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FORUM NON CONVENIENS, A NEW FEDERAL DOCTRINE

In court battles, as in warfare, new weapons of attack tend to be neutralized by new defenses. State laws giving courts jurisdiction over non-residents in certain circumstances have resulted in increased maneuverability for plaintiffs by providing a wider choice of forum. To counter this advantage defendants have increasingly been allowed to rely on the doctrine of forum non conveniens to restrict the plaintiff to the appropriate state court. Both Congress and the judiciary have during the past few years evidenced a desire to bestow the doctrine upon the federal courts, and in two decisions of the past term the Supreme Court has approved dismissals on forum non conveniens grounds.

As with other legal labels, forum non conveniens means many things to many courts. In this discussion it will be used broadly to signify a discretionary power to decline the exercise of jurisdiction when the court is not an “appropriate” tribunal. For the elements that make a court “inappropriate,” it is necessary to turn to particular courts and individual cases.

The doctrine has reached its fullest development in England and Scotland. To the rule that a court having jurisdiction is under a duty to exercise it, the English courts have added the qualification that where the parties are aliens and the cause of action arises outside of the country such exercise may be declined. The absence of witnesses from the country, the necessity of applying the law of another nation, the inaccessibility of papers and records—each is evidence that the court of the plaintiff's choice is not appropriate. A mere balance of convenience and inconvenience will not move a British court to turn the plaintiff away, but the relative expense of defending in the court

1. Examples are statutes endowing courts with jurisdiction over non-resident motorists, non-resident individuals doing business within the state, and over debtors and partnerships when one joint debtor or partner is outside the territorial jurisdiction of the court. See Comment, 45 YALE L. J. 1100 (1936).
4. Dainow, supra note 3, at 881; Gibb, op. cit supra note 3, C. XVI; Gloag and Henderson, op. cit. supra note 3, at 22.
chosen may be of weight. Though the doctrine is designed to protect the defendant, the plaintiff's choice of court will not be disturbed unless it is shown that the tribunal is inconvenient to the point of oppression, and, in addition, that there is another court available to the parties.

I

FORUM NON CONVENIENS IN THE STATE COURTS

The growth of forum non conveniens in this country was long hindered by decisions indicating that state courts were required by the federal Constitution to hear actions between residents of other states. The right to sue in a state court was said to be one of the "privileges" which each state must extend to the citizens of the several states. It is now settled that jurisdiction may be refused on forum non conveniens grounds, though state courts have not until recently employed the Latin tag.


7. See Logan v. Bank of Scotland, [1906] 1 K. B. 141, 147, 153 (expense of trial "utterly out of proportion to the trifling amount in dispute").


10. In the famous case of Corfield v. Coryell, 6 Fed. Cas. 546, No. 3,230 (C. C. E. D. Pa. 1823), which decided that citizens of one state did not have a constitutional right to dredge oysters in another, an enumeration of the "privileges and immunities" guaranteed to citizens of sister states included "the right to... institute and maintain actions of any kind in the courts of the state." Id. at 552. See Missouri Pac. R. R. v. Clarendon Co., 257 U. S. 533, 535 (1922); Canadian Northern Ry. v. Eggen, 252 U. S. 553, 560 (1920); Chambers v. Baltimore & O. R. R., 207 U. S. 142, 148 (1907); Blake v. McCung, 172 U. S. 239, 248 (1898); see, Foster, Place of Trial—Interstate Application of Intrastate Methods of Adjustment, 44 Harv. L. Rev. 41, 49 (1930); Comment, 37 Yale L. J. 983, 984 (1928); Note, 32 A. L. R. 6, 12-3 (1924).


12. For example, WORDS AND PHRASES (Perm Ed. 1940) did not include the phrase, but it is now contained in the pocket supplement. See Blair, supra note 3, at 2. More recent cases employing the phrase are: Leet v. Union Pac. R. R., 25 Cal.2d 605, 608, 155 P.2d 42, 44 (1944) (with disapproval); Pinson v. Potter, 298 Mass. 109, 114, 10 N. E.2d, 136, 138–9 (1937); Lydia E. Pinkham Medicine Co. v. Gove, 293 Mass. 53, 59, 9 N. E.2d 573, 576 (1937); Universal Adjustment Corp. v. Midland Bank, Ltd., 231 Mass. 303, 313-319, 184 N. E. 152, 159-160 (1933); Anderson v. Delaware, L. & W. R. R., 18 N. J. Misc. 153, 156-164, 11 A.2d 607, 609–12 (1940) (lengthy discussion); Kantakevich v. Delaware, L. & W. R. R., 18 N. J. Misc. 77, 80, 10 A.2d 651, 653 (1940); Goldstein v. Lightner, 265...
An analogy to *forum non conveniens* is found in state statutes providing for transfer of actions to another court within the state when the convenience of witnesses, local prejudice, or interests of justice recommend it. However, in the absence of interstate compacts, transfer of an action across state lines is not possible, and other solutions must be developed for protecting the defendant against a vexatious choice of forum.

