Hastings Law Journal

Volume 21 | Issue 5 Article 4

1-1970

Forum Non Conveniens in California: Code of Civil Procedure Section 410.30

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NOTES

FORUM NON CONVENIENS IN CALIFORNIA: CODE OF CIVIL PROCEDURE SECTION 410.30

California has recently codified the doctrine of forum non conveniens as part of the broad revision of its law on jurisdiction.[1] It will be the purpose of this Note to describe the nature of the doctrine, its development and present status in California, and its relationship to jurisdiction, and to consider the possible future application of the doctrine under the new California statute.

The California Supreme Court has defined forum non conveniens as "an equitable [doctrine] embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere."[2] The purpose of the doctrine is to permit a court, in its discretion, to dismiss an action where its exercise of jurisdiction would be unfair or where hearing a case would place an unwarranted burden on the court.[3]

While many factors are considered in determining whether there is sufficient cause to warrant denying the plaintiff his choice of forum,[4]

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1. CAL. CODE CIV. PROC. § 410.30 (operative July 1, 1970).

2. Leet v. Union Pac. R.R., 25 Cal. 2d 605, 609, 155 P.2d 42, 44 (1944). The United States Supreme Court, in recognizing the doctrine three years later, gave a very similar definition which seems to be the one most frequently cited in other jurisdictions: "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." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

3. 1 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 174, at 441 (1954).

4. *Id.* at 442.

It has been suggested that California courts should weigh these particular factors under the new law:

"1. Where the residence or the principal place of business of each party is located.

2. Whether some or all of the parties regularly conduct business or other activities in this state.

3. Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state.

4. Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried.

5. Whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state.

6. Whether witnesses would be inconvenienced if the action were prosecuted (a)

certain factors are generally considered whenever forum non conveniens is sought to be invoked. One basic consideration is whether the plaintiff has an alternate forum. As a general rule a court will not deny the plaintiff a hearing where there is no present opportunity for him to sue elsewhere.[5] This situation can exist for a number of reasons, such as the plaintiff's inability to get personal jurisdiction of the defendant elsewhere,[6] the running of a shorter statute of limitations in the alternate forum,[7] a refusal of an alternate jurisdiction to hear the case for reasons of public policy,[8] or such hardship to the plaintiff in bringing his action elsewhere that he really has no alternate forum.[9] In such cases the general rule of providing the plaintiff with a forum should be adhered to even though it imposes a severe hardship on the defendant.[10] Adherence to this rule protects the plaintiff who has chosen his forum in good faith and, more important, causes the controversy to be settled on its merits rather than on a procedural technicality. These reasons seem to be in accord with the general purpose of the doctrine to limit the plaintiff's choice of forum somewhat without

in this state or (b) in the forum in which the moving party asserts it ought to be prosecuted.

7. The relative expense to the parties of maintaining the action (a) in this state and (b) in the state in which the moving party asserts the action ought to be prosecuted.

8. Whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case.

9. Whether prosecution of the action will or may place a burden on the courts of this state which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state.

10. Whether the parties participating in the action, other than those of their own volition, have a relationship to this state which imposes upon them an obligation to participate in judicial proceedings in the courts of this state.

11. The interest, if any, of this state in providing a forum for some or all of the parties to the action.

12. The interest, if any, of this state in regulating the situation or conduct involved. involved.

13. The avoidance of multiplicity of actions and inconsistent adjudications."

CAL. CODE CIV. PROC. § 410.30, Judicial Council Comment (operative July 1, 1970).

5. "[T]he doctrine . . . presupposes at least two forums in which the defendant is amenable to process . . . ." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947); Hill v. Upper Miss. Towing Corp., 252 Minn. 165, 167, 89 N.W.2d 654, 657 (1958); *see* Van Dam v. Smit, 101 N.H. 508, 509-10, 148 A.2d 289, 291 (1959); WIS. STAT. ANN. § 262.19, Revision Notes (Supp. 1969).

6. *E.g.*, Hill v. Upper Miss. Towing Corp., 252 Minn. 165, 89 N.W.2d 654 (1958).

7. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, comment *c* at 311 (Proposed Official Draft 1967).

8. *Cf.* Hughes v. Fetter, 341 U.S. 609 (1951).

9. *See* Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 649 (1950) (dictum).

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, comment *c* at 311 (Proposed Official Draft 1967).

permitting the defendant to escape or minimize his obligations.[11]

Another important consideration is the residence of each party. Where the plaintiff is a resident of the forum, a prima facie reason exists for hearing the case there, and the application of forum non conveniens is extremely limited in this situation.[12] Forum non conveniens is typically applied to provide relief to a nonresident defendant in an action brought by a nonresident plaintiff where the forum state has little or no connection with the matter in litigation.[13] But even here courts hesitate to deny the plaintiff his chosen forum because his choice should not be disturbed except where the balance of justice clearly requires it.[14] The following rules, then, seem to have evolved from the cases: Where the plaintiff and defendant are both nonresidents and the over-all convenience of the parties and the interests of justice may be better served if the action is brought elsewhere, the action will be dismissed; but if the plaintiff is a resident, the action ordinarily will not be dismissed except in those rare instances where it is virtually impossible for the defendant to receive a fair trial in plaintiff's home forum.[15]

11. *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1009 (1960).

12. Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 742, 427 P.2d 765, 768, 59 Cal. Rptr. 101, 104 (1967). This attitude, which minimizes the inconvenience of the nonresident defendant, has been particularly prevalent in cases where the existence of jurisdiction was in issue. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 945-46, 458 P.2d 57, 66, 80 Cal. Rptr. 113, 122 (1969).

13. Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 742, 427 P.2d 765, 768, 59 Cal. Rptr. 101, 104 (1967); *see* Price v. Atchison, T. & S.F. Ry., 42 Cal. 2d 577, 580, 268 P.2d 457, 458-59 (1954).

In Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959), California had no real connection with the cause of action and the court used forum non conveniens considerations to determine an absence of jurisdiction. *See* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 404-05 (1947).

14. See note 5 & accompanying text *supra*. Beirut Universal Bank v. Superior Court, 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969), is a recent case in which it would seem that the doctrine might have been considered but was not. This case concerned a contract action between a Lebanese bank and a Swiss corporation where jurisdiction was found and retained on the basis of an isolated negotiation in Los Angeles. What is particularly noteworthy about this case is the fact that the contract in issue called for controversies thereunder to be resolved in Lebanese courts. *Id.* at 837, 74 Cal. Rptr. at 336.

15. *See* Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 744, 427 P.2d 765, 769, 59 Cal. Rptr. 101, 105 (1967). *But cf.* Koster v. Lumbermen's Mut. Cas. Co., 330 U.S. 518 (1947), where the home forum argument was disregarded in a stockholder's class suit on the basis that technically there were numerous plaintiffs and therefore numerous home forums. *Id.* at 524.

Normally, there would be no problem where the nonresident plaintiff has brought

Another basic consideration is the effect trial of a case would have on the forum.[16] In deciding whether to hear a case that could be brought in another jurisdiction, a court may consider such practical problems as the condition of the court calendar, the court's ability to apply foreign law in difficult or unusual cases, the cost to local taxpayers in providing a forum, the extra burden on residents of increased jury duty, and the delay caused local litigants by an increased case load.[17] Because of the importance to the efficient administration of justice of preventing undesirable forum shopping by a plaintiff, the interest of the forum in the outcome of the litigation is also a proper consideration in deciding whether to apply forum non conveniens.[18]

The argument most likely to be advanced for the invocation of forum non conveniens is the inconvenience and burden on the defendant resulting from the plaintiff's choice of forum. While some courts may put the burden of proof on plaintiff to show that he has selected a convenient forum,[19] the better rule, and that of California, requires the party making the motion to show his own inconvenience.[20] Among the many grounds which may warrant dismissal of the action because of burden on the defendant are the difficulty of access to proof, unreasonable cost of obtaining necessary witnesses, nonavail-

his action in the defendant's home jurisdiction. Nevertheless, the resident defendant should not be precluded from invoking the doctrine where he would be required to bring in extensive or expensive evidence from another forum where a trial might be more economically had. This factor of availability of evidence was of considerable importance in *Koster, supra* at 526.

