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# Civil Procedure - Venue - Forum Non-Conveniens

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CIVIL PROCEDURE—VENUE—FORUM NON CONVENIENS—Plaintiff, an Indiana corporation not authorized to do business in New York, brought an action in New York, aided by attachment, against Indiana residents on a contract that was made, was to be performed, and allegedly was breached in Indiana. On the basis of the doctrine of forum non conveniens the defendants moved to vacate the warrant of attachment and to dismiss the complaint. The lower court denied the motion. On appeal, *held*, reversed. Under the doctrine of forum non conveniens, the lower court should have exercised its discretion to

refuse to entertain the action. *Central Pub. Co. v. Wittman,* 128 N.Y.S. (2d) 769 (1954).

The doctrine of forum non conveniens is relatively new in American law, and though it has been said that all American courts have the inherent power to decline jurisdiction under the doctrine,[1] the courts have been slow to do so.[2] Although New York was one of the earliest states to accept forum non conveniens, and probably has applied the doctrine more than any other state,[3] the New York rule has been limited by certain peculiarities. In applying the doctrine the most immediate question seems to be: for whose convenience is it applied? The Scottish cases, in which the doctrine originated,[4] held that the test was injustice to the litigants, but New York had made the test one of inconvenience to the court.[5] This aspect of the New York rule has been adopted in other jurisdictions.[6] New York had also limited the doctrine of forum non conveniens to tort actions; until recently the New York courts did not have power to dismiss contract actions or other "commercial" actions, provided, of course, that the court had jurisdiction and was capable of enforcing the decree.[7] This dictinction between commercial and tort cases was strongly criticized[8] and was recently broken down in cases which indicate that New York is under-

[1] Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 COL. L. REV. 1 (1929); 32 A.L.R. 6 (1924); 87 A.L.R. 1425 (1933).

[2] Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 at 388 (1947). One of the obstacles to the acceptance of the doctrine was the dictum in an early federal case, Corfield v. Coryell, (D.C. Pa. 1823) 6 Fed. Cas. 546 at 552, which asserted that the right of access to the courts of a state is one of the privileges protected by Article IV of the United States Constitution. Later, other courts, notably New York, took the position that the discrimination was based on residence, not citizenship and this position was finally adopted by the U.S. Supreme Court in Douglas v. New York, N.H. & H. R. Co., 279 U.S. 377 at 387, 49 S.Ct. 355 (1929). Barrett, supra, at 389-395. Another reason attributed to the non-application of forum non conveniens by the United States courts was the fear of retaliation by other courts against citizens of the state applying the doctrine. GOODRICH, CONFLICT OF LAWS, 3d ed., 23 (1949). A bold expression of this retaliation can be found in Sielcken v. Sorenson, 111 N.J. Eq. 44 at 47, 161 A. 47 (1932).

[3] 34 VA. L. REV. 811 at 815 (1948).

[4] Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 at 386 (1947).

[5] Id. at 404-406; 34 VA. L. REV. 811 at 814 (1948). Hoes v. New York, N.H. & H. R. Co., 173 N.Y. 435 at 441, 66 N.E. 119 (1903); Reep v. Butcher, 176 Misc. 369, 27 N.Y.S. (2d) 330 (1941).

[6] Jackson & Sons v. Lumbermen's Mut. Casualty Co., 86 N.H. 341, 168 A. 895 (1933); Grovey v. Washington Nat. Ins. Co., 196 Ark. 697, 119 S.W. (2d) 503 (1938); Sielcken v. Sorenson, note 2 supra.

[7] Hutchinson v. Ward, 192 N.Y. 375, 85 N.E. 390 (1908); Wedemann v. U.S. Trust Co., 258 N.Y. 315 at 318, 179 N.E. 712 (1932). The distinction has been attributed to a desire to encourage business activities by not denying to non-citizens the use of New York courts. Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 at 405 (1947). But this distinction has not been applied to disputes concerning the internal affairs of a foreign corporation, where the doctrine of forum non conveniens has always been applied. 18 A.L.R. 1383 (1922); 89 A.L.R. 736 (1934).