Some of the procedures adopted in an attempt to confine litigants to appropriate tribunals do not involve discretion to refuse jurisdiction. But they are relevant to a discussion of *forum non conveniens* because the results sought are similar, and they are presented as parallel principles. Thus, there are many statutes requiring that a cause of action which arises within a state must be prosecuted to judgment therein. Other states provide that their courts shall not entertain actions arising elsewhere if both parties are non-residents. At an early date the practice developed of granting injunctions against bringing suits in another state. The rule seems to be that mere inconvenience will not justify an injunction, but that it will issue only where the foreign suit was brought to vex or harass the defendant. Although the Supreme Court has not decided that such a decree must be recognized in other states, the injunction remains a partially effective remedy since a plaintiff...


13. For a collection of these statutes, see, Foster, *supra* note 10, at 62.

14. *Id.* at 50. Fosters here makes the suggestion that the interstate problem could be handled similarly to intrastate procedure by adopting a practice of dismissing on the condition that the defendant admit service in the more appropriate jurisdiction, waive the Statute of Limitations, etc. No examples of such a solution have been found. *But cf.*., Anderson v. Delaware, L. & W. R. R., 18 N. J. Misc. 153, 164, 11 A.2d 607, 612 (1940). In that case the balance of convenience was strongly in favor of dismissal, and the defendant offered to waive the Statute of Limitations. The court retained jurisdiction because of uncertainty as to whether defendant's waiver would be enforced in another court.

15. These statutes are said to have had little effect and may be disregarded by the courts of another state. See Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1240 and cases cited note 62 (1930).

16. See, for example, the New York statute, GEN. CORP. LAW, § 225, which denies jurisdiction over actions between two foreign corporations (or a foreign corporation and a non-resident) when the cause of action arose outside the state. The constitutionality of the statute was upheld in Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373 (1903).

17. Comments, 45 YALE L. J. 1235, 1240 (1936); 39 YALE L. J. 719 (1930); Notes, 115 A. L. R. 237 (1938); 57 A. L. R. 77 (1928).


cannot disregard it unless he is willing to stay outside the jurisdiction of the issuing court in the future. It would seem, however, that the determination of appropriateness could better be made by the court where suit is brought.

\textit{Foreign Causes of Action.} Courts have also declined jurisdiction for reasons of convenience in tort and contract actions arising in other jurisdictions between aliens\(^2\) or residents of other states.\(^2\) Although the convenience of the witnesses and the parties are of weight, there are important differences from the British doctrine of \textit{forum non conveniens}. There is not the same requirement that another more appropriate forum be available to the parties.\(^2\) The emphasis has been less on the convenience of the parties than on the convenience of the courts.\(^3\) And dismissal has sometimes been justified on the grounds that local residents should not bear the financial burden of supporting courts to be used by outsiders.\(^4\)

\textit{The "Internal Affairs" Rule.} Judicial discretion to refuse jurisdiction has come to be frequently exercised in cases which are described as involving the "internal affairs" of a corporation chartered in another state.\(^5\) If a plaintiff sought redress for some act of a foreign corporation which affected him solely in his capacity as a member of the corporation, the suit involved the "internal affairs" of the corporation.\(^6\) Early decisions indicated that do-

\(^{719}\) (1930). The American Bar Association once suggested a bill to extend the application of the "full faith and credit" clause to all equitable decrees. \(^{52}\) A. B. A. REP. 292 (1927). See also, Foster, \textit{supra} note 15, at 1245-6.


\(^{22}\) The English rule places the burden on the defendant to show that another forum is available. See page 1235 \textit{supra}. The American cases seem to put the burden on the plaintiff to show that he will be remediless if the suit is dismissed. Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828 (1909); Blair, \textit{supra} note 3, at 33 and n. 151. Nevertheless in the following cases, courts have retained jurisdiction because a Statute of Limitations had barred suit elsewhere. Anderson v. Delaware, L & W. R. R., 18 N. J. Misc. 153, 11 A.2d 607 (1940); Williamson v. Palmer, 181 Misc. 610, 43 N. Y. S.2d 532 (Sup. Ct. 1943); Randle v. Inecto, 131 Misc. 261, 226 N. Y. S. 686 (Sup. Ct. 1928).

\(^{23}\) References to the overcrowded condition of the court as a grounds for dismissal are found in Douglas v. New York, N. H. & H. R. R., 279 U. S. 377, 387 (1929); Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 315, 184 N. E. 152, 160 (1933); Blair, \textit{supra} note 3, at 1.


\(^{25}\) Notes, 46 COL. L. REV. 413 (1946); 33 COL. L. REV. 492 (1933); 155 A. L. R. 1231 (1945); 89 A. L. R. 736 (1934); 32 A. L. R. 1353 (1924); 18 A. L. R. 1383 (1922).

\(^{26}\) \textit{See} North State Copper & Gold Mining Co. v. Field, 64 Md. 151, 29 Atl. 1039 (1885); Note, 18 A. L. R. 1383, 1390 (1922) and cases cited therein.
mestic courts could not take jurisdiction because only courts of the chartering state possessed the "visitorial powers" necessary to give the plaintiff relief.

However, by narrowing the definition of "internal affairs" and by exercising jurisdiction when the corporation was foreign in creation only, some courts modified the formality of the rule. Thus suits are often retained when the assets and the books and records are within the jurisdiction of the court, and, if a suit in the chartering state would be plainly inconvenient, courts are reluctant to dismiss. With these qualifications the "internal affairs" rule has grown very close to forum non conveniens.