16. *See generally* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 404-10 (1947).

17. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). Although the California Supreme Court has recognized these considerations, it has not indicated how much weight California courts should give them in determining whether to apply forum non conveniens. Goodwine v. Superior Court, 63 Cal. 2d 481, 485, 407 P.2d 1, 4, 47 Cal. Rptr. 201, 204 (1965); Price v. Atchison, T. & S.F. Ry., 42 Cal. 2d 577, 585, 268 P.2d 457, 461-62 (1954).

18. *E.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Price v. Atchison T. & S.F. Ry., 42 Cal. 2d 577, 268 P.2d 457 (1954); *see* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1132 (1966).

19. In New York, defendant's burden is apparently limited to a statement in the complaint that the parties are nonresidents and that the cause of action arose outside the state. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 416 (1947). If the issue is raised in federal courts, the plaintiff must come forward and show the convenience of the forum. Comment, *Factors of Choice for Venue Transfer Under 28 U.S.C. § 1404(a)*, 41 CALIF. L. REV. 507, 518 (1953).

20. *See* Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 744-45, 427 P.2d 765, 770, 59 Cal. Rptr. 101, 106 (1967); WIS. STAT. ANN. § 262.19, Revision Notes (Supp. 1969). *See generally* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 416-18 (1947).

ability of compulsory process on unwilling witnesses outside the jurisdiction, pendency of the same litigation elsewhere, need for a view of a foreign site, and the impossibility of a fair trial.[21] It is not enough that the moving party show slight inconvenience or additional expense in having to litigate in a particular forum. The movant must show that the inconvenience is such that substantial injustice must or very likely will occur.[22] Clearly, there must be a substantial reason for plaintiff to be denied his privilege of choosing a forum.[23]

History of the Doctrine in California

The California Supreme Court first discussed the doctrine of forum non conveniens in 1944 in the case of *Leet v. Union Pacific Railroad.*[24] Even though the doctrine was recognized as viable in that case, its availability in California remained uncertain. Because the action in *Leet* was brought under the provisions of the Federal Employers' Liability Act,[25] the court ruled forum non conveniens inapplicable, for it read the Act as giving the plaintiff an absolute right to have the action tried in the courts authorized by the statute. Nine years passed before the court again considered the doctrine.

In the meantime the United States Supreme Court had occasion to consider a situation similar to *Leet* in *Missouri ex rel. Southern Railway v. Mayfield.*[26] The Court held that a state court could refuse

21. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). For a more detailed discussion of these factors see 1 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 174 (1954); Comment, *Factors of Choice for Venue Transfer Under 28 U.S.C. § 1404(a)*, 41 CALIF. L. REV. 507 (1953).

22. *See* Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 412 (1947).

23. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). It has often been stated by California courts that there is no constitutional requirement that the plaintiff need always bear the expense of bringing suit in a distant forum. *E.g.*, Empire Steel Corp. v. Superior Court, 56 Cal. 2d 823, 834, 366 P.2d 502, 509, 17 Cal. Rptr. 150, 157 (1961).

24. 25 Cal. 2d 605, 155 P.2d 42 (1944).

25. 45 U.S.C. § 56 (1964). This act provides that a cause of action thereunder may be brought either where the cause of action arose or where the defendant may be found to be "doing business." In *Leet* there was no question that Oregon, rather than California, would have been the most convenient forum for the action since the accident occurred there and all interested parties resided there. Denial of defendant's motion to stay the action indefinitely was upheld primarily on the basis of Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942). In so doing the California Supreme Court stated: "The Miles case is completely decisive that the doctrine of *forum non conveniens* is no justification for a state court to refuse jurisdiction of an action under the Federal Employers' Liability Act. Likewise it is conclusive that the state court *must* take jurisdiction." 25 Cal. 2d at 612-13, 155 P.2d at 46.

