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Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty

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THE DOCTRINE OF FORUM NON CONVENIENS AS APPLIED IN THE FEDERAL COURTS IN MATTERS OF ADMIRALTY

An Object Lesson in Uncontrolled Discretion

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Courts and commentators, in dealing in the past three decades with the increasingly topical doctrine of *forum non conveniens* in the Federal courts,[1] have sought support for their advocacy of its application in actions at law from what they considered to be its respectable and established status in admiralty.[2] It has also been possible to draw the inference from one or two cases in which the Supreme Court dealt with the doctrine in admiralty that it thought its general statements to have application on the law side as well.[3] In the recent, much noted, twin cases of *Gulf Oil Corp. v. Gilbert*[4] and *Koster v. Lumbermen's Mutual Co.*,[5] the Court gave definitive judicial[6] sanction to the application of *forum non conveniens* in actions brought at law or in equity in the Federal courts.[7] Mr. Justice Jackson, speaking in both cases for a 5-4

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1 The doctrine has had an independent development in the state courts, and is in many, notably those of New York, firmly established. See Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908, 911-18 (1947); Foster, *Place of Trial in Civil Actions,* 43 HARV. L. REV. 1217 (1930); Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment,* 44 HARV. L. REV. 41 (1930); Gaither, *Jurisdiction of Foreign Causes of Action,* 66 U. S. L. REV. 303 (1932); Hansell, *The Proper Forum for Suits Against Foreign Corporations,* 27 COL. L. REV. 12 (1927); Comment, 31 MICH. L. REV. 682 (1933).

2 *E.g.,* Rogers v. Guaranty Trust Co., 288 U. S. 123, 130 (1933). Commentators who advocate the adoption of the *forum non conveniens* technique almost without exception rely in part on the admiralty practice. See, *e.g.,* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COL. L. REV. 1 (1929); Braucher, *supra* n. 1; Comment, *Forum Non Conveniens, A New Federal Doctrine,* 56 YALE L. J. 1234 (1947) (no reason why *forum non conveniens* should apply in admiralty but not at law).

3 In Canada Malting Co. Ltd. v. Paterson Steamships Ltd., 285 U. S. 413, 423n. (1932), Mr. Justice Brandeis, reaffirming the application of the doctrine in admiralty, cited Blair's article, *supra* n. 2, which advocates the general extension of *forum non conveniens* powers, and leading non-admiralty foreign cases, to support a dictum that discretion to dismiss does not exist in admiralty only, but quite generally. A similar dictum, based on the citation of state cases, may be found in Langnes v. Green, 282 U. S. 531, 544 (1931).

4 330 U. S. 501 (1947) (5-4 decision).

5 330 U. S. 518 (1947) (5-4 decision).

6 Legislative action soon followed. 62 STAT. 930 (1948), 28 U. S. C. § 1404 (a) (Supp. 1949).

7 The *Koster* and *Gilbert* cases are not made obsolete by the new Judicial Code. See n. 31 *infra.* The Reviser notes that "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens.* . . . The new subsection requires the court to deter-

majority, laid considerable stress on the argument that no unprecedented innovation in Federal practice was being introduced and cited admiralty cases for support.[8] Mr. Justice Black, in a careful dissent,[9] met this point by maintaining that the existence of the doctrine in admiralty was based on the courts' special powers and functions in the exercise of that branch of their jurisdiction, and therefore had no relevance on the law side.

An admiralty practice of long standing[10] has thus been brought into a rather important controversy concerning the powers of the Federal law courts, neither side being able to summon any more substantial support for its view of that practice than the cursory citation of a leading case or two. Analysis of the problems of admiralty jurisdiction which the device of *forum non conveniens* has been used to solve and of the actual operation of the device has been rare and not exhaustive;[11] a comparative study of the admiralty problems and practice and of their law and equity counterparts has never been attempted.

It is proposed here to state rather generally the problems at law and in equity in the Federal courts which the device of *forum non conveniens* is meant to solve, and then to proceed to a detailed analysis of the admiralty experience, which is believed not to have been a happy one. The device has been in use in admiralty in the United States for 150 years and more[12] and has never received an overhauling. It needs one pretty badly. Much that is relevant to the new field to which the plea of *forum non conveniens* has now been made available will become evident as the analysis proceeds. A study of *forum non conveniens* at law and in equity in the Federal courts in terms of the classes of suits

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mine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to do so. (sic!)" Reviser's Notes to § 1404 (a), 28 U. S. C. (Cong. Serv. 1948). Thus *Koster* and *Gilbert* were codified. Whatever indications there are in the two cases as to how and when discretion is to be exercised are still the only beginnings of detailed development in this field. Problems which the cases left open, such as those centering around the pertinence of state law under Erie R.R. v. Tompkins, 304 U. S. 64 (1938), remain acute, and will be solved in context of what was said in these cases. See Barrett, *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380, 409 *et seq.* (1947); Braucher, *supra* n. 1, at 927 *et seq.*; Comment, 46 MICH. L REV. 102, 104 (1947).

8 Gulf Oil Co. v. Gilbert, 330 U. S. 501, 504 (1947).

9 *Id.* at 512.

10 *See* Marshall, C.J. in Mason v. The Ship Blaireau, 2 Cranch 240, 264 (U. S. 1804).

11 See 1 BENEDICT, ADMIRALTY § 84 (6th ed. 1940); ROBINSON, ADMIRALTY § 3 (1939); Coffey, *Jurisdiction over Foreigners in Admiralty Courts,* 13 CALIF. L. REV. 93 (1925); Notes, 27 CALIF. L. REV. 424 (1939), 87 A. L. R. 1425 (1933); 9 GEO. WASH. L. REV. 352 (1940); 42 HARV. L. REV. 434 (1929); 47 HARV. L. REV. 535 (1934); 29 MICH. L. REV. 767 (1931).

12 *See e.g.,* Willendson v. Forsoket, Fed. Cas. No. 17,682 (D. C. Pa. 1801).

to which it is applied is believed to be needed, but is beyond the scope of this paper.

The Problem of Forum Non Conveniens at Law and in Equity

The problem of *forum non conveniens* is really an obvious one. It is this: How much freedom is a plaintiff to have in choosing the place where he wishes to bring suit. He once had next to none. In modern times he has been largely freed of rigid venue restrictions,[13] and been given an area of discretion so wide that, in the judgment of many commentators, he is able to abuse it.[14] He may bring suit in the forum in which, for various reasons, it is most cumbersome and expensive for the defendant to present his case.[15] Many a settlement unduly favorable to the plaintiff has been hastened in this manner. Or he may for less extreme reasons prefer a forum other than the one which the defendant would like to see chosen.[16] Plaintiff may sue in that part of the country

[13] In the diversity jurisdiction, venue in suits brought in the federal courts is laid in either defendants' or plaintiffs' district of residence. 62 STAT. 930 (1948), 28 U. S. C. § 1391 (a) (Supp. 1949). Where a basis for jurisdiction other than diversity exists, and there is no specific provision to the contrary, venue is laid only in the district of residence of all the defendants. *Id.* § 1391 (b). But specific provisions to the contrary there are. Suits under the FELA and stockholders' actions against corporations may be started almost anywhere. 36 STAT. 291 (1910), as amended, 36 STAT. 1167 (1911), 45 U. S. C. § 56 (1946); 28 U. S. C., *supra,* §§ 1391 (c), 1695. A corporation generally may be sued almost wherever it can be found. 28 U. S. C., *supra,* § 1391 (c); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165 (1939); see Note, 53 HARV. L. REV. 660 (1940). Special, liberalized venue provisions may be found also in the Clayton Act, 38 STAT. 736 (1914), 15 U. S. C. § 22 (1940). Nor, of course, is this list exhaustive of all special venue provisions Congress has seen fit to enact.

[14] See, *e.g.,* Foster, *supra* n. 1, 43 HARV. L. REV. at 1219: "Progress in removing arbitrary limitations on plaintiff's choice of forums without corresponding progress in protecting defendants from improper exercise of such choice may create more abuses than it corrects."

[15] An inconvenient forum raises quite real difficulties in the defense of a suit. The attendance of witnesses from a foreign jurisdiction cannot be forced. Witnesses may be unwilling to travel; and when they do, the expenses involved are considerable. Documents also may have to be transported, and dispensed with for lengthy periods of time, as well as subjected to the risk of loss. In the case of a corporation, the witnesses may be key employees whose time is valuable to the defendant, and who, if the trial is at a distant place, will have to be away from their jobs for long periods of time, whereas if the trial had been at home, their absence would have been a matter of hours. Litigation in a strange place may involve also the hiring of local counsel; defendant may even lose the advantage of having his house counsel conduct the case, even though it is that house counsel who, familiar with all operations, would defend most efficiently and cheaply. The list of inconveniences is really endless, and to such obvious ones as are here enumerated may be added in particular cases additional annoyances; though the factors taken singly may appear to be of small significance, their cumulative effect is impressive.

[16] See Braucher, *supra* n. 1, at 931: "The parties may have *legitimate* differences as

in which juries are least likely to be startled by and most likely to grant a large verdict.[17] He may like the judges hearing cases on appeal in one circuit better than in another. In the process of thus getting the full advantage of their positions, plaintiffs often overcrowd the dockets of a small number of popular courts, and burden judges with unnecessary and difficult decisions on points of conflict of laws[18] and with unaccustomed and therefore not the most skilful consideration of the laws of another jurisdiction.

There is, however, nothing inherently outrageous in this sort of a situation. The burden on the courts is easily alleviated by assigning disproportionate numbers of judges to the "popular" circuits—a practice prevalent anyway. Whether to allow the plaintiff to retain all his advantages, or how many to allow him to retain, is in all reason a question the answer to which must vary with the type of action dealt with and with the rationale behind the jurisdictional and venue provisions which govern it. This has, by and large, up to now been understood by the courts and the Congress. Thus in causes under the FELA the result has been—and has remained unshaken by the *Koster* and *Gilbert* cases,[19] though not by § 1404 (a) of the new Judicial Code[20]—that the plaintiff was allowed to keep his advantages, and to sue large corporate defendants wherever he found them.[21] A strong argument can be made against

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to the appropriate place to try the lawsuit. . . ." (italics supplied). The difficulties under which defendant labors might have arisen for plaintiff had he sued at a place more convenient for defendant. Two objectives which a plaintiff may have in mind should be distinguished. One is to pick the place at which suit is most likely to force defendant into an unfavorable settlement. The other is simply to pick the place most convenient for himself.