Forum Non Conveniens in the Commerce Clause. Into the commerce clause of the Federal Constitution has been read a requirement that suits against defendants engaged in interstate commerce must be declined if the tribunal is sufficiently inconvenient. The rule has some points of similarity with forum non conveniens, but there is one great difference. Far from giving a court discretion, it lays down a constitutional command to relinquish jurisdiction. There had been an early holding in a lower court that a statute permitting the attachment of rolling stock was unconstitutional when applied to an interstate railroad, but the first Supreme Court case, Davis v. Farmers Cooperative Equity Co., went further and held that merely sub-

27. North State Copper and Gold Mining Co. v. Field, 64 Md. 151, 20 Atl. 1039 (1885); Madden v. Penn. Electric Light Co., 181 Pa. 617, 37 Atl. 817 (1897); Note, 46 Col. L. Rsv. 413, 414 (1946).


29. The following actions were held not to involve internal affairs. Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324 (1894) (action to compel issuance of stock certificate); Gere v. Dorr, 114 Minn. 240, 130 N. W. 1022 (1911) (action against corporate officials to declare an issue of stock fraudulent; Andrews v. Mines Corp., 205 Mass. 121, 91 N. E. 122 (1910) (action to compel inspection of books; Boardman v. Lake Shore & M. S. Ry., 84 N. Y. 157 (1881) (enjoining directors from paying dividend). See cases collected, Note, 46 Col. L. R. 413, 416 n. 16 (1946).


33. Pullman Co. v. Linke, 203 Fed. 1017 (D. S. C. D. Ohio 1913). The facts of the case were extreme: attachment was levied on a car carrying passengers that was temporarily on a siding.

34. 262 U. S. 312 (1923). The case is said to have been taken to the Supreme Court as a result of a flood of imported litigation causing expense and inconvenience to inter-
jecting a corporation engaged in interstate commerce to suit was an unconsti-
tutional burden on commerce when neither party resided in the state of
suit and the cause of action arose elsewhere. This decision has been followed
where all three factors—the two parties and the cause of action—were for-
eign to the state of suit.\textsuperscript{35} Further, it has been held unconstitu-
tional to subject an out-of-state defendant to suit even where the plaintiff had acquired
residence in the state before bringing suit.\textsuperscript{36}

The importance of the defendant’s operations within the state was made
clear in \textit{Denver & Rio Grande W. R. R. v. Tente},\textsuperscript{37} where the plaintiff joined
two interstate railroads as defendants. Even though the plaintiff had moved
to the state of suit before bringing the action, the Supreme Court held the
suit an unconstitutional burden on the defendant not doing business within the
state. As to the second defendant, a railroad which had tracks and operated
trains within the state, there was no unconstitutional burden.

Some of the earlier cases requiring a state to relinquish jurisdiction seemed
to turn solely on the extent of the defendant’s activities within the state of
suit.\textsuperscript{38} Mr. Justice Cardozo in \textit{International Milling Co. v. Columbia Trans-
portation Co.},\textsuperscript{39} introduced an element of discretion by holding that a suit
may be burdensome and still not conflict with the commerce clause so long as
the burden was not “oppressive or unreasonable.”\textsuperscript{40} With this qualification
the constitutional requirement of convenience of forum which has been read
into the commerce clause approaches the doctrine of \textit{forum non conveniens}.

\section*{II}

\textbf{Forum Non Conveniens in the Federal Courts}

A study of the evolution of \textit{forum non conveniens} in the federal courts be-
gins with the federal constitution and with the statutes upon which jurisdic-

\begin{itemize}
\item \textbf{state commerce. Dainow, supra note 3, at 871. Minnesota seems to have been the heaviest importer. Note, 13 Minn. L. Rev. 485 (1933).}
\item 35. Denver & R. G. W. R. R. v. Tente, 284 U. S. 284 (1932); Michigan Central R. R. v. Mix, 278 U. S. 492 (1929); Atchison T. & S. F. Ry. v. Wells, 265 U. S. 101 (1924); Louisville & N. Ry. v. Deutsche Dampfschiffarts-Gesellschaft, 43 F.2d 651 (D.C.S.D. Ala. 1930) (unconstitutional burden on foreign commerce). In the latter case plaintiff acquired jurisdiction by attaching a ship of defendant's. The court dismissed even over plaintiff's plea that if suit were not permitted it would have to go to Germany to get recovery.
\item 37. 284 U. S. 284 (1932).
\item 38. See note 35 supra. In the following cases the burden was permitted because of defendant's activities within the state: Hoffman v. Foraker, 274 U. S. 21 (1927); St. Louis B. & M. Ry. v. Taylor, 266 U. S. 200 (1924); Schendel v. McGee, 300 Fed. 273 (C. C. A. 8th 1924); cf. Miles v. Illinois Central R. R., 315 U. S. 698 (1942) (alternate ground).
\item 39. 292 U. S. 511 (1934).
\item 40. Id. at 521. Defendant maintained only an agent for solicitation of business in the state of suit. But since plaintiff had its main place of business there, the burden on defendant was not unconstitutional.
\end{itemize}
Neither the Constitution nor statutes specifically authorized a federal court to decline jurisdiction. Indeed, in several early cases, the Supreme Court indicated in dicta that federal courts were bound to proceed to judgment in every case to which their jurisdiction extended. These opinions appear fortified by the wording of the federal venue statute which provides that a civil action may be brought in any district of which the defendant is an inhabitant, except that where jurisdiction is based on diversity the action may be brought in any district where the plaintiff or defendant resides. Such a statute seems to be a legislative declaration that any of the districts specified are appropriate places for trial. In addition, judicial construction has widened the plaintiff's choice of forum beyond that given in the statute. The Court held in *Neirbo Co. v. Bethlehem Shipbuilding Corp.* that compliance with a state statute requiring the designation of an agent for service of process operates as a waiver of improper venue. The effect is to make venue proper wherever a defendant does business and thus incidentally increase a plaintiff's opportunity to select a burdensome locality for trial.

