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Conflict Of Laws—Forum Non Conveniens

Robert Thompson

been applied in actions brought under §13.[23] However, confusion has resulted from some lower court decisions which adopted the modern view where labor unions were sued in tort.[24]

The instant decision makes it clear that the statute only lessens the plaintiff's burden to the extent that he need not join and serve all the members of an association as parties defendant. Although the result here is unfortunate, in that it renders suit against a labor union a practical impossibility, it is not without merit. The majority probably felt that any change in the liability of unincorporated associations must be accomplished through legislation. In light of the express language of the statute and previous decisions[25] in which it has been interpreted, the present §13 does not suit that purpose.

III. Conflict of Laws

Forum Non Conveniens

The courts of New York have no power to decline jurisdiction in an action involving residents or domestic corporations.[1] However, in those cases in which neither the parties nor the cause is "related"[2] to the forum, *forum non conveniens* is applicable.[3] The doctrine is designed to protect the defendant in a civil action from suit in a place so inconvenient as to be oppressive,[4] and rests not upon a principle of jurisdiction, but one of convenience, neces-

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23. *Glauber v. Patoff*, 294 N. Y. 583, 63 N. E. 2d 181 (1945); *Havens v. Dodge*, 250 N. Y. 617, 166 N. E. 346 (1929); *McCabe v. Goodfellow*, 133 N. Y. 89, 30 N. E. 728 (1892).

24. *Tonelli v. Osman*, 186 Misc. 58, 54 N. Y. S. 2d 793 (Sup. Ct. 1945); *Lubliner v. Reinlib*, 184 Misc. 472, 50 N. Y. S. 2d 786 (Sup. Ct. 1944); *National Variety Artists, Inc., v. Mosconi*, 169 Misc. 982, 9 N. Y. S. 2d 498 (Sup. Ct. 1939); See note, 51 Yale L. J. 40, 47 (1941).

25. *Supra* n. 8.

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1. N. Y. Gen. Corp. Law § 224.

2. Goodrich, Conflict of Laws 23 (3rd ed. 1949).

3. In its operative area, *forum non conveniens* applies equally to actions at law, *Collard v. Beach*, 93 App. Div. 339, 87 N. Y. Supp. 884 (1st Dep't 1904); *Murnan v. Wabash Ry. Co.*, 246 N. Y. 244, 158 N. E. (1927); and equity, *Langfelder v. Universal Laboratories*, 293 N. Y. 200, 56 N. E. 550 (1944).

Surprisingly few states make any use of the doctrine. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 382 (1947).

4. *Logan v. Bk. of Scotland* [1906] K. B. 141. See generally, Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1 (1929).

sity and discretion.[5] Thus, although the balance of convenience must be strongly in favor of the defendant before the plaintiff's choice of forum will be disturbed,[6] where it appears that the action might better be tried elsewhere, the court may dismiss on that ground alone—the presence of jurisdiction as well as properly laid venue notwithstanding.[7]

No formula as to just what combination of factors renders a forum inconvenient has been established by the courts. However, in *Gulf Oil Corp. v. Gilbert*,[8] Justice Jackson enumerated several factual considerations that have since served as guideposts to the lower courts:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; possibility of view of premises, if view would be appropiate to the action; and all the other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.

In the 1951-1952 term, the New York Court of Appeals dealt with two actions involving the doctrine of *forum non conveniens*. (1) In *Bata v. Bata et al.*,[9] the plaintiffs were the widow and

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5. *Blaustein v. Pan Amer. Petroleum & Transp. Co.*, 174 Misc. 601, 659, 21 N. Y. S. 2d 651, 706 (Sup. Ct. 1940), and cases cited therein.

Because of the susceptability to abuse of any discretionary theory put into practice, it seems advisable that some limitations be (self) imposed by the courts, preferably in the form of prerequisites to the doctrine's applicability. Such a limitation was expressed in *Gulf Oil Co. v. Gilbert*, 330 U. S. 501, 507 (1946), the Supreme Court ruling,

> In all cases in which the doctrine . . . comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes a criteria for choice between them.

And as the corollary to this, the court in *Wilson v. Seas Shipping Co.*, 78 F. Supp. 464, 465 (E. D. Pa. 1948), held,

> In the instant case, since there is no basis for presupposition that the defendant is subject to suit in Alabama, this court cannot make any 'choice' between this forum and that of the State of Alabama.