17 This was one of the stated reasons for plaintiff's choice of New York as a forum in the *Gilbert* case. See Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 510 (1947).

18 See Braucher, *supra* n. 1, at 937.

19 *See* Gulf Oil Corp. v. Gilbert, *supra* n. 17, at 506.

20 28 U. S. C. § 1404 (a), *supra* n. 6.. In *Ex parte* Collett, 337 U. S. 55 (1949), and Kilpatrick v. The Texas and Pacific R. R., 337 U. S 75 (1949), the Supreme Court, Mr. Chief Justice Vinson writing, held, over the dissents of Black and Douglas, JJ., that § 1404 (a) overruled the *Kepner* case, *infra* and made the doctrine of *forum non conveniens,* as heretofore judicially developed, applicable to actions brought under the Federal Employers' Liability Act.

21 Baltimore & Ohio R. R. v. Kepner, 314 U. S. 44 (1941), held that an Ohio court could not enjoin an action under the FELA in a New York federal court. But the majority of six indicated clearly that their reasoning would extend to prohibiting dismissal of such an action by a federal court on *forum non conveniens* grounds as well.. *Id.* at 54. Mr. Justice Frankfurter dissented, saying that if, as the court thought, the FELA venue provision forbade the application of the doctrine of *forum non conveniens,* so did every other venue provision in the books. *Id.* at 62. But that is ignoring the reason why this particular venue provision was read as the court read it. The court saw in this one the expression of an intent on the part of Congress to facilitate the typically impecunious

restricting plaintiff's choice in shareholders' suits.[22] On the other hand, our law knows instances in which policy has been thought so strong in favor of allowing suit in one place only that plaintiffs were never accorded any discretion at all.[23]

This statement of the problem would seem to suggest that it can and should be resolved not only in piecemeal fashion, but legislatively, through venue provisions. It would appear to follow then that in laying down, as it has, rules of venue, whether special or general, for the Federal courts, the Congress has concluded the matter.[24] This is Mr.

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plaintiff's recovery by allowing him to have the advantages which accrue from a free choice of forum. See n. 16 *supra*. It may be doubted whether Congress intended to include among plaintiff's advantages the ability to harrass. Since *Kepner* guarantees that one also, it may have gone too far. It was to be hoped, and may still be possible, there being nothing to the contrary in the holdings of the *Collett* and *Kilpatrick* cases, *supra* n. 20 that only so much of it as went too far was overruled by § 1404 (a). That will be for the courts to decide when they come to laying down in detail the criteria which are to govern the exercise of *forum non conveniens* power in cases arising under the FELA. No more is noted by the Reviser than this: "As an example of the need of such a provision, see Baltimore & Ohio R. R. v. Kepner, . . . which was prosecuted under the Federal Employers' Liability Act . . ." Reviser's Notes to § 1404 (a), 28 U. S. C. (Cong. Serv. 1948). But surely the FELA venue provision does not spring from precisely the same policy considerations as any other one, see n. 13 *supra*, and cannot be said to force the same *forum non conveniens* result. The terms in which Congress expresses its intent are the same, namely various provisions for venue, but, quite obviously, that need not make its intent the same in every instance. What is meant must be determined in context of what is talked about.

22 See the general implications of Mr. Justice Cardozo's dissent in Rogers v. Guaranty Trust Co., 288 U. S. 123, 150 (1933); see Comments, 31 MICH. L. REV. 682 (1933), 46 MICH. L. REV. 102, 104 (1947).

23 The familiar distinction, drawn in the early case of Livingstone v. Jefferson, Fed. Cas. No. 8,411 (C. C. D. Va. 1811), between transitory and local actions need only be mentioned, on the basis of which suits involving title to foreign land are dismissed. See also Ellenwood v. Marietta Chair Co., 158 U. S. 105 (1895). This rule resolves the problem of place of suit entirely in defendant's favor. So also, although less definitively, does the holding in Davis v. Farmers Co-operative Equity Co., 262 U. S. 312 (1923). In that case, Mr. Justice Brandeis, declared unconstitutional as an undue burden on commerce, an extreme form of inconvenience imposed on a railroad by suit by a non-resident in Minnesota, where the railroad had a ticket-selling agent only, on a cause of action which arose in Kansas. Again defendant was protected, but less securely, because the line drawn here, being based on particular facts, is a more wavering one than that established by Livingstone v. Jefferson.

A further illustration of the fact that problems of place of suit normally receive treatment which varies with the types of action in which they arise is found in New York, where *forum non conveniens* is well established as a technique for dealing with tort actions between non-residents, but is not deemed applicable to suits in contract. See Smith v. Crocker, 14 App. Div. 245, 43 N. Y. Supp. 427 (1st Dep't 1897), *aff'd mem.*, 162 N. Y. 600, 57 N. E. 1124 (1900); Gaither, *supra* n. 1, at 304.

24 Since there is no venue in admiralty, *In re* Louisville Underwriters, 134 U. S. 488 (1890), and certainly none in suits against aliens, Pub. L. No. 773, *supra* n. 6, § 1391 (d), justification would remain for the exercise of *forum non conveniens* discretion in that jurisdiction even under this view.

Justice Black's view, though his reasoning in arriving at it is not quite clear, in his dissent in the *Gilbert* case,[25] and it is this view that Mr. Justice Frankfurter sets up in order then to disagree with the premises on which it is based in his dissent in *Baltimore & Ohio R. R. v. Kepner*.[26] But the premises do not require such a conclusion, and are not discredited when the latter is proved to be untenable. All that is involved in the premise here accepted is a statement of the *forum non conveniens* problem as one that is inescapably connected with the substantive rights of the parties in any given type of suit, rather than being "merely" an "administrative" problem.[27] Nothing is said about what techniques may be suited for its solution.[28]

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[25] See *supra* n. 9.

[26] See *supra* n. 21. In the first United States v. National City Lines case, 334 U. S. 573 (1948), in which the Court, per Rutledge, J., came closest to accepting the precise view suggested in this paper, Mr. Justice Frankfurter, again in dissent, restated his position. An intent of Congress to allow plaintiffs a free choice of forum (the Justice used the vituperative adjectives "oppressive" and "vexatious," but his meaning extended to all freedom in choice of forums, without taking the distinction pointed out in notes 15 and 16 *supra*) should not be lightly inferred "from language merely conferring jurisdiction." 334 U. S. at 599, 600. One wonders why not, when detailed, extraordinary and carefully considered and debated venue provisions are made, and one wonders further how else Congress could express such an intent.

[27] *But cf.* Taney, C.J. dissenting in Taylor v. Carryl, 20 How. 583, 600 (U. S. 1857); Foster, *supra* n. 1, 44 HARV. L. REV. at 41 (discretion is like that exercised in granting a continuance; place of trial is an "administrative" problem).

[28] Professor Braucher, in his article, *supra* n. 1 at 912 *et seq.*, takes issue with Blair, who, in the first published analysis of *forum non conveniens*, illustrated the operation of that doctrine, as he called it, with cases such as those which dismiss actions involving title to foreign land, and hase their holdings not on discretion, but on a "rule of law." Mr. Braucher also takes to task Mr. Justice Jackson who in an extra-judicial statement said that Davis v. Farmers Co-operative Equity Co., *supra* n. 23, "really is a *forum non conveniens* case and ouly incidentally a commerce clause case." See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COL. L. REV. 1, 31 (1945). That, says Professor Braucher, is "to neglect the stated ground of decision," and if taken to indicate "that dismissal is discretionary, fails to explain the course of decision and hence *to furnish a reliable basis for prediction.*" (italics supplied). See Braucher, *supra* n. 1, at 913. However, Mr. Justice Jackson's statement is justifiable, for although the *Davis* case purports to state a "rule of law" it does not define it further than in terms of its own facts, thus leaving it to the district judge in subsequent cases not only to find facts, an area in which he has a good deal of discretion, but also, case by case to define the meaning of the standard "burden on commerce." No matter how one reads the case therefore, one cannot get out of it a wholly "reliable basis for prediction." See FRANK, LAW AND THE MODERN MIND 131, 140-41 (1930) (whatever their general truth, the passages cited are peculiarly relevant here); compare Louisville & N. R. Co. v. Deutsche Dampfschiffarts-Gesellschaft (S. D. Ala. 1930), with 31 COL. L. REV. 323 (1931) (comment on the *Louisville* case) for an illustration of how, under *Davis*, with the shifting of emphasis from some facts to others—and this includes only the facts published in the opinion, not whatever else may have been shown—opposite results may he insisted upon with equally righteous vehemence.

Clearly, venue provisions, whether restrictive or liberal, are one way to deal with the matter. They are an inflexible, and not often the best way. But it is erroneous to think of them only as a source of the problem. They are also one way to solve it. The Supreme Court, before the enactment of § 1404 (a) clearly recognized this, notably in the first *National City Lines* case, in which the Court, having found that the Congress, in the Clayton Act, as in the FELA, had adopted the venue technique, decided that there was nothing for it to do but respect the legislative judgment.[29] The Court realized that the solution of a *forum non conveniens* problem must vary with the class of suits in context of which it is presented. And there is nothing in the recent cases[30] in which the Court applied § 1404 (a) despite special venue provisions to indicate any acceptance of a different view; clearly not of Mr. Justice Black's unreal assumption that Congress in writing venue provisions, whether special *or* general, always consciously framed them as techniques for the solution of the *forum non conveniens* problem as it appears full blown in this day and age; nor of Mr. Justice Frankfurter's equally unreal assumption that Congress *never* so framed them. Both, as generally applicable propositions, are easily rebutted by actual legislative history. The Court in the recent cases, it is believed, merely misread the Congressional intent behind § 1404 (a). But the Court held only that § 1404 (a),[31] which in effect codifies the Gilbert and Koster cases, applies, special venue provisions to the contrary notwithstanding. The Court did not say how in detail § 1404 (a) is to be applied, or that it is to be applied in the same manner to all classes of suits. Detailed rules, which must still take account of what Mr. Justice Rutledge referred to as "all revelant materials" (including legislative history of the

Professor Braucher's general objections imply the desire to differentiate between the *problem* of *forum non conveniens,* and the technique for its solution which employs the exercise of discretion, and is also known as *forum non conveniens.* Such a distinction is indeed desirable. But all the cases adduced by Blair are concerned with the problem, all right.