This tactical advantage has been somewhat reduced, however, as the Supreme Court has held twice in the present term that the federal courts may exercise discretion and decline jurisdiction if the forum is sufficiently inconvenient. In *Koster v. Lumbermens Mutual Casualty Co.*, the trial court had dismissed a stockholder's suit on the ground that it involved the internal affairs of a foreign corporation. The Supreme Court, through Mr. Justice Jackson, declared that this aspect of the case alone did not justify dismissal, but that application of *forum non conveniens* was indicated because the witnesses and records were in another state and because the law of another state had to be applied.

In *Gulf Oil Corporation v. Gilbert*, the Court was faced with a tort action brought in a district court in New York by a Virginia citizen and resident

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44. 308 U. S. 165 (1939).
45. 67 Sup. Ct. 839 (1947).
47. 67 Sup. Ct. 839 (1947).
against a Pennsylvania corporation. Jurisdiction was founded on diversity, and the plaintiff sought damages for the allegedly negligent handling of gasoline which resulted in the burning of his warehouse in Virginia. The district court dismissed the suit on New York law which it felt compelled to follow. The Supreme Court refused to decide whether or not New York law should be applied, but affirmed the action of the district court on the alternate ground that, with witnesses far removed and the necessity of applying the law of another state, the federal doctrine of *forum non conveniens* justified dismissal.

That there was such a federal doctrine prior to the *Koster* and *Gulf Oil* cases was denied by four of the justices, who felt that the decisions which were relied on by the majority and which are here discussed in succeeding paragraphs were taken out of context and far from compelling.

**Actions Under the Federal Employers Liability Act.** In addition to early language apparently requiring the exercise of jurisdiction in all cases, the Supreme Court has uniformly held that a federal court must hear suits properly brought before it under the Federal Employers Liability Act. This statute has a special venue provision which permits suit in the district where the cause of action arose or where the defendant resides or is doing business. State courts are given concurrent jurisdiction. Manifestly this makes it possible for the plaintiff to choose a district far from the locality where the cause of action arose and where defending the suit would be inconvenient and costly. Nonetheless, the Court has said that Congressional intent to allow the plaintiff this wide choice of forum is clear. Although an action brought in a federal court or in the court of another state may not be enjoined when venue is proper under the act, the Court has allowed one state tribunal to decline jurisdiction for *forum non conveniens* reasons. But the same discretion has

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49. See note 42 supra.
50. 35 STAT. 65 (1908), as amended, 45 U. S. C. § 51 (1940).
51. 35 STAT. 66 (1908), as amended, 45 U. S. C. § 55 (1940). The special venue provision was added by the 1910 amendment, 36 STAT. 291.
52. Mr. Justice Jackson distinguishes the cases arising under this statute on the grounds that the holdings were required only by the special provision. See Gulf Oil Corp. v. Gilbert, 67 Sup. Ct. 839, 841–2 (1947).
53. "The language finally adopted must have been deliberately chosen to enable the plaintiff . . . 'to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.'" Baltimore & Ohio R.R. v. Kepner, 314 U. S. 44, 50 (1941). The Court quoted from Senator Borah. 45 Cong. Rec. 2253 (1910); see Sen. Rep. No. 432, 61st Cong., 2d Sess. 4 (1910).
not been permitted in the federal courts, and despite some protest against allowing what seemed a vexatious choice of forum,\textsuperscript{56} jurisdiction has been uniformly retained.\textsuperscript{57}

\textbf{Foreign Causes of Action.} Support for the application of \textit{forum non conveniens} is found, however, in holdings that jurisdiction could be declined when the cause of action arose outside the United States and one or both parties were aliens. The cases that have arisen under this rule are almost entirely tort actions, the great bulk of them in admiralty.\textsuperscript{58} Although the leading admiralty decision held that a federal court had jurisdiction of an action between aliens arising out of a collision at sea, refusal to hear such a case was said to be within the court's discretion and would be justified if a foreign tribunal was easily accessible.\textsuperscript{60}

It is argued that admiralty courts "act upon enlarged principles of equity," and that courts of law do not possess the same discretion to decline jurisdiction.\textsuperscript{60} There is no question that admiralty courts differ from law courts in their jurisdiction and procedure. But aside from the fact that they are more often appealed to by aliens with foreign causes of action, there does not seem to be any functional reason for restricting to such courts the power to refuse to hear cases.\textsuperscript{61}

