).

13. *Mooney v. Denver & Rio Grande R. Co.*, *supra* note 4.

14. *Cotton v. Louisville & Nashville R. Co.*, *supra* note 1.

15. *James v. Grand Trunk West R. Co.*, 14 Ill.2d 356, 152 N.E.2d 858 (1958).

16. *Boullerie v. De Vienna*, 300 N.Y. 60, 89 N.E.2d 15 (1949).

17. *Douglas v. New Hampshire R. Co.*, 279 U.S. 377 (1929).

18. *Waischkowski v. Philad. & Reading Coal & Iron Co.*, 173 App.Div. 538, 159 N.Y.Supp. 906 (1916).

19. *Pietrarroia v. N.J. & H. R. C.* 197 N.Y. 434, 91 N.E. 120 (1910).

jurisdiction, even as to residents;²⁰ (3) to enforce or regulate the internal workings of a foreign corporation;²¹ (4) to entertain actions which relate directly to real property situated in a foreign state;²² (5) or to enforce foreign law in conflict with the state's own settled policy or adverse to principles of abstract justice.²³ Although the policy is against entertaining such suits, there is no absolute prohibition against them.²⁴ Whether a court of the state should take jurisdiction of a particular foreign claim is in the sound discretion of the court, and when there are exceptional or unusual circumstances jurisdiction will be retained.²⁵ When, however, there are no special circumstances shown the court will dismiss, notwithstanding the fact the suit is brought under a Federal act (the Jones Act).²⁶ The courts have found special circumstances and have retained jurisdiction where:²⁷ (1) there is a consolidation of two actions, one transitory, the other local; (2) the statute of limitations has run;²⁸ (3) personal jurisdiction could not be obtained elsewhere;²⁹ (4) the acts complained of have been performed partially in the state;³⁰ (5) or the action has been pending one year without objection until the close of the trial (laches).³¹

Recent New York cases, however, indicate a shift in emphasis, more weight being given to the convenience of the parties and less to an abstract convenience of the court. This shift is evidenced by a broader consideration of the special circumstances justifying retention of the action.³² There is also some indication that the United States District Court for the Southern District of New York wishes to free itself from the New York rule. Whereas in the *Gulf Oil* case the court embraced a more liberal policy and outwardly avoided the *Erie v. Tomkins* question, in *Shulman v. Compagnia Generale Transatlantique*,³³ the court employed forum non conveniens independently of the New York rule and stated: "There is substantial authority for the proposition that *Erie R. Co. v. Tomkins* does not bind the Federal Courts to follow state views on forum non conveniens."

Peter L. Curtis

20. *Raisor v. Chicago R. Co.* 215 Ill. 47, 74 N.E. 69, cited in 235 N.Y. 152, 139 N.E. 223 (1923).

21. *Marshal v. Sherman*, 148 N.Y. 9, 42 N.E. 419 (1895).

22. *Alger v. Alger*, 31 Hun. (N.Y.) 471 (1894).

23. *Louls v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

24. *Taylor v. Interstate Motor Freight System*, 309 N.Y. 633 (1956).

25. *Burdick v. Freeman*, 120 N.Y. 420, 24 N.E. 949 (1890).

26. *Seely v. Waterman S.S. Corp.*, 274 App.Div. 934, 83 N.Y.S.2d 502 (1948).

27. *White v. Boston & Maine R. Co.*, 28 App. Div. 482, 129 N.Y.S.2d 15 (1954).

28. *Wendel v. Hoffman*, 25 App. Div. 1084, 18 N.Y.S.2d 96 (1940).

29. *Tucatan v. Argumedo*, 92 Misc. 557, 157 N.Y.Supp. 219 (1915).

30. *Buonanno v. S. Pacif. Co.*, 121 Misc. 99, 205 N.Y.Supp. 79 (1923).

31. *Burdick v. Freeman*, 120 N.Y. 420, 24 N.E. 949 (1890).

32. See *Castanos v. Public Service Coordinated Transport*, 140 N.Y.S.2d 609 (1954); *Bata v. Bata*, 304 N.Y. 51, 105 N.E.2d 623 (1952); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946).

33. 152 F.Supp. 833 (S.D.N.Y. 1957).