[29] United States v. National City Lines, 334 U. S. 573 (1948). See *supra* n. 26. The case is conceivable in which it might be possible to show that the Congressional intent was a solution wholly in plaintiff's favor of the *forum non conveniens* problem even where Congress refused in a particular instance to impose any venue requirements at all, rather than imposing lax ones.

[30] *Ex parte* Collett, 337 U. S. 55 (1949); Kilpatrick v. The Texas and Pacific R. R., 337 U. S. 75 (1949); United States v. National City Lines, 337 U. S. 78 (1949). Concurring opinion by Mr. Justice Rutledge for all three cases, 337 U. S. at 72. Dissenting opinion by Mr. Justice Douglas, joined in by Mr. Justice Black, 337 U. S. at 84. See *supra* n. 20.

[31] 62 STAT. 930 (1948), 28 U. S. C. § 1404 (a) (Supp. 1949): "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."

various statutes) remain to be laid down by appellate courts. For neither § 1404 (a) nor the recent decisions applying it vest in the lower Federal court untrammeled discretion to decide cases on an *ad hoc* basis, on their particular facts, exercising no rule-making, but only their decisional power. Such an unusual grant of authority to make orders[32] which affect the substantive rights of similarly situated parties as well as those before the court should not be lightly presumed. The effect of this provision therefore is to remove the technical doubts expressed by Mr. Justice Black, and leave the courts free to formulate for the various classes of situations *forum non conveniens* techniques which they think are suited.

Suits in Admiralty Between Foreigners

Careful consideration of the various classes of suits in admiralty between foreigners with a view to determining whether and how the device of *forum non conveniens* is to be applied to them has never been undertaken by our appellate courts. The lower courts borrowed the technique from English cases,[33] and while they made some attempt to formulate rules concerning it, they could not do so authoritatively, of course. As a result, the development has been much like that of the proverbial Topsy, and the cases have often seemed to observers to defy analysis and rational classification.[34] While the consequence of this situation has not been any great miscarriage of justice, since the results have most frequently and, often, one feels, instinctively, been correct, nevertheless, time, effort and money have been wasted by parties and courts in suits which would never have been brought and on motions which would never have been argued if lines of demarcation and guidance had been drawn by someone.

Suits between foreigners in admiralty are of three major types which it is relevant to distinguish for present purposes. The techniques applicable to each should differ substantially.

Actions by Seamen for Wages: The Constitution extends the Federal judicial power "to all cases of admiralty and maritime jurisdiction."[35]

[32] While a dismissal in trial court discretion under the doctrine of *forum non conveniens* is appealable, the only appeal under § 1404 (a), whether the action was transferred or retained, would lie after judgment on the merits. See Braucher, *supra* n. 1, at 938 and authority there cited. Appellate courts can and should nevertheless consider the propriety of dismissals and retentions of cases even after the merits. The consequences of failure to do so will become apparent as the admiralty experience is reviewed.

[33] See ROBINSON, *supra* n. 11, at p. 15; Coffey, *supra* n. 11, at 94-95.

[34] See Coffey, *supra* n. 11, at 94; 42 HARV. L. REV. 434 (1929); 29 MICH. L. REV. 767 (1931).

[35] U. S. CONST. Art. III, § 2. This grant was implemented by the Judiciary Act of 1789 and all its subsequent revisions.

It was quickly settled that this grant covers controversies between foreign seamen and their foreign masters for discharge and wages or for wages after discharge,[36] although this result was by no means the only possible one.[37] The reason for this grant and assumption of jurisdiction is clear from the cases as well as from the traditions of the admiralty system. The courts in a very real sense consider seamen to be their wards and the objects of their protection.[38]

In formulating a guide for the exercise of the discretion which they held to govern their assumption of jurisdiction,[39] the courts in this field quite sensibly, though not often articulately, looked to the reasons for the existence of their jurisdiction. It soon became accepted, therefore, that jurisdiction would be taken when justice to the plaintiff seaman demanded it.[40] This rule, quite obviously, takes no account of the convenience of the parties, certainly not of the defendant. It considers only the convenience of the forum. Doing so is justified for several reasons. To begin with, there is seldom in these cases any such inconvenience as is mentioned in the normal *forum non conveniens* case. The witnesses in this type of case are usually the master and the plaintiff and other crew members, all of whom are there *ex hypothesi*, except perhaps if the dispute arose after the end of the voyage, and libellant and the ship independently happen to be in this country.[41] Secondly, the real considerations of convenience here are more unusual ones. It is

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[36] Moran v. Baudin, Fed. Cas. No. 9,785 (D. C. Pa. 1788); Weiberg v. The St. Oloff, Fed. Cas. No 17,357 (D. C. Pa. 1790); Thompson v. The Catharina, Fed. Cas. No. 13,949 (D. C. Pa. 1795).

[37] It would not have been unreasonable, it would seem, to have read Art. III, § 2 in context of the general grant of jurisdiction to the federal courts, which conspicuously does not cover suits between foreigners. It might then have been held that jurisdiction was here given to admiralty over parties otherwise entitled to a hearing in the Federal courts only. For it is generally recognized that the purpose of this section was to draw a line of demarcation between state and Federal courts, not to enlarge the class of persons who may have access to the federal courts.

[38] *See* Judge Learned Hand in The Falco, 20 F. 2d 362, 363 (2d Cir. 1927); The Albergen, 223 Fed. 443, 444 (S. D. Ga. 1915) ("claims of seamen for wages are entitled to the highest consideration, and . . . they occupy a favored position in admiralty law").

[39] *E.g.*, Willendson v. Forsoket, Fed. Cas. No. 17,682 (D. C. Pa. 1801).

[40] *E.g.*, Bucker v. Klorkgetter, Fed. Cas. No. 2,083 (S. D. N. Y. 1849); The Amalia, 3 Fed. 652 (D. C. Me. 1880); The Sirius, 47 Fed. 825 (N. D. Calif. 1891). An alternative formulation, though not one which affects results any differently than the other, is the statement sometimes seen, see, *e.g.*, The Albani, 169 Fed. 220 (E. D. Pa. 1909), that jurisdiction is taken only where an injustice would result to plaintiff from a refusal to do so. Which phrasing is used often depends on whether the court is justifying a dismissal or a retention of jurisdiction in a particular case.

[41] Only one case has been found in which the unusual circumstance is present of a libellant suing a ship for a debt arising out of an old voyage. It is The Pawashick, Fed. Cas. No. 10,851 (D. C. Mass. 1872).

feared that holding a ship and its crew in an American port, to which they may have come to do no more than refuel, may, in the eyes of the nation of the flag be deemed an undue interference with her commerce,[42] and a violation of that "comity and delicacy" which in the more courtly days of some of the earlier cases were considered normal among the nations.[43] But may one not assume, as some courts did, that other nations have the same regard for the welfare of their seamen as our courts, and that it is therefore the part of comity to right an injustice to a sailor?[44] Or, if this argument is cancelled by the fact that the foreign consul concerned has protested the assumption of jurisdiction, is not the answer that objections of this kind go to the very existence of jurisdiction, in every instance, regardless of particular circumstances, have been overridden by the grant of it to the courts, and are therefore not proper considerations in the exercise of discretion? Moreover, a more fundamental answer is the fact that these matters of "comity and delicacy" were early taken in hand by the Executive and the Senate in the course of their conduct of foreign affairs through the signing of treaties with the nations, and were thus taken out of the province of the courts completely.[45]

With proper regard for the reasons underlying the existence of their jurisdiction and the single other relevant factor of their own convenience, the courts thus formulated in detail a rule to fit the cases.[46] It was said

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[42] Such interference results from the interruption of voyages. See, for prominent mention of this consideration, though not as the ground of decision, Lynch v. Crowder, Fed. Cas. No. 8,637 (S. D. N. Y. 1849); The Infanta, Fed. Cas. No. 7,030 (S. D. N. Y. 1848).

[43] *See* Davis v. Leslie, Fed. Cas. No. 3,639 (S. D. N. Y. 1848) ("comity and delicacy" noted, but jurisdiction taken); Willendson v. Forsoket, Fed. Cas. No. 17,682 (D. C. Pa. 1801) (speaks of what is due "from one friendly nation to another").

[44] See, *e.g.*, Gonzales v. Minor, Fed. Cas. No. 5,530 (C. C. E. D. Pa. 1852) (statement that jurisdiction is *exercised* as a matter of comity, rather than refused so; the court in hearing the case "confers a favor" on a foreign state).

[45] These treaties, some of them negotiated early in our history with such seafaring nations as Sweden, and modified after the passage of the Seamen's Act of 1915, see n. 59 *infra*, often gave consuls exclusive jurisdiction over demands by seamen for wages, and sometimes jurisdiction concurrent with that of the courts. See Coffey, *supra* n. 11, at 103 *et seq.*; FOREIGN RELATIONS OF THE UNITED STATES 1914, 307-316. Their constitutionality is undoubted as applied to foreign seamen. See The Albergen, 223 Fed. 443 (S. D. Ga. (1915), 29 HARV. L. REV. 219; The Koenigin Luise, 184 Fed. 171 (D. C. N. J. 1910); see also The Bound Brook, 146 Fed. 160 (D. C. Mass. 1906). They show clearly that whatever problems of diplomacy are present in these cases are political rather than judicial problems really, and have been considered by that branch of the government in the competence of which they lie. That being so, where no treaty exists, considerations which might make it desirable for one to be concluded, or for conditions to be enforced as if one existed, are not proper ones for the courts.