Moreover, there have been several instances in which suits brought on foreign causes of action were dismissed by federal courts of law. For example, in \textit{Heine v. New York Life Ins. Co.},\textsuperscript{62} suit was commenced in a district court in Oregon on insurance contracts issued in Germany. The plaintiff, assignee of the contracts, was a German citizen and the action was brought in

\begin{itemize}
\item N.H. & H. R. R., 223 U. S. 1 (1912) ; McKnett v. St. Louis & S. F. Ry., 292 U. S. 230 (1934). In one case dismissal of an FELA suit was compelled on the ground that the state forum was so inconvenient as to be an unconstitutional burden on commerce. Michigan Central R. R. v. Mix, 278 U. S. 492 (1929).
\item 58. Canada Melting Co., Ltd. v. Paterson Steamships, Ltd., 285 U. S. 413 (1932), and cases collected \textit{id.} at 421 n. 2; Langes v. Green, 282 U. S. 531 (1931) ; Charter Shipping Co., Ltd. v. Bowring, Jones & Tidy, Ltd., 281 U. S. 515 (1930).
\item 59. The Belgenland, 114 U. S. 355 (1885).
\item 60. See Mr. Justice Black, dissenting in Gulf Oil Corp. v. Gilbert, 67 Sup. Ct. 839, 845 (1947).
\item 61. In Canada Melting Co., Ltd. v. Paterson Steamships, Ltd., 285 U. S. 413, 423 (1932), Mr. Justice Brandeis indicated that "courts of equity and of law also occasionally decline in the interest of justice, to exercise jurisdiction, where . . . the litigation can more appropriately be conducted in a foreign tribunal."
\item 62. 50 F.2d 382 (C. C. A. 9th 1931).
\end{itemize}
this country apparently to avoid the inflation of the German mark. Noting that some 28,000 policies had been assigned for the same purpose and that German law must be applied, the district court held that the burden on the court justified dismissal. The Ninth Circuit, affirming, maintained that discretion to refuse jurisdiction was not the exclusive power of admiralty courts and that "civil cases and actions in admiralty and maritime jurisdiction have equal status...".

A few decisions support the view of the Ninth Circuit and hold that jurisdiction over tort actions arising in foreign countries may be declined. In one case, even though both parties were United States citizens, the Supreme Court ordered dismissal on the ground that the remedial provisions of the applicable foreign statute were beyond the power of the district court. The theory behind these decisions seems to be that, since parties do not rely on our courts in their activities outside our borders, they cannot complain of the refusal to enforce rights acquired under foreign statutes. Whatever the source of the discretion to refuse jurisdiction, however, the rationale offered for turning suitors away was generally the inappropriateness of the forum.

Internal Affairs of Foreign Corporations. In the federal courts the growth of discretion in exercising jurisdiction over suits involving internal affairs of foreign corporations has paralleled that in the state courts. Early lower court decisions held that a federal court had no power to hear an "internal affairs" case if the corporation was "foreign" to the state in which the court sat. This rather arbitrary doctrine had little value in relation to its stated purpose. Since corporations frequently do no business in the chartering state, it would often be impossible for a plaintiff to obtain jurisdiction over officers or directors in that state. In such a case the chartering state would be inconvenient not only for witnesses and the defendant, but for the plaintiff as well. These considerations doubtless account in part for the Supreme Court's introducing "convenience, efficiency and justice" as factors to be weighed in the exercise of jurisdiction and for the trend culminating in the Koster decision which

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63. 45 F.2d 426 (D. C. Ore. 1930).
64. 50 F.2d 382, 387 (C. C. A. 9th 1931).
69. Rogers v. Guaranty Trust Co., 288 U. S. 123 (1933). Though the Court talked in terms of convenience, the facts of the case seemed to indicate that the forum chosen by the
has expressly substituted *forum non conveniens* for the arbitrary internal affairs rule.

*Deference to the States.* In suits involving matters primarily of state concern federal courts have occasionally relinquished jurisdiction on what Justice Jackson described as "substantially *forum non conveniens* grounds."71

For some years both Congress and the Court have contrived to limit the jurisdiction of the federal courts where its exercise might create friction with state policy.72 Congress has provided that injunctions against the governmental activities of a state shall be granted only by a three-judge district court with direct appeal to the Supreme Court72 and that a federal court must stay proceedings before it when the state activity in question is being tested in the state courts.74 Statutes have also withdrawn federal jurisdiction to enjoin the enforcement of certain state public utility rates75 or to enjoin the collection of state taxes76 except where there is no adequate remedy in the state courts.77 In addition, Section 266 of the Judicial Code forbids federal courts to enjoin proceedings in state tribunals, but judicially devised exceptions have until recently sapped its vitality.78 In supplementing this policy the Supreme Court has required the dismissal of suits for equitable relief which involved issues that could more appropriately be decided by state courts. Appropriateness is not, however, determined with reference to the convenience of litigants but with "regard to the rightful independence of state governments in carrying out their domestic policy."79 Thus the federal courts have been forbidden to interfere with a state prosecution for the violation of a Full Train Crew

plaintiff was the most appropriate available. The defendant maintained its main office and records within the district. The decision is criticized in Notes, 42 YAL. L. J. 792 (1933), 33 Col. L. Rev. 492 (1933), 46 Harv. L. Rev. 854 (1933).