26. 340 U.S. 1 (1950).

to exercise its jurisdiction over an F.E.L.A. action so long as it did not discriminate in its application of forum non conveniens between F.E.L.A. actions and other transitory causes, or between citizens and noncitizens. In addition, the Court specifically noted that its prior decisions[27] did not preclude a state from limiting access to its courts "to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State . . . enforces its policy impartially . . . ."[28]

A California court had an opportunity to consider the effect of *Mayfield* in *Schultz v. Union Pacific Railroad,*[29] a case factually on all fours with *Leet.* On appeal, the district court of appeal reversed the trial court's dismissal. The court reasoned that inasmuch as it was California's policy to accept and retain all transitory actions brought by California citizens—whether resident or nonresident—access could not be denied a nonresident noncitizen without violating the privileges and immunities clause of the United States Constitution.[30] In so holding the court avoided the issue whether the exercise of jurisdiction could be declined under appropriate circumstances.[31]

In the next year, however, the California Supreme Court considered forum non conveniens in *Price v. Atchison, Topeka, & Santa Fe Railway* and there unequivocally adopted the doctrine.[32] The action, again brought under the venue provisions of the Federal Employers' Liability Act, had arisen out of personal injuries sustained in New Mexico by employees of the defendant who were residents of that state. The defendant entered a general denial, a plea of contributory negligence, and a special defense of forum non conveniens.[33] After first

27. Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942); Baltimore & O.R.R. v. Kepner, 314 U.S. 44 (1941).

28. 340 U.S. at 4.

29. 118 Cal. App. 2d 169, 257 P.2d 1003 (1953).

30. U.S. CONST. art. IV, § 2.

31. It has been noted that the court in so doing bypassed an opportunity to clearly accept or repudiate forum non conveniens as a part of California law. 41 CALIF. L. REV. 755, 757 (1953). But an implication of the *Schultz* decision is that forum non conveniens was not and could not constitutionally be available in California without a change of policy toward transitory actions. "We have concluded that by reason of the privileges-and-immunities clause plaintiff's choice of forum in this state cannot be denied on the plea of *forum non conveniens.*" 118 Cal. App. 2d at 173, 257 P.2d at 1005.

32. 42 Cal. 2d 577, 268 P.2d 457 (1954).

33. *Id.* at 579, 268 P.2d at 458. In support of the latter plea the defendant showed that by defending in California it would incur substantial additional expense over the cost of defending in New Mexico. The defendant particularly emphasized the vexatious nature of the plaintiff's choice of venue by showing that plaintiff's counsel had within the past five years filed 67 cases in California courts and 21 in

reviewing forum non conveniens as delineated by the United States Supreme Court,[34] the court approved the doctrine as a part of California law.[35] The court justified its approval of the doctrine on grounds of ease of litigation, public interest, and a sense of fair play:

> [W]e are of the view that the injustices and the burdens on local courts and taxpayers, as well as those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state . . . require that our courts . . . exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere.[36]

Since the adoption of forum non conveniens in *Price*, there has been little case law to delineate the scope and limitations of the doctrine in California.[37] In fact, only one decision since *Price* appears to turn upon the issue of the doctrine's application, and in that case forum non conveniens was not applied because the plaintiff was a resident of California.[38]

The absence of the doctrine in California in recent years may be due to the fact that the concept of inconvenient forum seems to have become inextricably involved with the broader question of jurisdiction. It has often been proposed that forum non conveniens could provide appropriate limitations on the exercise of state court jurisdiction,[39]

California federal district courts, all against defendant, and all for causes of action arising in other states.

34. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), *discussed in* 42 Cal. 2d at 584-86, 268 P.2d at 461-62.

35. The implication in the *Leet* case that forum non conveniens had been rejected was explained on the ground that the *Leet* decision had been compelled by an earlier United States Supreme Court holding which no longer limited the court. 42 Cal. 2d at 581, 268 P.2d at 459. The court also found that the state had no policy of discrimination against either noncitizens or F.E.L.A. actions and specifically disapproved any implication in *Schultz* to the contrary. 42 Cal. 2d at 583, 268 P.2d at 460.