For other matters of diplomacy, not within the purview of these treaties, and for which the courts have been forced to have regard, see ns. 113, 114 *infra*.

[46] See The Ester, 190 Fed. 216 (E. D. S. C. 1911) for a thoughtful review of the then

that jurisdiction would be taken if the voyage was at an end and the seaman stranded here as a result, or if he had been discharged here without his pay and unjustly, or if the voyage provided for by the articles had been broken or unduly deviated from, or if for other reasons the master had violated the articles and made a discharge justified, as by cruel and barbarous actions.[47] Protests from consuls, in the absence of a governing treaty, which would likely receive a strict construction,[48] would in such cases be of no avail.[49]

A sensible *forum non conveniens* technique would thus seem to have been worked out. But the difficulty is that it never served its purpose. For the criteria of hardship and injustice which were set up to govern discretion in every instance coincided with the merits of the case, and thus necessitated a trial sufficient to determine the latter.[50] The futility of this process is exceptionally well illustrated by a series of cases decided around the middle of the last century in the busy Southern District of New York, which declined jurisdiction. In every one there had been a protracted trial and a decision on the merits against the plaintiff before the matter of discretion was reached.[51] In the remaining few of the limited number of cases declining jurisdiction, the decision to dismiss was reached in the same way, with varying degrees of elaborateness in the hearing on the merits,[52] unless it rested on a Treaty withdrawing

existing cases, a statement of the reason for the existence of jurisdiction, and a reformulation of the rule.

[47] Varrvavsos v. Pezas, 41 F. Supp. 318 (S. D. N. Y. 1941); The S. S. Illeano, 35 F. Supp. 663 (D. C. N. J. 1940); The Sirius, 47 Fed. 825 (N. D. Calif. 1891); The Gazelle, Fed. Cas. No. 5,289 (D. C. Mass. 1858); Bucker v. Klorkgetter, Fed. Cas. No. 2,083 (S. D. N. Y. 1849); M. Thompson v. The Catharina, Fed. Cas. No. 13,949 (D. C. Pa. 1795); Moran v. Baudin, Fed. Cas. No. 9,785 (D. C. Pa. 1788); *see* Davis v. Leslie, Fed. Cas. No. 3,639 (S. D. N. Y. 1848); The Napoleon, Fed. Cas. No. 10.015 (S. D. N. Y. 1845).

[48] See, *e.g.*, The Amelia, 3 Fed. 652 (D. C. Me. 1880). A treaty with Sweden gave Swedish consuls exclusive jurisdiction over suits for wages such as this one, which was commenced in Portland, Me. But the court noted that the nearest official of the Swedish government in this country was a vice-consul located in Boston. It held that the treaty could not have been intended to leave a seaman without a remedy in the absence of a consul on the scene, assumed jurisdiction after a trial had been had on the merits, and gave a decree for the seamen. See also for no less strict a construction, The S. S. Emmy, 39 F. Supp. 871 (S. D. N. Y. 1940). *But cf.* The Cambitsis, 14 F. 2d 236 (E. D. Pa. 1926).

[49] Orr v. The Achsah, Fed. Cas. No. 10,586 (E. D. Pa. 1849); Weiberg v. The St. Oloff, Fed. Cas. No. 17,357 (D. C. Pa. 1790).

[50] For judicial recognition of this fact, see The Ester, 190 Fed. 216 (E. D. S. C. 1911), and cases cited n. 55 *infra*

[51] Lynch v. Crowder, Fed. Cas. No. 8,637 (S. D. N. Y. 1849); The Infanta, Fed. Cas. No. 7,030 (S. D. N. Y. 1848); Graham v. Haskins, Fed. Cas. No. 5,669 (S. D. N. Y. 1845) (all opinions by Betts, J.).

[52] Gonzales v. Minor, Fed. Cas. No. 5,530 (C. C. E. D. Pa. 1852); The Gloria de

jurisdiction.[53] Nor, on the other hand, has any case been found taking jurisdiction, which did not also award a decree to the plaintiff,[54] with the notable exception of two decided by judges who rebelled at the farce of a discretionary dismissal after a trial on the merits.[55]

In modern times, Congress has taken a step in the discretion of eliminating jurisdictional dismissals in suits by seamen for wages. The Seamen's Act of 1920 extended to foreign as well as American seamen new remedies for the recovery of wages, before the voyage is ended and in the absence of a breach of the articles, and provided that the Federal courts were to be open to foreign seamen in suits under this Act.[56] The better and gradually prevailing view is that the jurisdiction so granted is mandatory. The Supreme Court, in *Strathern S. S. Co. v. Dillon*,[57] which held the parent legislation of the Act of 1920 constitutional in its application to foreign seamen on the theory that Congress could impose conditions on the privilege granted foreign ships to use our ports, did not expressly hold that jurisdiction was mandatory. But the implication from dicta is strong.[58] The provision would otherwise

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Larringa, 196 Fed. 590 (S. D. N. Y. 1911); The Albani, 169 Fed. 220 (E. D. Pa. 1909); Willendson v. Forsoket, Fed. Cas. No. 17,682 (D. C. Pa. 1801).

53 See cases cited *supra* n. 45.

54 See cases cited *supra* n. 47 and n. 49.

55 The Lady Furness, 84 Fed. 679 (E. D. N. Y. 1897) (Tenney, J. expressly takes jurisdiction on the ground that it took a trial on the merits to determine whether he should do so, and that at this point time and expense will be saved by a decree on the merits for the defendant rather than a jurisdictional dismissal); The Pawashick, Fed. Cas. No. 10,851 (D. C. Mass. 1872) (Lowell, J.). Judge Lowell's understanding of the dilemma, which leads him to the same sensible result as that reached by Judge Tenney in The Lady Furness, is demonstrated also by his remarks on this point in The Becherdas Ambaidass, Fed. Cas. No. 1,203 (D. C. Mass. 1871), a case argued to him by O. W. Holmes, Jr. for the libellants.

56 "Every seaman . . . shall be entitled to receive on demand . . . one-half part of the balance of his wages earned and remaining unpaid . . . at every port where such vessel . . . shall load or deliver cargo before voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided,* Such demand shall not be made . . . more than once in the same harbor on the same entry. Any failure of the master to comply . . . shall release the seaman from his contract. . . . And when the voyage is ended every . . . seaman shall be entitled to the remainder . . . : *And further provided,* That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement. This section shall not apply to fishing or whaling vessels or yachts." 41 STAT. 1006 (1920), 46 U. S. C. § 597 (1946). See also §§ 596, 599.

57 252 U. S. 348 (1919). See also Patterson v. The Bark Eudora, 190 U. S. 169 (1902).

58 The court appears to assume that jurisdiction over American seamen under the Act is mandatory. 252 U. S. at 354. It then argues that if foreign seamen were not accorded the same rights under the Act as American seamen, the latter would be put at a disadvantage, since shipowners would prefer to hire foreigners. Congress it is concluded, could have had no such intention, but must have meant to put foreign and American

be meaningless, since, Congress having established a new cause of action in admiralty for foreigners, jurisdiction, with the traditional proviso for discretion, would exist *ipso facto* under the Constitution. Here, it would seem, as in the FELA, Congress, if it has done anything, has faced the *forum non conveniens* problem, and has been persuaded by considerations favorable to the plaintiff, rather than by thoughts of the convenience of courts or defendants, or delicacy to foreign nations. The argnment is strong, for it cannot be assumed that foreign courts would grant recovery under this Act, and any dismissal will therefore defeat the purpose of the statute. The lower courts, though there has been conflicting language, have held jurisdiction to be mandatory.[59]

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seamen on an equal footing under the statute—that is, make them equally repugnant to shipowners nearing our shores.

[59] In Lakos v. Saliaris, 116 F. 2d 440 (4th Cir. 1940), Judge Parker, reversing The Leonidas, 32 F. Supp. 738 (D. C. Md. 1940), held squarely that the Seamen's Act of 1920 does not permit discretionary dismissals. He read the *Dillon* case, *supra* n. 57, as so saying. In The Prince Pavle, 32 F. Supp. 5 (E. D. N. Y. 1940), Byers, J. expresses the opinion that jurisdiction under the Act is not mandatory. The case is a confused one. The court first reviewed the merits and found that plaintiff's claim was baseless. It is not even clear that the libel prima facie stated a cause of action under the Act. The Estrella, 102 F. 2d 736 (3d Cir. 1938), *cert. den. sub nom.* Myklebust v. Meidelly, 306 U. S. 658 (1939), which like *The Prince Pavle* is expressly disapproved by Judge Parker in Lakos v. Saliaris, is based on a misreading of a treaty with Norway, which, signed anew in 1932 like so many others after the passage of the Seamen's Act, gave the consul jurisdiction concurrent with that of the courts over actions under the Act, while the consul's jurisdiction over other matters of the ship's internal affairs remained exclusive. But these treaties were changed precisely so as not to conflict with the courts' jurisdiction under the Seamen's Act. To give an article making the consul's jurisdiction concurrent the same effect as one allowing it to remain exclusive is, as Biggs, J. points out in dissent, nonsense. For a holding under the same treaty directly *contra* to that of *The Estrella,* see The Roseville, 11 F. Supp. 151 (W. D. Wash. 1935). Moreover, the case, decided without the citation of a single authority, would be clearly wrong even if jurisdiction were not mandatory under the Seamen's Act, and even, in fact, if there were no Seamen's Act at all. For a deviation on the part of the master was shown which terminated the seamen's contract.

Other cases granting motions to dismiss are based on construction of the substantive parts of the Act, and rest on holdings that particular libels state no cause of action under it. The question of whether jurisdiction over a good libel is mandatory or not is, of course, not reached. See, *e.g.,* The Jacob Luckenbach, 36 F. 2d 381 (E. D. La. 1929) (bonus not wages); The Strathorne, 15 F. 2d 210 (D. C. Ore. 1926). In The Memos, 35 F. Supp. 661 (E. D. N. Y. 1940), the judge first overrnled a motion to dismiss in his discretion on the ground that "the Seamen's Act opened the courts to foreign seamen" On reargument he dismissed because the libel asked for a bonus, not wages. The Nadin, 35 F. Supp. 390 (D. C. N. J. 1940) also involved a bonus. The court, without mentioning the Seamen's Act, dismissed on the ground that the bonus had already been paid.