Accord: Neal v. Penn. Ry. Co., 77 F. Supp. 423, 424 (S. D. N. Y. 1948); *Tivoli Realty Co. v. Paramount Pictures*, 89 F. Supp. 278, 280 (D. C. Del. 1950).

6. *Belair v. N. Y., N. H. & H. R. Co.*, 88 F. Supp. 572, 573 (S. D. N. Y. 1950). For the procedural niceties involved in raising the objection, see *Fifth & Walnut v. Loew's Inc.*, 76 F. Supp. 64, 67 (S. D. N. Y. 1948).

7. *Lattimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S. D. N. Y. 1950); *Hayes v. Chicago, R. I. & P. R. Co.*, 79 F. Supp. 821 (D. C. Minn. 1948).

8. 330 U. S. 501, 508 (1946).

9. 304 N. Y. 51, 105 N. E. 2d 623 (1952).

son of the deceased half-brother of the defendant. Decedent was a citizen and resident of Czechoslovakia until his death in 1932. Plaintiffs, currently citizens of Canada, obtained personal jurisdiction in New York over defendant, a Brazilian resident. An action was brought for a judicial determination that defendant held property of the plaintiffs in trust, and for an accounting thereof. The acts complained of had taken place at different times and in many countries.

Forum non conveniens provided one of the grounds for defendant's motion to dismiss. The Appellate Division affirmed the denial of the motion.[10] The defendant appealed, contending that the forum was inconvenient since: the laws of many countries would have to be applied; witnesses from foreign lands would have to be secured; the meagre assets of defendant in New York would ultimately force any judgment rendered in this state to remain unexecuted; and, in general, that a litigation of the case in New York would work a great hardship on the defendant. On the other hand, plaintiffs contended: that since the bulk of the assets were scattered all over the world there was no one appropriate forum; that there was valuable property in New York; that the inconveniences, etc., listed by the defendant would occur wherever the action was tried, being "inherent in the situation".

The Court of Appeals denied the defendant's motion, unanimously holding that although the suit might

> involve property, transactions, and laws almost entirely foreign to New York State . . .. Nevertheless, on the record before us, we cannot say that there was no basis at all for retaining jurisdiction here.

(2) In *Royal China, Inc. v. Regal China Corp.*,[11] the defendant, a New York corporation, was a stockholder of the plaintiff, an Ohio corporation. By an amendment of its charter, plaintiff created a prior right of purchase of, and a lien against, its outstanding shares of stock. Plaintiff's directors, by a resolution adopted pursuant to Ohio law, directed all stockholders to surrender their stock in exchange for certificates bearing legends referring to the new corporate rights. Defendant refused to so deliver, and plaintiff brought action in the State Supreme Court to compel surrender of the certificates. Defendant moved to dismiss, on the grounds that litigation of the issues before the court would involve the management of the *internal affairs of a*

10. 278 App. Div. 335, 100 N. Y. S. 2d 191 (1st Dep't 1950).

11. 304 N. Y. 309, 107 N. E. 2d 461 (1952).

foreign corporation. Defendant appealed from a denial of the motion.[12] However, the Appellate Division dismissed the plaintiff's complaint,[13] ruling that the issue of the validity or invalidity of the plaintiff corporation's act could more appropriately be determined in the courts of Ohio (the chartering State). Plaintiff appealed, alleging that defendant was not amenable to service in Ohio, and, apparently, could not be sued outside of New York State. Defendant continued to insist that a court in the State of incorporation constituted the only proper forum, at the same time declaring that it would not appear voluntarily in Ohio.

The Court of Appeals held that defendant's motion to dismiss should have been denied. The Court reasoned that *forum non conveniens*, and its adjunct, the *internal affairs rule*,[14] had been primarily designed for the benefit of a foreign corporation. Therefore, the availability of this objection to a resident defendant was dubious at best; especially inasmuch as the defendant here had made it clear that it would not voluntarily submit to an Ohio court's jurisdiction, and apparently could not be sued except in New York.

The *Bata* and *Royal China* cases present nothing completely novel insofar as the New York treatment of *forum non conveniens* is concerned. Perhaps the latter is notable in that the Court of Appeals' refusal to decline jurisdiction on these grounds was at least partially based upon the finding that there appeared to be

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12. 107 N. Y. S. 2d 901 (Sup. Ct. 1951).

13. 279 App. Div. 515, 110 N. Y. S. 2d 718 (1st Dep't 1952).