70. The cases are collected and analyzed in Note, 46 Col. L. Rev. 413, 420-2 (1946). Prior to the Koster decision the Court had held it error to dismiss under the "internal affairs" rule when in fact the forum chosen by the plaintiff was appropriate for trial. Williams v. Green Bay & W. R. R., 326 U. S. 549 (1946).


74. *Ibid.* This provision was added by amendment in 1913, 37 Stat. 1013.


Law,\textsuperscript{80} or with the appointment of a receiver in the liquidation of a state bank where the state provided elaborate liquidation machinery.\textsuperscript{81} The Court has gone beyond Congress in prohibiting interference with state fiscal policy,\textsuperscript{82} utility rate enforcement,\textsuperscript{83} and orders of administrative agencies.\textsuperscript{84}

In order to give states the fullest scope in deciding questions of their own law, the Supreme Court has directed that final decision should not be rendered in cases involving both an unsettled question of state law and a Constitutional issue, and has adopted a series of solutions implementing this policy. Thus a district court has been required to dismiss such a suit without prejudice to a state action.\textsuperscript{85} On another occasion the Court has sanctioned rendering a decision on the state law with the proviso that parties may apply for modification if a state court later interprets the law differently.\textsuperscript{86} Or the federal court may decide the constitutional issue, and if it finds no constitutional violation, dismiss the action and refer the parties to the state courts for a decision on the state question.\textsuperscript{87} Occasionally a stay of proceedings is granted by the federal courts pending the initiation of suit in the state courts.\textsuperscript{88} This procedure avoids an interpretation of state law in a federal court which would be only a prediction, and a final decision by a state court on the state question may well make a determination of the constitutional issue unnecessary.\textsuperscript{89}

\textsuperscript{82} Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293 (1943) (suit for declaratory judgment).
\textsuperscript{83} Central Kentucky Gas Co. v. Railroad Comm'n, 290 U. S. 264 (1933). This decision was prior to the Johnson Act.
\textsuperscript{84} Burford v. Sun Oil Co., 319 U. S. 315 (1943); Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U. S. 570 (1940).
\textsuperscript{85} Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929). This case seems to have been judicially forgotten until recently. Note, 54 HARRY L. REV. 1379, 1385 (1941).
\textsuperscript{86} Lee v. Bichell, 292 U. S. 415 (1934); Glenn v. Field Packing Co., 290 U. S. 177 (1933); \textit{cf.} Wald Transfer & Storage Co. v. Smith, 4 F. Supp. 61 (D. C. S. D. Tex. 1933), \textit{modified per curiam}, 290 U. S. 602 (1933). In the latter case the district court had held the administrative order complained of valid on both state and constitutional grounds. The Supreme Court ordered the decree dismissing the bill amended to provide for modification if the state court should hold the order invalid.
\textsuperscript{87} Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U. S. 570 (1940); \textit{cf.} Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940) (the same technique was employed in bankruptcy proceedings in the absence of a constitutional question).
\textsuperscript{89} Chicago v. Fieldcrest Dairies, 316 U. S. 168, 172-3 (1942); Railroad Comm'n v. Pullman Co., 312 U. S. 496, 499, 500 (1941).
It is not clear whether a federal court may decline to hear cases involving unsettled questions of state law when no constitutional question is present. In *Thompson v. Magnolia Petroleum Co.*, the Court directed that a dispute arising in bankruptcy proceedings over the title to oil underlying a right of way be submitted to the state courts. The state law was not clear, and Justice Black pointed out that unless this procedure were followed, the rights of the parties might "have—by the accident of federal jurisdiction—been determined contrary to the law of the state which in such matters is supreme." But more recently in a case arising under diversity rather than bankruptcy jurisdiction, which does not specifically overrule the *Thompson* case, the Court has declared rather unequivocally that "the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction. . . .”

These decisions sanctioning dismissal were all made in suits for equitable relief. It may, therefore, be argued that they are not authority for declining jurisdiction over an action for damages at law. The granting of equitable relief is recognized as discretionary, and whether or not it will be granted, other jurisdictional requirements being satisfied, is "strictly not a question of jurisdiction. . . . It is a question only of the merits. . . ." But in the cases just discussed the Court in fact decided that the merits should not even be examined, which would seem akin to a refusal to exercise jurisdiction in the accepted sense.

In any event these decisions suggest an American corollary to *forum non conveniens*. Our federal structure presents problems of interlocking jurisdiction which do not arise in England; the desire to avoid interference with state policy or decision on unsettled state law may be an additional consideration relevant to the issue of appropriateness.

### III

#### The New Rule and Alternatives

Whether or not the foregoing practices be considered persuasive precedent, it is clear that the *Koster* and *Gulf Oil* holdings constitute formal recognition of a comprehensive *forum non conveniens* doctrine.