Lastly, there are a number of cases which retain jurisdiction without facing up squarely to the question of whether they are doing so in their discretion or because under the Seamen's Act they have to. The Prahova, 38 F. Supp. 227 (S. D. Calif. 1941), after an extended excursion among numerous irrelevancies, comes to rest on the proposition that

Thus no libel which states a cause of action under the Seamen's Act should ever be dismissed. And once jurisdiction is taken it would hardly seem worthwhile, on the trial, to exclude evidence closely allied to the Seamen's Act issues but going to alternate or additional claims to recovery under the law of the flag or the general maritime law, or to refuse to grant such additional or alternate recovery if it appears on the evidence relevant to the main issue that the seaman is entitled to it, on the ground that the forum is inconvenient.

It appears therefore, that had any authoritative appellate tribunal ever comprehensively considered the problem of *forum non conveniens* in suits for wages by foreign seamen, before the passage of the Seamen's Act and *a fortiori* afterward, it would have been forced to arrive at the conclusion that no good reason exists for vesting in the courts discretion to dismiss such actions otherwise than on the merits. Certainly it is true that the burden placed on the courts is a considerable one. Taking testimony from foreigners is a cumbersome and lengthy job, at the end of which there still stands between the judge and the witness a middleman interpreter or translator.[60] If a decision under foreign law is required, it is with the law not of one of the states but of Turkey or Yugoslavia that the court has to deal. And those for whose benefit all these difficulties are undergone pay no taxes toward the support of our courts. Nor should the annoyance to masters and ship-owners whose schedules are disrupted be disregarded. However, it seems abundantly clear that no *forum non conveniens* device is capable of obviating these difficulties in view of the nature of this type of suit. The only effect of its application has been confusion resulting from efforts by courts to state decisions reached on the merits in discretionary terms. Non-critical factors have from time to time been unduly emphasized by har-

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there "probably" is no discretion anyway. Language to this effect in The Sonderborg, 47 F. 2d 723 (4th Cir. 1931), *cert. den. sub nom.* Atkies, Dampskibsellskabet Donnebrog v. Mikkelsen, 284 U. S. 618 (1941), is even stronger. The Gaudia, 34 F. Supp. 405 (E. D. N. Y. 1940), and The Almena, 23 F. Supp. 645 (E. D. N. Y. 1938) take jurisdiction without making much of a show of the exercise of discretion. One suspects they assumed it does not exist. On the whole, therefore, it is not unfair to say that the cases, such as they are, tend to support the strongest one of the lot, namely the decision in which Judge Parker held that there is no discretion under the Seamen's Act.

[60] But the courts, in our seaboard cities especially, are not yet entirely unaccustomed to dealing with foreign-language parties and witnesses. It can be mentioned as a rather startling exception only, but in The Prahova, 38 F. Supp. 418 (S. D. Calif. 1941), which is the case of the same name, *supra* n. 59, on trial, Yankwich, J., after reviewing documentary evidence which in the original was in Rumanian and French, notes that he was helped considerably in his understanding by the fact that he is proficient in both languages. The real point is, of course, that the more normal and less linguistically inclined judge would have been just as considerably hindered.

ried judges, and much time and effort expended in the argument of unnecessary motions by baffled counsel. For given the constitutional grant of jurisdiction over these suits, no rational standard of convenience, divorced from the merits, exists to separate suits which should be retained from those which should be dismissed. It has to be all or nothing. It is doubtful whether Congress could, even if it were so inclined, withdraw this jurisdiction from the courts. Only the President and the Senate, through the negotiation of treaties with the nations, transferring jurisdiction to consuls, probably can relieve the courts of this burden. The courts themselves can do no more than to relieve themselves of the additional, self-imposed burden of hearing irrelevant motions on points of discretion, when the only possible decision must be on the merits.[61] But the courts can do no less, either.

Actions by Seamen for Injuries Sustained in the Course of Employment: Clearly, jurisdiction over this type of suit between foreiguers, as in the case of actions for wages, is based on admiralty's duty to protect its wards.[62] The prime consideration here as there must be, therefore, to promote the objectives behind the grant of jurisdiction, that is, to see justice on the merits done to the seaman.[63] But there are significant differences between the two classes of suits, all pointing toward the feasibility of adopting here a fruitful *forum non conveniens* technique. For in actions for injuries on board ship, rational criteria are readily found, aside from the very merits of the cause itself, for separating suits which ought to be entertained from those which can be dismissed with assurance that substantive justice will be done elsewhere. The fact that the voyage may not be ended and that the master is willing to return plaintiff to his home port is clearly one of the issues around which *forum non conveniens* discretion may turn. In suits for wages it is part of the merits.[64] Here, however, plaintiff's whole purpose is not to affect a severance of his relationship with the ship. The merits and sensible *forum non conveniens* factors can be successfully separated.

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[61] For an outstanding example of the utter and helpless confusion which can result from the search for factors on which to rest discretion when none aside from the merits exist, see Elman v. Moller, 11 F. 2d 55 (4th Cir. 1926).

[62] See *supra* n. 38. The Falco, 20 F. 2d 362, 363 (2d Cir. 1927), in which Judge Learned Hand noted this fact as applicable both in suits for wages and in tort, actually involved a libel for injuries on the high seas.

[63] There is no question but what the courts, as in cases where suit is for wages, are aware of this. For explicit statements, see, *e.g.,* The Sneland I, 19 F. 2d 528 (E. D. La. 1927); Heredia v. Davies, 7 F. 2d 741 (E. D. Va. 1926), *aff'd,* 12 F. 2d 500 (4th Cir. 1926); The City of Carlisle, 37 Fed. 807 (D. C. Ore. 1889); Bernhard v. Greene, Fed. Cas. No. 1,349 (D. C. Ore. 1874).

[64] See, *e.g.,* The Infanta, *supra* n. 51.

A second and perhaps equally important difference is the advanced kind of laws providing automatic compensation for injured seamen which many seafaring nations have adopted. Consuls are empowered by some of these statutes to grant the recovery to which a crew member may be entitled on the spot.[65] When the court relegates a plaintiff to the consul of the country of the flag, it does not, as in a controversy over wages, delegate to a non-judicial officer what is properly a judicial function; it leaves rather with an administrative officer the performance of what, under a modern compensation law, is very much of an administrative job.

That the courts, in the instinctive way in which they have exercised what they considered their discretionary jurisdiction in this area, have not been unaware of the distinctions between suits for wages and for recovery for injuries, is evidenced by the fact that the percentage of dismissals among the latter is considerably higher, and that such dismissals are for the most genuine ones,[66] ordered without prejudgment of the merits. It should be noted also that another justification for this trend is the substantially greater inconvenience placed on both courts and defendants in the trial of many injury suits as compared with actions for wages. The burden is heavier on the courts because the factual issues are for the most more intricate and the law governing them more subtle; on the defendant, because it is more likely that witnesses will have to be imported from distant points where a plaintiff, hurt on the high seas, may have been treated or temporarily hospitalized. However, the trend, justified as it is, has been a haphazard one. No rules to guide discretion have been formulated, and the cases, although the better ones point to and assist in the definition of standards, have not been lacking in confusion.[67]

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[65] See, *e.g.*, The Paula, 91 F. 2d 1001 (2d Cir. 1937), *cert. den.* 302 U. S. 750 (1938) (Denmark).

[66] See especially cases cited n. 69 *infra*. Even the weaker cases, such as The Thorgerd, 11 F. 2d 971 (E. D. N. Y. 1926), which fail to state any rational ground for the dismissal they order, do not give the impression, unmistakable in their counterparts dealing with wage claims, that the merits have been prejudged. Whatever the unexpressed reason for the instinctive action they take, it is not, at any rate, that the plaintiff's substantive claim is not valid. *But cf.* The Leontios Teryazos, 45 F. Supp. 618 (E. D. N. Y. 1942) (motion to dismiss denied with leave to renew after trial, at which time granted; a variety of factors are noted by the court, among them the fact that plaintiff failed to prove the case stated in the libel); The Carolina, 14 Fed. 424 (D. C La. 1876) (motion to dismiss granted after trial on the merits led to conclusion that plaintiff had no case).

[67] See, *e.g.*, The Hanna Nielsen, 25 F. 2d 984 (W. D. Wash. 1928), in which mention of any relevant factor was studiously avoided, and jurisdiction was at length assumed, apparently on the ground that, as a matter of the conflict of laws, it would be permissible for the court to apply the general maritime rather than Norwegian law.

Starting with the proposition, which follows from the existence of jurisdiction in the first place, that a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true,[68] it is not difficult to list fairly comprehensively the circumstances which would justify a dismissal. To begin with, whenever defendant is able to show that the consul of the ship's flag stands ready and supplied with funds to compensate plaintiff, the court should always stay the action and upon later certification that the consul has acted, dismiss it.[69] Where the consul has no such authority,

[68] The question of whether the law of the other forum permits recovery for the wrong libellant alleges is highly pertinent, and a finding that it doesn't, should result in an automatic assumption of jurisdiction. Heredia v. Davies, 7 F. 2d 741 (E. D. Va. 1926), *aff'd*, 12 F. 2d 500 (4th Cir. 1926) (jurisdiction assumed on this ground). However, this is unusual, since it is not likely that the antiquated general maritime law, which, in the absence of applicable foreign law, is what our courts have to apply in cases of injuries to foreign seamen on a foreign ship, grants recovery where the law of any seafaring nation would not. See n. 70 *infra*.