14. In its simplest terms the *Internal Affairs Rule* is that since a State possesses no general visitorial powers over a foreign corporation, its courts in their discretion will usually not interfere in the internal affairs and management of such corporation. FLETCHER, ENCY. OF CORPORATIONS §§ 8425-8429 (1933). For what constitutes internal affairs, see Anno., 155 A. L. R. 1226, 1238 (1945); FLETCHER, *op. cit.*, §§ 8425-8429.

The reasons advanced for declining jurisdiction under the *Rule* are closely analogous to those employed by a court in dealing with *Forum Non Conveniens. E.g.,*

(1) That the court lacks the power to make enforceable decrees. *Saurbrunn v. Hartford Life Ins. Co.*, 220 N. Y. 363, 115 N. E. 1001 (1917). Some writers suggest that the courts are overly modest concerning their powers in these situations. See Notes, 33 COL. L. REV. 492 (1933); 31 MICH. L. REV. 682 (1934).

(2) That adjudication in a State other than the one of incorporation would lead to diverse decisions and much confusion. *Nothiger v. Croon & Reynolds Corp.*, 266 App. Div. 299, 42 N. Y. S. 2d 103 (1st Dep't 1943), aff'd 293 N. Y. 682, 56 N. E. 2d 296 (1944): *Strassburger v. Singer Mfg. Corp.*, 263 App. Div. 518, 33 N. Y. S. 2d 424 (1st Dep't 1942).

(3) That it would be difficult or inappropriate to determine the applicable foreign law. *Langfelder v. Universal Laboratories*, 293 N. Y. 200, 56 N. E. 2d 550 (1944).

It is not surprising, therefore, to find the *Rule* characterized as but a facet of *forum non conveniens. Koster v. Amer. Lumbermen's Mut. Cas. Co.*, 330 U. S. 518 (1947); *Goldstein v. Lightner*, 266 App. Div. 352, 358, 42 N. Y. S. 2d 338, 339 (1st Dep't 1943), aff'd without opinion, 292 N. Y. 670, 56 N. E. 2d 98 (1944).

no other forum capable of hearing the issues. Under these circumstances, possibly the doctrine might better have been ruled inapplicable at the outset. At any rate, the decision in the *Royal China* case is at least apparently in accord with the federal cases[15] denying the exercise of a court's discretion in this regard in the absence of a showing of at least one other forum possessed with the power to make an adjudication on the merits.

Foreign Divorce Proceedings

Should the New York courts issue a temporary injunction against the maintenance of a foreign *ex parte* divorce proceeding by the migrant spouse in order that the *bona fides* of his claim to domicile might be tested in New York? This question has been twice posed to the Court of Appeals in as many years,[16] and was again answered in the affirmative in *Hammer v. Hammer.*[17]

Plaintiff wife and defendant husband were married in New York in 1913, and established the marital domicile within the State. In 1948, an action for separation was commenced by the wife in the State Supreme Court. The action was settled when the defendant agreed to the separation and to periodic payments for the wife's support. In 1951, the wife was constructively served as defendant in a Florida divorce action. Plaintiff wife, alleging that the defendant's Florida domicile was sham, moved for a prohibitory injunction *pendente lite,* to become final on the court's determination that the defendant's domicile had remained in New York. The Appellate Division reversed the denial of the motion by Special Term.[18] The Court of Appeals affirmed the Appellate Division, holding that inasmuch as plaintiff's complaint entitled her to a permanent injunction against the maintenance of the foreign *ex parte* divorce action, the Appellate Division had, in its discretion, power to issue the injunction *pendente lite.*

When acts are threatened which, if performed, would subject the plaintiff to irreparable damage, an injunction against the action will issue, whether it be local or foreign.[19] Irreparable

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15. *Supra* n. 5.

16. The identical point was raised in *Garvin v. Garvin,* 302 N. Y. 96, 96 N. E. 2d 721 (1951).

17. 303 N. Y. 481, 104 N. E. 2d 864 (1952); *motion for reargument denied,* 303 N. Y. 1008, 106 N. E. 2d 283 (1952).

18. 278 App. Div. 396, 940, 105 N. Y. S. 2d 812 (1st Dep't 1951).

19. RESTATEMENT, CONFLICT OF LAWS § 96 *Comment a.* As to the efficacy of such an injunction once issued, see Jacobs, *The Utility of Injunctions and Declaratory Judgments In Migratory Divorce,* 2 LAW AND CONTEMP. PROB. 370, 386-391 (1935). Comment, 39 YALE L. J. 719 (1930).