These cases evoked four dissents, which, besides questioning the legal authority, raise some practical objections to the adoption of a federal rule of

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90. 309 U. S. 478 (1940).
91. Id. at 484.
92. Meredith v. Winter Haven, 320 U. S. 228, 234 (1943). This principle was affirmed in Markham v. Allen, 326 U. S. 490 (1946).
94. "Plainly they (state courts) constitute the more appropriate forum for the trial of those issues." Chicago v. Fieldcrest Dairies, 316 U. S. 168, 172 (1942).
95. Justices Black, Reed, Burton, and Rutledge dissented in each case, the first two with opinions.
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forum non conveniens. With the impressive example of the Gulf Oil case for support, Mr. Justice Black pointed out that the doctrine permits an additional and lengthy hearing before the final trial on the merits.\footnote{Gulf Oil Corp. v. Gilbert, 67 Sup. Ct. 839, 847 (1947).} This preliminary proceeding might, as it did, go through three courts including the Supreme Court, with the result of two or three years of litigation being the commencement of suit anew. The plaintiff's problem is further complicated by uncertainty as to what makes a forum appropriate. A doctrine phrased in terms of "vexatiousness, oppression, and hardship" makes accurate prediction difficult. And further, a judge might be persuaded of his court's unsuitability less by the circumstances of the case than by his own overcrowded calendar. It may be that the dissenting justices feel an economically weak plaintiff should be entitled to harass a defendant large enough to be "found" in a distant forum. Practical justice may argue that the small plaintiff needs the advantage of maneuverability to counterbalance the economic strength and resultant legal talent of his opponent.\footnote{Compare Justice Black, dissenting id. at 846. "It will be a poorly represented multistate defendant who cannot produce substantial evidence . . . to establish that the forum of action against him is most inconvenient."}

On the other side is the argument against permitting "strike" suits, which are at least common enough to have a name. While it is true that disputes over the convenience of the forum may delay ultimate decisions, a plaintiff seeking speedy justice need only select a forum against which no reasonable objection could be raised. In the main the criticisms of forum non conveniens are protests against possible abuse by the courts of the discretion which the doctrine gives them. The grant of discretion has been limited, however, by the qualification that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."\footnote{Gulf Oil Corp. v. Gilbert, 67 Sup. Ct. 839, 843 (1947).} It should be noted that abuses are equally possible and accurate prediction equally difficult in many other situations where the trial judge has traditionally acted at his discretion.\footnote{For example, a trial judge in many instances has discretion to permit amendments to pleadings, to take judicial notice, or to declare a mistrial—any of which could materially affect the ultimate result.}

Whatever the merit of the dissenting arguments, it is plain that the federal courts may now apply the rule of forum non conveniens. Though the Court has not described the operation of the doctrine in detail, it has suggested that convenience of witnesses, accessibility of proof, applicability of the law of another state, and enforceability of the judgment are to be considered.\footnote{Id. at 843. Koster v. Lumbermens Mutual Casualty Co., 67 Sup. Ct. 828, 833 (1947).} The federal doctrine seems to include the British qualification that the availability of another forum is a condition precedent to dismissal; apparently a plaintiff may not be turned away when a Statute of Limitations bars the institution of
his suit elsewhere.\textsuperscript{101} Since the expenses of the federal court are borne by the nation as a whole, there is no need to consider the burden on local taxpayers;\textsuperscript{102} it was, however, suggested by the Court that the burden of jury duty "ought not to be imposed upon the people of a community which has no relation to the litigation."\textsuperscript{103} Perhaps also a court will be allowed to weigh an overcrowded calendar as evidence of its own inappropriateness.\textsuperscript{104} Staying the action pending institution of proceedings in the appropriate court may be approved, as an alternative to dismissal, a procedure which is followed in England, and which finds precedent here in the cases involving unsettled state law and a Constitutional question.\textsuperscript{105}

While the \textit{Koster} and \textit{Gulf Oil} opinions declare the existence of \textit{forum non conveniens} in the federal courts, the Supreme Court has expressly left open the question of whether \textit{Erie R.R. v. Thompkins}\textsuperscript{106} compels federal rules similar to those of the forum states.\textsuperscript{107} The Second Circuit, however, has squarely faced the issue on two occasions and has apparently reached contradictory results. In \textit{Weiss v. Routh},\textsuperscript{108} an internal affairs suit was dismissed on the authority of New York law, Judge Learned Hand advancing the proposition that "the accident of citizenship should not change the outcome." But in the \textit{Gulf Oil} case the same court held that \textit{Erie R.R. v. Tompkins} did not apply.

Whether an independent federal doctrine of \textit{forum non conveniens} would "change the outcome" depends to a large extent on whether the applicable state rule requires dismissal even though no other forum is available; in which case the state dismissal would be tantamount to a judgment for the defendant. Additionally, differing criteria of convenience might alter the probabilities of dismissal under the federal as compared with the state doctrine. And while a change of forum would probably not change the governing "law"\textsuperscript{110} it would be quite likely to change the ultimate outcome. By common knowledge, there

\textsuperscript{101} The statement of the Court in the \textit{Gulf Oil} case that \textit{forum non conveniens} "presupposes at least two forums in which the defendant is amenable to process," can perhaps be construed as a requirement that the defendant be amenable to suit elsewhere, as well as to "process." \textit{Gulf Oil Corp. v. Gilbert}, 67 Sup. Ct. 839, 842 (1947). See state cases cited note 22 \textit{supra}.