[69] The Ivaran, 121 F. 2d 445 (2d Cir. 1941) (dismissal conditioned on remedy promised by consul materializing, and without prejudice to libellant's right to sue again if consul refuses to act). The device used in The Ivaran has the same effect as a stay. However, granting the latter, rather than dismissing without prejudice, saves the seaman the trouble of having to start suit again if recovery is not forthcoming from the consul. The stay or conditional dismissal technique, the extension of which to the law side has been forcefully advocated by commentators, see, *e.g.*, Braucher, *supra* n. 1, at 931-32, is not entirely unusual in other classes of cases in admiralty. See n. 90 *infra*. But courts relegating libellant to a consul for recovery on personal injury claims have more often dismissed unconditionally. *E.g.*, The Paula, 91 F. 2d 1001 (2d Cir. 1937), *cert. den.*, 302 U. S. 750 (1938); The Astra, 34 F. Supp. 152 (D. C. Md. 1940) (court at first assumed jurisdiction, but on reargument dismissed on sole grouud that Norwegian consul stood ready to hear the claim); The Ferm, 15 F. 2d 887 (E. D. N. Y. 1926). Consuls should be given guidance by the court as to what kind of assurances are required from them, and should be asked for a clear statement of their powers and of what action they are prepared to take. Just what the consul offered to do was not clear in The Lynhang, 42 F. Supp. 713, and as a result, the dismissal there, based really on an expressed "hope" that the consul would do justice, was felt to need the support also of some vague talk about the untrammeled discretion resting in the trial court. For another example of a dismissal not apparently based on definite assurances from the consul, see reference to unreported case in The Knappingsborg, 26 F. 2d 935 (E. D. N. Y. 1928). It is an easy thing for the courts to find out what the extent of a consul's power is in such a case, and they would doubtless address themselves to this question if they knew that the answer is determinative of the issue before them, in the sense of making possible an automatic, if conditional, dismissal. *Cf.* Radovic v. The Prince Pavle, 43 F. Supp. 1013 (S. D. N. Y. 1941), in which this issue alone was considered, and jurisdiction was retained because, while a Board connected with the consulate was sitting in New York and was empowered to make an award, it could not at the time show that it had funds to actually pay an award so made. It may be noted, however, that subsequent developments in this particular case happen to show that a dismissal conditioned on the promise that funds would be obtained would have been more appropriate, since a year later funds did in fact become available to the Board, and as a result a final disposition of the matter was left in its hands by another court; but a year and a trial had transpired. See Radovic v. The Prince Pavle, 45 F. Supp. 15 (S. D. N. Y. 1942).

the first inquiry ought to be directed toward finding any special reason why it would be unfair to libellant to relegate him to his home forum.[70] Such a reason would be libellant's expressed desire to remain in this country,[71] as evidenced by the filing of citizenship papers,[72] or a stipulation in the articles that the voyage was to end for plaintiff elsewhere than at home. Since the fiction that a seaman assumes the nationality of the flag under which he serves[73] is just that, a fiction, conclusive weight should be given to the fact that plaintiff and the ship are of different nationalities,[74] even though the articles may provide that the

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[70] See *supra* n. 68. The home forum may not have any civilized compensation laws, though that is unlikely. Moreover, what would be left for an American court to apply is even less civilized. The Jones Act, even aside from the conflict of laws point involved, has been held regularly not to apply. *E.g.,* The Paula, *supra* n. 69; The Lynhang, *supra* n. 69. Left to apply the general maritime law, a court is more than likely, under the outdated rule of recovery for injuries resulting from "unseaworthiness" only, to find itself unable to give any remedy at all. *E.g.,* The Falco, 20 F. 2d 362 (2d Cir. 1927) (L. Hand, J.). Unfairness to the seaman resulting from the state of the law at the home forum is therefore not a frequent ground for retention of jurisdiction.

[71] For a variation on this theme, see O'Neill v. Cunard White Star Ltd., 160 F. 2d 446 (2d Cir. 1947). This was a suit by the administratrix to recover for the wrongful death of her husband. Deceased had been a resident, and his children were citizens. Judge Learned Hand held that to dismiss was an abuse of discretion, since the administratrix was also a resident, and the children, to whom the benefits of the action would go, were citizens. Arguments of defendant's convenience, based on the fact that witnesses, i.e., the crew of the ship, which sails from London, were not here, were rejected. However, in the end there was a dismissal on the merits beeause the Jones Act has no application to foreign ships in foreign waters. See *supra* n. 70.

[72] *E.g.,* The S. S. Emmy, 39 F. Supp. 871 (S. D. N. Y. 1940), The Seirstad, 12 F. 2d 133 (E. D. N. Y. 1926) (court at first dismissed on ground that plaintiff was offered transportation home where he would be compensated; on rehearing, jurisdiction assumed as a result of showing that plaintiff bad filed first papers with a view to obtaining citizenship). The conformance of this rule to the traditional view of this country as a willing haven for immigrants is too obvious to point out.

[73] This is a persistent theory, which has the authority of the Supreme Court behind it. *In re* Ross, 140 U. S. 453, 472 (1891). *See* The Egyptian Monarch, 36 Fed. 773 (D. C. N. J. 1888). It has led to such a patently unrealistic remark, unfounded in the cases, as that there is always a common forum in suits by seamen, which should militate for dismissal. See Coffey, *supra* n. 11, at 98. On the other hand, while the *Ross* case held that a British seaman assumed the nationality of an American ship, the rule was treated with scant respect where an American serving on a foreign ship was involved. See The Epsom, 227 Fed. 158 (D. C. Wash. 1915).

[74] This is clearly so where the articles do not provide that the voyage is to end at the ship's home port, and is forcefully held to be so in Bernhard v. Greene, Fed. Cas. No. 1,349 (D. C. Ore. 1874). No inconvenience to defendant from suit here can compare with that which would result to a seaman if he were forced to take an uncontemplated voyage across the seas to reach a "proper" forum. The *Bernhard* case is also quite explicit in its refusal to give any weight to the "fact" that seamen of various nationalities became *pro tanto* British subjects by signing on a British ship. See also The Troop, 128 Fed. 856 (9th Cir. 1904).

voyage end at the ship's home. For a man's mobility is unavoidably impaired by illness, and the travelling required of him should be kept to a minimum. Healthy, a seaman may have intended to work his way back home after the voyage; after injury he may not be able to. One more factor may exist which should make for the automatic retention of jurisdiction in the absence of consular action. If the large percentage of witnesses such as doctors who have treated plaintiff and can testify to the nature and extent of his injuries are in this country rather than anywhere else, it would be extremely unfair to deprive plaintiff of the inexpensive benefit here of their testimony.[75]

In the absence of any of the above circumstances, the court should next determine whether the master or the consul stand ready to provide a plaintiff who is able to travel[76] with transportation which will bring him home at approximately the same time his ship arrives, so that he can promptly commence proceedings against it.[77] If that is so, and if it does not appear that plaintiff may have reason to fear cruel or inconsiderate treatment on the trip,[78] there should be a dismissal conditioned on the master or consul proceeding to carry out his promise.[79]

It is not contended that the authoritative formulation of such a rule would result in more dismissals than have been possible. It would in fact have prevented dismissal in some cases.[80] Nor can it really entirely substitute predictable standards for some measure of trial court discretion. For the trial court must still find the facts, and it is there that it has some leeway for true discretion. But it does provide a guide for the reasoned decision of a set of facts which has never before arisen;

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[75] *E.g.*, The Sneland I, 19 F. 2d 528 (E. D. La. 1927); The Noodleburn, 28 Fed. 855 (D. C. Ore. 1886), *aff'd*, 30 Fed. 142 (9th Cir. 1887).

[76] Plaintiff's physical inability to travel, if a remedy is not available from a consul on the spot, should cause automatic retention of the case. The city of Carlisle, 39 Fed. 807 (D. C. Ore. 1889).

[77] The only assurance that this will be so is, normally, that the ship in question itself take plaintiff home. It is quite obvious that an injured and usually less than prosperous seaman should not be forced to wait, even at home, for a lengthy period of time till his defendant, the ship, which also carries some of his witnesses, the crew, shows up. See The Troop, 128 Fed. 856 (9th Cir. 1904).

[78] The prior conduct of the master is in this regard pertinent. See The Noodleburn, 28 Fed. 855 (D. C. Ore. 1886), *aff'd*, 30 Fed. 142 (9th Cir. 1887).

[79] *But cf.* The Walter D. Wallet, 66 Fed. 1011 (S. D. Ala. 1895). The court thoughtfully reviewed most of the factors here listed, noted that plaintiff had been in the consul's care and that the latter promised, and is indeed under obligation by British law, to see that the seaman gets home. But there was no inquiry as to whether the seaman *could* be moved, or as to *when* he would get home. Nor was the dismissal which the court ordered conditioned on his leaving in comfortable quarters with his ship.

[80] In addition, it would sanction no absolute dismissal, unless preceded by a conditional one or a stay.

a basis for the occasionally needed appeal from an unfairly decided case; and perhaps most importantly an indication for courts and counsel of what is relevant and worth considering, hearing and arguing. Like all common law doctrines, seasoned with the judge's basic discretion in finding facts, it will help in the just and expeditious decision of the vast majority of cases, while an *ad hoc* procedure is cumbersome and must frequently lead astray.[81]

Collision, Salvage, Bottomry, Charter-party Disputes and the Like: When Mr. Justice Black remarked in his *Gilbert* dissent that the existence of *forum non conveniens* in Admiralty is based on the peculiar functions of courts sitting in Admiralty,[82] he could not have been referring to either of the two types of suits considered here so far. For their every special feature points to the retention rather than to discretionary refusal of jurisdiction. But he might have had reference to the various suits arising under this heading.

It is not entirely clear why the Federal courts should ever have assumed jurisdiction over suits between one foreign ship-owner and another, or between foreign ship-owners and their creditors, charterers or salvors. It has been said in a collision case[83] that there is an interest in having foreigu ship-owners come into our ports for repairs, and that opening the doors of our courts to them will induce them to do so. Whatever there may have been to this argument in an earlier period of our history, it surely does not have much weight today, when our facilities hold a commanding position in the world, and, at any rate, it does not cover all the cases. Another rationalization, advanced by Mr. Justice Story sitting on circuit,[84] is the familiar one of comity between the nations. But, as has been noted in connection with suits for wages, this one cuts both ways.[85] There is more substance, perhaps, and a good

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[81] See the discussion in CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 138-41 (1921), of *le phénomène Magnaud,* a French experiment in uncontrolled discretion reported by Gény. The experiment, as described by Cardozo, resembles the operation of the *forum non conveniens* technique when courts of review refuse to give any guidance and restrict themselves to sanctioning the discretion of lower courts. Cardozo refers to this state of affairs as "judicial impressionism," and contrasts it with "the judicial process as we know it," saying that under it we have "discretion informed by tradition, methodized by analogy, disciplined by system." *Cf.* The Lynhang, *supra* n. 69, in which the judge says that in dismissing the case he is not controlled by precedent or anything else, and may do as he desires or thinks best.