[8] Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 COL. L. REV. 1 at 30-32 (1929).

going a complete re-formulation of its forum non conveniens doctrine. In *Rothstein v. Rothstein*[9] it was held that a court is not without discretion to decline jurisdiction of actions between nonresidents when the action is of a commercial character. If it is impractical or inconvenient for the court to act, it may decline to hear the case. A further crystallization of New York's new position was presented in the recent case of *Bata v. Bata*.[10] The court reiterated the view that the commercial-tort distinction was gone, but quoting from the leading United States Supreme Court case of *Gulf Oil Corp. v. Gilbert*,[11] the court asserted that a plaintiff's choice of forum should rarely be disturbed and then only if the balance is strongly in favor of the defendant. The court then went on to weigh not only the convenience of the court, but also the convenience of the parties. The *Bata* case presented three different changes in the New York rule: (1) it showed the elimination of the commercial-tort distinction; (2) it made convenience of the parties a factor; (3) and by adopting the language of the *Gulf Oil* case it seemed to have placed the burden of proof on the defendant, whereas the prior New York cases clearly implied that the burden was on the plaintiff to show why jurisdiction should be assumed.[12] In the principal case neither the plaintiff nor the defendant put forth any reasons for assertion of jurisdiction or decline of jurisdictions; thus, the burden of proof problem took on added importance. The use of the attachment procedure was ambiguous. On the one hand, it may have been the only means of obtaining a recovery, especially if the defendant were insolvent. On the other hand, it may have been merely a means of forcing the defendant into an inconvenient forum. The majority of the court seems to have reverted to the view that the burden is on the plaintiff, the defendant having no burden beyond showing the nonresidence of the parties and the fact that the cause of action arose outside the state. The dissenters, on the other hand, would refuse to disturb the plaintiff's choice of forum unless the defendant can offer compelling reasons for the change.[13] This divergence of views reflects two competing considerations: (1) the assurance to plaintiffs of every reasonable opportunity to recover for wrongs

[9] 272 App. Div. 26, 68 N.Y.S. (2d) 305 (1947), affd. 297 N.Y. 705, 77 N.E. (2d) 13 (1947).

[10] 304 N.Y. 51, 105 N.E. (2d) 623 (1952).

[11] 330 U.S. 501 at 508, 67 S.Ct. 839 (1947).

[12] Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 at 416 (1947). Although the courts do not discuss the problem in terms of burden of proof, it seems that those courts which emphasize convenience of the parties place the greater burden on the defendant while those courts that emphasize the convenience of the court place the greater burden on the plaintiff. Ibid.

[13] Principal case at 773. Factors that are likely to be asserted in this type of litigation include: (1) the accessibility to sources of proof; (2) whether an effective remedy is available only in the forum selected [Thistle v. Halstead, 95 N.H. 87, 58 A. (2d) 503 (1948)]; (3) whether the forum is capable of enforcing the plaintiff's right even if a decree is granted [Slater v. Mexican National R. Co., 194 U.S. 120, 24 S.Ct. 581 (1904)]; (4) the relative unfairness to the forum's own citizens by increased administrative expenses and delays; (5) the ease or difficulty of applying foreign law. See generally Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 COL. L. REV. 1 at 23-30 (1929).

done them, and (2) the protection of defendants from harassment by plaintiffs whose aim is to compel large settlements, to take advantage of larger verdicts usually rendered in a distant state, or to avail themselves of simplified procedures. Whether the burden of proof should rest upon plaintiff or defendant will thus depend upon which of the above considerations is deemed to be paramount.[14] Despite the majority view in the principal case, it cannot be said that the state of the law in New York is settled. The implications of the *Bata* case are clearly in harmony with the dissenters. A clear determination of the issue by the New York Court of Appeals would not only contribute to the edification of the lower courts, but would be of great benefit to prospective foreign litigants.

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[14] There has been a tendency in recent American decisions to consider both factors. See Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 at 408 (1947).