\textsuperscript{102} The burden on local taxpayers has been given as justification for a state court's dismissal of a suit between non-residents. \textit{Douglas v. New York, N. H. & H. R.R.}, 279 U. S. 377, 387 (1929). See page 1237 \textit{supra}.

\textsuperscript{103} \textit{Gulf Oil Corp. v. Gilbert}, 67 Sup. Ct. 839, 843 (1947).

\textsuperscript{104} "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." \textit{Ibid}.

\textsuperscript{105} See page 1245 \textit{supra}.

\textsuperscript{106} 304 U. S. 64 (1938).

\textsuperscript{107} The Court in the \textit{Koster} and \textit{Gulf Oil} cases noted that both New York and federal law required the results reached.

\textsuperscript{108} 149 F.2d 193 (C. C. A. 2d 1945).

\textsuperscript{109} 153 F.2d 883 (C. C. A. 2d 1946).

\textsuperscript{110} A change in result might follow if a difference in conflict of laws rules made for the application of different substantive doctrine.
are "plaintiff" and "defendant" states.\textsuperscript{111} Procedural rules may affect the substantive result. A different judge and different jury obviously will influence the plaintiff's recovery. But, admitting that the application of \textit{forum non conveniens} may change results, the doctrine still does not seem to be "substantive law" within the purview of \textit{Erie R.R. v. Tompkins}.\textsuperscript{112} There are obvious differences in gaining admission to a state and federal court, and it would be unreasonable to argue that \textit{Erie R.R. v. Tompkins} established the same venue requirements for both or commands a federal court to hear a case merely because a state court would have done so.\textsuperscript{113} The reasoning of the \textit{Erie} case was that federal courts could not apply independent rules of substantive law, except with specific constitutional authority. A holding that \textit{forum non conveniens} is substantive would presumably mean that even Congress could not constitutionally make the doctrine a part of federal law. In view of the close alliance between \textit{forum non conveniens} and venue proper, such a result would greatly alter accepted doctrine.

Under the rule of \textit{forum non conveniens} as announced by the Supreme Court, dismissal may be directed. A happier solution would seem to be a transfer of the action to the suitable tribunal. There is pending in Congress a proposed revision of the Judicial Code\textsuperscript{114} which, in the form of an amendment to the venue statute, authorizes a district court, for the convenience of the parties and witnesses, to transfer an action to any district where it could have been brought.\textsuperscript{115} Though this provision would not apply to cases involving a foreign cause of action or unsettled state law (where possibly no federal court would be appropriate), it would cover the most common situations. There is a similar provision for transfer in the federal Bankruptcy Act, which, so far as can be ascertained, has operated successfully.\textsuperscript{110}

\textsuperscript{111} Minnesota, for example, has the reputation of being generous to plaintiffs who import suits. See note 34 supra.

\textsuperscript{112} See Note, 14 U. Chi. L. Rev. 97, 100-2 (1946).

\textsuperscript{113} Another argument for refusing to follow state law is found in the nature of \textit{forum non conveniens}. Since the doctrine rests on discretion, precedent is less compelling than for rules of law. The facts and equities of the case will doubtless have more weight with a judge than state precedent furnished by counsel.

\textsuperscript{114} H. R. 2055, 80th Cong., 1st Sess. (1947).

\textsuperscript{115} \textit{Id.}, § 1404a. The committee report on this section states that it "was drafted in accordance with the doctrine of forum non conveniens permitting transfer to a more convenient forum, even though venue is proper. As an example of the need of such a provision, see \textit{Baltimore & Ohio R. Co. v. Kepner . . . .}" H. R. Rep. No. 2646, 79th Cong., 2d Sess. A 127 (1946). The reference to the \textit{Kepner} case (a suit under the FELA) seems to indicate legislative overruling of the Court's interpretation of the special venue provision of the FELA. See page 1241 supra.

\textsuperscript{116} Section 118 of the Bankruptcy Act provides for the transfer of corporate reorganization proceedings to "any other district . . . if the interest of parties will be best served by such transfer." 52 Stat. 885 (1938), 11 U. S. C. § 518 (1940). For what appears to be wise use of this discretion, see Clark Bros. Co. v. Portex Oil Co., 113 F.2d 45 (C. C. A. 9th 1940); \textit{In re} American Fuel Co., 32 F. Supp. 107 (D. C. Del. 1940). The
As has been seen, the tendency toward increased discretion in the exercise of jurisdiction is evidenced in both state and federal courts. The importance of considerations of convenience in situations where for other reasons the exercise of jurisdiction may be declined is some indication of a need for the doctrine of *forum non conveniens* along the general lines announced by the Supreme Court. Attitudes toward this development will vary with the amount of confidence placed in the wisdom of the judges to whom this new discretion has been given. But, recalling the public trust placed in the bench, it does not seem too dangerous a step to permit a trial judge to turn away a suiter who has tried to tip the scales of justice by selecting a court with a view to harassing his opponent.

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proposed amendment provides, as the Bankruptcy Act does not, for transfer rather than dismissal where venue was not proper.