36. 42 Cal. 2d at 583-84, 268 P.2d at 461 (citations omitted).

37. It appears that the only cases are: Whealton v. Whealton, 67 Cal. 2d 656, 432 P.2d 979, 63 Cal. Rptr. 291 (1967) (dictum); Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967); Goodwine v. Superior Court, 63 Cal. 2d 481, 407 P.2d 1, 47 Cal. Rptr. 201 (1965) (dictum); Root v. Superior Court, 209 Cal. App. 2d 242, 25 Cal. Rptr. 784 (1962) (dictum).

38. Thomson v. Continental Ins. Co., 66 Cal. 2d 738, 427 P.2d 765, 59 Cal. Rptr. 101 (1967).

39. *E.g.*, H. GOODRICH & E. SCALES, CONFLICT OF LAWS 17, 141 (4th ed. 1964); Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 574 (1958); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 658 (1957); von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1132 (1966);

which has gradually expanded from the outdated standards of *Pennoyer v. Neff*[40] to the modern standards of *International Shoe*[41] and *McGee*.[42] California courts, however, seem to have frequently utilized forum non conveniens considerations to determine the convenience of California as a forum and thereby justify state court jurisdiction.[43] Courts in California and other states which make doing business within the state the criterion for exercising jurisdiction over foreign corporations have used this approach to establish jursdiction over such corporations where they were not "doing business" within the state in the traditional sense. These states have required fewer contacts with the forum state than would amount to "doing business," so long as due process requirements have been satisfied by the convenience and fairness of the place of trial.[44] This blending of forum non conveniens with jurisdiction has been particularly evident in California,[45] where the California Supreme Court has also used this approach to justify quasi in rem jurisdiction[46] and

Developments in the Law—State-Court Jurisdiction, 73 HARV. L. REV. 909, 1012 (1960).

40. 95 U.S. 714 (1878).

41. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

42. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

43. *See, e.g.*, Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Empire Steel Corp. v. Superior Court, 56 Cal. 2d 823, 366 P.2d 502, 17 Cal. Rptr. 150 (1961); Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958); Agalite-Bronson Co. v. K.G. Ltd., 270 Cal. App. 2d 308, 75 Cal. Rptr. 527 (1969); Beirut Universal Bank v. Superior Court, 268 Cal. App. 2d 832, 74 Cal. Rptr. 333 (1969); American Continental Import Agency v. Superior Court, 216 Cal. App. 2d 317, 30 Cal. Rptr. 654 (1963); Regie Nationale des Usines Renault v. Superior Court, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962).

44. R. LEFLAR, AMERICAN CONFLICTS LAW 58-60 (1968).

45. Cases cited note 43 *supra*. Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969), is illustrative of this point. The court found that defendant "purposefully [availed] itself of the privilege of conducting activities within the forum State thus invoking the benefits and protection of its laws." *Id.* at 938, 458 P.2d at 62, 80 Cal. Rptr. at 118. However, the cause of action alleged had absolutely nothing to do with the defendant's "purposeful activity" in California, which was very minimal, but concerned a single unit of a product unconnected with defendant's California activity which had mysteriously found its way into the state without the defendant's knowledge. The court commented that there would have been no jurisdiction if the defendant had conclusively shown the unforeseeability of this item entering the state and that the burden of defending the action would be greater or different in nature from defending actions arising from his purposeful activity within the state. *Id.* at 945, 458 P.2d at 66, 80 Cal. Rptr. at 122. This view is contrary to the usual requirement that the plaintiff show jurisdiction over the parties. The real basis for finding jurisdiction seems to have been the fact that California was clearly the fairest and most convenient place in which to litigate since the cause had arisen there, much of the evidence was there, and because there were medical defendants involved who were not joinable elsewhere. *Id.* at 946, 458 P.2d at 66-67, 80 Cal. Rptr. at 122-23.