[82] *See* Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 512 (1947).

[83] Thomassen v. Whitwell, Fed. Cas. No. 13,928 (E. D. N. Y. 1877).

[84] The Jerusalem, Fed. Cas. No. 7,293 (C. C. Mass. 1814). See also Blatchford, J. in The Russia, Fed. Cas. No. 12,168 (S. D. N. Y. 1869).

[85] See ns. 43, 44 *supra.*

deal more basis in admiralty traditions,[86] for the feeling that where litigants don't have a common forum, being of different nationalities, and their case falls under the general maritime law, a neutral forum is the one best and most impartially suited to do justice.[87] But this would also not cover the *general* assumption of jurisdiction. Somewhat more satisfactory and of widest application is a reason advanced by the Supreme Court when it held, in a case involving citizens,[88] that venue provisions do not apply to suits in admiralty. The court said that it is in the nature of things for the usual defendant in admiralty, or at least for the libellant's only security, that is the ship, to be extremely elusive, and that it is therefore the part of fairness to let the libellant sue wherever he has found his security, rather than to force him to chase it over an area that might be as wide as the seven seas. There is sense in this statement, but it would justify only the most limited kind of jurisdiction. To satisfy this objective, which is the one referred to also when it is said that the *forum rei sitae* is always prima facie a proper one,[89] the courts need only, after defendant has filed bond, dismiss conditionally upon defendant's promise to file security equal to the value of the ship, in another forum.[90]

In view of the absence of any compelling reason for the assumption

[86] Courts of admiralty have always considered themselves to be international courts rather than arms of the state in which they happen to be sitting. See Thomassen v. Whitwell, *supra* n. 83, for a comment to this effect by Benedict, J., an admiralty judge of long experience.

[87] Retention of jurisdiction in The Belgenland, 114 U. S. 355 (1885), which is discussed at length *infra*, was on this ground. See also The Kaiser Wilhelm der Grosse, 175 Fed. 215 (S. D. N. Y. 1909).

[88] Atkins v. The Disintegrating Co., 18 Wall. 272 (U. S. 1873).

[89] This factor is one prominently mentioned in the cases, and is sometimes stated almost as if it not only justified the existence of jurisdiction, but had the effect of nullifying discretion. The Jerusalem, Fed. Cas. No. 7,293 (C. C. Mass. 1814); Usatore v. Compania Argentina Navegacion Mihanovich, 49 F. Supp. 275 (S. D. N. Y. 1942); The Bee, Fed. Cas. No. 1,219 (D. C. Me. 1836). *But cf.* One Hundred and Ninety-four Shawls, Fed. Cas. No. 10,521 (S. D. N. Y. 1848) (discretion is not affected by fact that proceedings are in rem).

[90] This procedure, which cleanly disposes of the *locus rei sitae* argument, has actually been followed. *E.g.*, The City of Agra, 35 F. Supp. 351 (S. D. N. Y. 1940). Defendant's rights have also been safeguarded in much the same manner, by the imposition on libellant of conditions under the threat of dismissal. This was done by Judge Benedict in Muir v. The Brisk, Fed. Cas. No. 9,901 (E. D. N. Y. 1870), a suit for possession against a master, in which the latter entered a counter-claim for wages. An alternative technique, used by one court to protect libellant against the running of the Statute of Limitations, has been the elicitation from defendant's counsel of a stipulation in open court that he will fulfill the condition upon which the dismissal is ordered. See Bulkey, Dunton Paper Co. v. The Rio Salado, 67 F. Supp. 115 (S. D. N. Y. 1946). See n. 69 *supra* for the application of the conditional dismissal technique to suits by seamen for recovery for personal injuries.

of jurisdiction here, therefore, it would seem that the courts, free of any special obligation to libellants as their wards, should be at least as inclined to listen to a defendant's pleas of undue expensiveness and discomfort in the forum as Mr. Justice Jackson has admonished them to be on the law side.[91] They should, indeed, as Mr. Justice Black suspected, be more inclined. For not only is the discomfort to a Turk whom there was no good reason to sue here rather than in Turkey greater than that caused a Californian when he is sued in the Southern District of New York, but the inconvenience to the courts is also considerably more serious in the first instance,[92] and lacking in even the partial consolation that at least the parties imposing on the court pay taxes toward its support.

Peculiarly enough, however, it is in this class of cases that the percentage of dismissals is smallest, and of inexplicable retentions of jurisdiction—largest. One fundamental reason for this state of affairs is that uncontrolled discretion is most apt to work out in this way. To begin with, a trial judge has good ground for believing that he is less likely, after a decree on the merits has been had, to be reversed for having abused his discretion in assuming jurisdiction, than he is for having done so by dismissing. When in doubt, he will therefore normally incline toward hearing the case. Moreover—and, while this is an indefinite feeling, it does not entirely lack articulation—the courts experience a certain degree of discomfort still in, as they will say, "abdicating" a jurisdiction which is theirs. Mr. Chief Justice Marshall's largely inapplicable dictum that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution,"[93] framed as it is in the highest and most terrible terms of a judge's duty, is still a "brooding sometimes-presence in the skies."[94] Figuring more

91 See Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947); Koster v. Lumbermen's Mutual Co., 330 U. S. 518 (1947).

92 Foreign law is apt to get quite complex. In one case, a judge's almost desperate-sounding plea of unfamiliarity with the law of Estonia under Russian occupation, seemed to be the main ground for dismissal. See the Kotkas, 37 F. Supp. 835 (E. D. N. Y. 1941).

93 Cohens v. Virginia, 6 Wheat. 264, 404 (U. S. 1821).

94 This feeling of discomfort in "abdicating" jurisdiction expresses itself in such statements as that the court will refuse jurisdiction only "when strong reasons appear for doing so," Dominion Combing Mills v. Canadian Pac. Ry. Co., 300 Fed. 992, 993 (E. D. N. Y. 1924), and in the whole posture of opinions striking about for a reason on which to rest a dismissal, and finally retaining the case when the search proves futile, which means only that the factors of convenience are more or less evenly balanced, *e.g.*, Compagnie Francaise de Navigation à Vapeur v. Bounasse, 15 F. 2d 202 (S. D. N. Y. 1925) (A. N. Hand, J.). *But cf.* Judge Ware's dictum in The Bee, Fed. Cas. No. 1,219 (D. C. Me. 1836), that the courts are "not eager to exercise this voluntary jurisdiction (over a

articulately in the cases, however, are two additional factors. One, lifted without analysis from cases involving seamen's claims for wages, is the assumption that an obligation rests on the courts in this area also to do justice on the merits to a plaintiff with a valid claim.[95] Thus, almost as if out of habit, one district judge, in a leading salvage case, went to the merits before reaching the jurisdictional point, as he would and several times did in suits involving wages.[96] The reasons enumerated above for the existence of any jurisdiction at all comprise the other additional factor. Courts often mention them singly or in bunches. But none of them, even if they apply to a particular case should have sufficient force to cause its unconditional retention, absent other considerations.

Although the Supreme Court, which has never directly passed on the matter of discretionary jurisdiction in a foreign seaman's suit for wages[97] or tort recovery, has at least four times[98] had the opportunity to offer

salvage case), where there is the least disinclination to submit to it." (Despite a marked disinclination by defendant to submit, however, demonstrated by most strenuous objections raising a variety of jurisdictional points, the case was retained.)

95 *See* Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Basiliero, 27 F. 2d 1002, 1003 (E. D. N. Y. 1928), 42 HARV. L. REV. 434.

96 One Hundred and Ninety-four Shawls, Fed. Cas. No. 10,521 (S. D. N. Y. 1848) (Betts, J.). See n. 51 *supra*. This case is exceptional, because the court, in dismissing, notes, as it would have in a case involving wages, that it would have acted differently if it had thought that plaintiff rather than defendant should have a decree on the merits. Other courts have also in this field reached the jurisdictional point only after having examined the merits. But the only result of this procedure with them has been a somewhat greater disinclination to dismiss if plaintiff could otherwise have a decree. See Boult v. Ship Naval Reserve, 5 Fed. 209 (D. C. Md. 1881); Thomassen v. Whitwell, Fed. Cas. No. 13,928 (E. D. N. Y. 1877); The Russia, Fed. Cas. No. 12,168 (S. D. N. Y. 1869). In a rare modern case in which this procedure was followed, the court declined the motion to dismiss in its discretion, and then ordered a dismissal on the merits. The Elqui, 62 F. Supp. 764 (E. D. N. Y. 1945).

97 Taylor v. Carryl, 20 How. 583 (1857), which contains a dictum on discretionary dismissals by Taney, C.J., *Id.* at 600, 611, was a libel by a seaman for wages. But there had been no plea to the jurisdiction of the court. *Ex parte* Newman, 14 Wall. 152 (1871), was also a libel for wages. The jurisdictional point was raised below, and the district court assumed jurisdiction, giving a decree for libellants. The circuit court reversed on the ground that a treaty had given consuls exclusive jurisdiction. But this point was not reviewed by the Supreme Court. For no appeal was possible to it, since the amount in controversy was less than that ($2,000) required for such an appeal. The case therefore came up on a writ of mandamus to compel the circuit court to assume jurisdiction. The Supreme Court, in quashing the writ, rested on the ground that a writ of mandamus cannot be used as a substitute for an appeal. The writ does not lie to a court which decides a jurisdictional question, and on the basis of that decision refuses further to hear a case. The opinion concerned itself with this matter, and there was only a general dictum at the end affirming the existence of discretion, absent a treaty. *Id.* at 168-69.