46. *See* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957).

jurisdiction over individuals.[47]

California's New Statute

California attorneys will soon be confronted with forum non conveniens in codified form. New section 410.30 of the Code of Civil Procedure provides:

> When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.[48]

By this statute, the legislature has partially heeded Justice Carter's dissent in *Price*, where he urged that the establishment of the doctrine is a matter of legislative concern.[49] The legislature, however, has failed to lay down the guidelines which Justice Carter anticipated would be necessary to safeguard the plaintiff from indiscriminate application of the doctrine.[50] Instead, the legislature apparently has recognized the equitable nature of the doctrine and couched the statute in terms that will continue to leave its application to judicial discretion.[51]

Only twice previously has the doctrine been put into statutory form in the United States. It was first codified in the federal statute on change of venue, 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."[52] The most obvious distinction between federal application of the doctrine and a state's application is that the federal statute makes provision for transfer to a more suitable forum, whereas a state court has no power to transfer to another jurisdiction but can only stay or dismiss a proceeding. This approach by state courts can give the plaintiff a wider choice of forums than the federal statute since, under the federal statute, transfer is limited to those districts "where [the action] might have been brought."[53] Under liberal state application, on the other hand, the defendant might be able to succeed in having

47. *See* Owens v. Superior Court, 52 Cal. 2d 822, 345 P.2d 921 (1959). *See also* Comment, *Extending "Minimum Contacts" to Alimony: Mizner v. Mizner*, 20 HASTINGS L.J. 361 (1968).

48. Operative July 1, 1970.

49. 42 Cal. 2d at 588-89, 268 P.2d at 464. Justice Black was also of this opinion. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 517 (1946) (dissenting opinion).

50. 42 Cal. 2d at 600-01, 268 P.2d at 465.

51. "[*F*]*orum non conveniens* . . . resists formalization and looks to the realities that make for doing justice." Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 528 (1946); see text accompanying note 2 *supra*.

52. 28 U.S.C. § 1404(a) (1964).

53. *Id.*

the forum changed to a jurisdiction where the action could not have been brought originally, by agreeing to submit to the second forum's jurisdiction.[54]

Another distinguishing feature of the federal rule is that it seems to serve a broader purpose than does forum non conveniens in the state courts. Although the federal rule, section 1404(a), was intended to codify forum non conveniens,[55] it has been found to authorize a wider discretion than allowed by forum non conveniens because it provides a "remedy" not as harsh as dismissal.[56] Therefore, under federal practice, the defendant may be able to obtain a transfer of venue on a lesser showing of inconvenience than would be required for dismissal in a state court. The application of the doctrine in federal courts would thus seem intended to put the litigation into the most convenient forum rather than merely to serve as a preventative against forum shopping.[57]

A very important safeguard not found in the California statute which section 1404(a) offers to the plaintiff is that under the federal rule he is not subjected to a surrender of jurisdiction by his chosen forum. Under the new California law, the court will still have the option of ordering an outright dismissal. If it so orders, plaintiff will then have to choose between appealing or instituting the action elsewhere. The federal rule, however, not only preserves jurisdiction for the plaintiff but, where the motion for transfer is made by the defendant, also preserves the plaintiff's choice of law.[58] The plaintiff in a state court, however, may be subjected to a change of applicable law by the invocation of forum non conveniens.[59]

In 1960 Wisconsin became the first state to codify forum non

54. *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1012-13 (1960). See, for example, WIS. STAT. ANN. § 262.19(1) (Supp. 1969).

In California the conditional stay or dismissal seems never to have been used to direct litigation to a more appropriate jurisdiction. Since the new code section expressly provides for stay or dismissal "on any conditions that may be just," it seems that this may change. The conditional decree provision would seem to be particularly useful where the plaintiff had a bona fide reason for commencing his action in California. For instance, California might be the only jurisdiction left open to the plaintiff because of a shorter statute of limitations elsewhere. The defendant may then agree to waive that defense in return for the more convenient forum.

55. 28 U.S.C. § 1404(a), Reviser's Note (1964).

56. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1954).

57. 3 U.C.L.A.L. REV. 102, 104-05 (1955).

58. Van Dusen v. Barrack, 376 U.S. 612 (1963).

59. *See generally* Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1957).

conveniens.[60] The Wisconsin statute is more specific than the new California statute in that it provides procedural and substantive guidelines for application of the doctrine. The fact that neither the statute nor its application seems to have been challenged is some indication that it has been successful. It is noteworthy that under the Wisconsin statute a court may only stay a proceeding.[61] The California statute, on the other hand, gives a court discretion to dismiss the action.

Possible Effects of Codification

Although any prophecy concerning the effect of codification of forum non conveniens in California must be uncertain at best, one probable result will be that the doctrine will be pleaded with increasing frequency. The very fact that the doctrine now appears in statutory form will serve to remind lawyers of its existence and of its approved status as a part of California law. A more significant influence upon the doctrine, however, will probably be the enactment of new section 410.10 of the Code of Civil Procedure.[62] This section does little to expand California's jurisdiction over foreign corporations because of the present liberal construction of "doing business" by California courts;[63] but it certainly will broaden jurisdiction over nonresident individuals,[64] many of whom were previously beyond the reach of the California courts. A number of these individuals would be most inconvenienced if they were forced to defend a suit in California, and would therefore be more likely to plead forum non conveniens.

A more subtle effect of codification is that it may cause a reversal in the tendency of California courts to consider factors of forum non conveniens in determining the existence of jurisdiction.[65] Codification of forum non conveniens in new section 410.30, separate and distinct from the long-arm statute in new section 410.10, seems to indicate that the legislature intended the existence of jurisdiction and the propriety of invoking forum non conveniens to be considered separately because only

60. WIS. STAT. ANN. § 262.19 (Supp. 1969).

61. *Id.* § 262.19(1) (Supp. 1969).

62. CAL. CODE CIV. PROC. § 410.10 (operative July 1, 1970), which provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

63. *E.g.*, Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958).

64. *The Development of In Personam Jurisdiction over Individuals and Corporations in California: 1849-1970*, 21 HASTINGS L.J. 1105 (1970).

65. *See* Buckeye Boiler Co. v. Superior Court, 71 A.C. 933, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Fisher Governor Co. v. Superior Court, 53 Cal. 2d 222, 347 P.2d 1, 1 Cal. Rptr. 1 (1959).

by separate treatment of inconvenient forum can section 410.30 be given effect. A further indication of the legislative intent in this regard is evidenced by new section 418.10(a), which distinguishes between a motion to quash for lack of jurisdiction and a motion to stay or dismiss on grounds of forum non conveniens.[66] This conclusion is also supported by the separate discussion in the Judicial Council Report on the new law of factors forming the basis for jurisdiction and factors to be considered on the issue of inconvenient forum.[67] If California courts respect the apparent intent of the legislature, they will first determine, under the authority of section 410.10, whether any constitutionally permissible basis exists for the exercise of jurisdiction. A determination that jurisdiction does exist would then leave a broad area for the application of the doctrine of forum non conveniens and a consideration of the factors discussed in this Note.

Some increase in the use of the doctrine of inconvenient forum seems presaged by the manner of its codification. Any bolder conclusion at this point would be hazardous because of the absence of any sufficiently similar codification of the doctrine in other jurisdictions that might supply some guide for the California courts to follow.[68] One thing is certain. Because of the dearth of decisional authority in California construing the doctrine, frequent reference will be made to precedents in other jurisdictions.[69]

*Charles Francis Vulliet**

66. CAL. CODE CIV. PROC. § 418.10(a) (operative July 1, 1970) provides: "A defendant . . . may serve and file a notice of motion either or both:

"(1) To quash service of summons on the ground of lack of jurisdiction . . . .

"(2) To stay or dismiss the action on the ground of inconvenient forum."

67. JUDICIAL COUNCIL OF CALIFORNIA, 1969 REPORT TO THE GOVERNOR AND THE LEGISLATURE Apps. II and III.

68. See text accompanying notes 52-62 *supra.*

69. See note 37 & accompanying text *supra.*

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