98 Another case, beside the three here discussed, in which the matter of discretion in the admiralty jurisdiction over foreigners other than seamen was squarely raised and fully

guidance for the present class of cases, it has contributed little of value beside three case names which can always be cited, and almost always are, for the proposition that discretion, in *all* of admiralty's jurisdiction over foreigners, exists. The oldest leading decision is *The Belgenland*,[99] which involved a collision on the high seas between ships of different nationalities, and was handed down as early as 1885. The net effect of this case was to give impetus to the retention of jurisdiction, since it affirmed such action on the sole ground that, the parties having no common forum, and the case being governed by the general maritime law, a neutral forum is as fair as any and should not be denied.[100] Not only was this the only precise holding, but of the more general comments which the Court made, one was rather obviously ill considered, and the other too narrow. The Court said that jurisdiction should not be taken where, presumably assuming the existence of a common forum, the case is governed by the law of the country of which the parties are nationals, or where there is an agreement between the parties to resort only to a home forum. To this was added the proviso that such would be the case mostly in suits by seamen for wages or recovery for personal injury. But it was precisely in such suits that these criteria had not been and were not to be controlling.[101] As it concerns the remaining

argued, was The Maggie Hammond, 9 Wall. 435 (U. S. 1869). Its importance is greatly diminished by the fact that in it Mr. Justice Clifford delivered for the court one of the most confused and nearly incomprehensible opinions on record. It is not frequently cited, no doubt for that reason, although it is some kind of a tribute to the equivocalness of its language (was it studied?) that in Watts, Watts & Co. v. Unione Austracia di Navigatione, 248 U. S. 9 (1918), a case involving a co-belligerent's right to sue a common enemy in our courts, counsel for plaintiff cited The Maggie Hammond, on the argument, for the proposition that trial court discretion in dismissing is not absolute, while counsel for defendant cited it as holding that such unhampered discretion does exist below. *Id.* at 14, 15. Actually, the Maggie Hammond, which involved a breach of contract to carry cargo from England to Montreal, Canada, held only that the question of a discretionary dismissal is open in the Supreme Court, although it was never raised below. Jurisdiction was retained and a decree for libellants affirmed, without the mention of anything that might pass for a relevant factor, although the question of convenience *was* argued to the court by plaintiff's counsel.

99 114 U. S. 355 (1885).

100 See n. 87 *supra.*

101 The treatment, *supra,* of suits by seamen for wages or for recovery for personal injuries demonstrates that other factors than the fact that the law of a common foreign forum may govern, are controlling. The case of Bucker v. Klorkgetter, Fed. Cas. No. 2,083 (D. C. N. Y. 1849), which was a controversy over wages, and in which, in the usual manner, jurisdiction was taken because plaintiff had a valid case, is an excellent illustration showing that the second criterion mentioned in The Belgenland as having peculiar application to this type of case was never given any weight either. For there the court noted a stipulation in the articles that suit was to be in Bremen only, but ignored it on the ground that libellant had proved his case, namely that the articles, stipulation and all, had been broken by the master. In other words, no weight at all

class of cases, the first one, open to serious objections, was ignored if not repudiated,[102] and the second, though it has merit, can apply only rarely.[103]

The next case did not come up till forty-five years later. It was *Charter Shipping Co. Ltd. v. Bowring, Jones & Tidy Ltd.*,[104] decided by Mr. Justice Stone in 1930. Its main significance is that under extreme circumstances the Court was satisfied to dismiss resting almost wholly on trial court discretion, and refused to make law applicable to any but the exact particular facts. This was a suit by one British corporation against another to recover a general average deposit made in London. It was not contested that English law governed. Seaworthiness was in issue, and the district court found and the Supreme Court agreed,

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was given to the agreement to sue elsewhere only, which would have little meaning if it did not refer to suits based on alleged breach of the articles.

102 See Canada Malting Co. Ltd. v. Paterson Steamships Ltd., n. 105 *infra*. *But see* Boult v. Ship Naval Reserve, 5 Fed. 209, 210 (D. C. Md. 1881), in which the court on agreed facts, assumed jurisdiction to construe a charter contract signed in Liverpool. The court said that it might perhaps have declined to hear the case if it had been alleged that customs of the port of Liverpool must be considered in construing the charter.

103 Where it is found, this factor should, and apparently does result in dismissal. In The Iquitos, 286 Fed. 383 (D. C. Wash. 1921), the bill of lading stipulated that Liverpool was to be the forum for the adjustment of all disputes. There was a dismissal on that basis, although some consideration was given also to the absence of any witnesses in this country. However, to single this factor out, as *The Belgenland* did, is to fail to go to the root of the problem, because it is to disregard the vast bulk of the cases in which no such agreement on another forum is found. Where one of the parties in this kind of suit is a citizen, see *infra*, emphasis on this factor will serve a useful purpose, because it may be hoped that it will encourage American firms to foresee the problem of place of suit in dealing with foreigners, and to make provision for it, if they know that such provision will be respected by the courts of this country. But it cannot be expected that foreigners will foresee the possibility of suit in the United States when dealing with each other, for we are only one of many jurisdictions in the world. Nor can it be expected that foreign admiralty lawyers read the Federal Reporter, or even the Supreme Court Reports.

Agreements to arbitrate disputes elsewhere than in this country, are somewhat more frequently, though still rarely found. There seems to be no reason why these stipulations should not also result in dismissals. Under the Federal Arbitration Act proceedings in admiralty are to be stayed till an arbitration agreement is complied with. But The Silverbrook, 18 F. 2d 144 (E. D. La. 1927), held that this Act does not apply to agreements which call for performance outside the United States. Therefore, The Atlanten, 252 U. S. 313 (1920), the case overruled by the Federal Arbitration Act, was held to govern, jurisdiction was assumed, and a stay refused. But this case has been severely criticized, see Comment 36 YALE L. J. 1016 (1927); 41 HARV. L. REV. 664 (1928), and expressly disapproved by a later one, in which, while jurisdiction was assumed, the court indicated it would grant a stay while arbitration takes place, as stipulated, in London. Damelsen v. Entre Rios Rys. Co. Ltd., 22 F. 2d 326 (D. C. Md. 1927). *Cf.* The Wilja, 113 F. 2d 646 (2d Cir. 1940), *cert. den.* 311 U. S. 687 (1940), in which A. N. Hand, J. avoided the issue by giving the arbitration agreement a somewhat unnecessarily strict construction.

104 281 U. S. 511 (1930).

on a factual basis, that most witnesses on this issue were not in this country. The Supreme Court left the definite impression that if in the trial court's judgment the presence of three out of ten or "x" out of "y" witnesses in this country had been thought to justify suit here rather than in England, this court would not have considered retention of the case an abuse of discretion.

The last case of any general importance was *Canada Malting Co. Ltd. v. Paterson Steamship Ltd.*,[105] which came up two years later. It involved again a collision, which, however, this time took place on the United States side of Lake Superior. The parties were both Canadians, and so were all the witnesses. There was a dismissal below, which was affirmed. It was argued to the court expressly in this case that United States law governed here and that therefore jurisdiction was or should be mandatory. Mr. Justice Brandeis, who wrote the decision rejected this view, and repudiated a negative inference which might have been drawn to support it from *The Belgenland*.[106] He cited in his own support, a large number of district court cases in which discretion was said to have been exercised regardless of the place where the cause of action arose, and admitted that most of them were suits by seamen against their masters, but without attributing any significance to that distinction from the case before him. In holding as it did that it would not have to decide what law governed the case, the Court of course not only rejected negative inferences from *The Belgenland,* but also, *sub silentio,* the rule there positively announced that a case governed by the law of the parties' forum should be dismissed. For it rested not on that ground, but on the holding that, since *all* witnesses were Canadians, no abuse of discretion by the trial court could be shown.

Although it cleared the air of some of the after-effects of *The Belgenland,* the *Canada Malting* case did not, therefore, any more than had its predecessors, offer any exhaustive analysis of the problem before it, or any guide to the discretion the existence of which in the trial courts it again sanctioned.[107]

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[105] 285 U. S. 413 (1932).

[106] See n. 99 *supra.*

[107] The objection to these cases is that they failed to establish those "buoys of prior decisions," which in the view of one commentator, always pilot the otherwise uncharted discretion which exists, as in his view it must, under the doctrine of *forum non conveniens.* See Dainow, *The Inappropriate Forum,* 29 ILL. L. REV. 867, 870 (1935). How differently Mr. Justice Brandeis himself dealt with the problem in the *Davis* case, n. 23 *supra*; differently—not because he used the Commerce Clause to enforce the rule that cases falling on the other side of a certain line should be dismissed, but because he closely analyzed the type of situation before him, and on the basis of that analysis *drew* a line, established a "buoy" to guide the lower courts.

It cannot be contended, and it is not, that a rule to govern discretion, as comprehensive and definite as was thought possible in seamen's personal injury actions, is capable of formulation for this class of cases. The reasons for this are at least two. The first is that these cases do not follow as nearly uniform a pattern as those first mentioned, and yet they have to be treated together without subdivision. Differences between collision, salvage, charter-party and other actions under this head exist. But they vary with the facts of particular suits. Thus salvage as well as collision cases may fall under the general maritime law, though the former more generally.[108] But salvage as well as collision cases may be governed by the law of a foreign country.[109] Moreover, no guide to discretion singling out particular features of any projected subdivisions of suits would be possible, even if those features always held true, since no distinction between them goes to the root of the *forum non conveniens* problem in the sense of providing a satisfactorily rational ground for dismissing one type of case while retaining another.

The other reason why it is not possible to lay down a comprehensive rule for the disposition of these cases, is an allied one. Treating them, as one has to, under one head, and looking to the grounds advanced to justify the existence of jurisdiction over them, one finds there again no satisfactory basis for separating the sheep from the goats. Thus it is fairly obvious that the "law of the common forum" criterion laid down in *The Belgenland,* which is the converse of the suggestion that jurisdiction exists to provide a neutral forum where there is no common one, is an irrational guide to discretion and was wisely repudiated by Mr. Justice Brandeis. For one thing, acceptance of it would have involved the courts in each case where a common forum of the parties exists in a decision as to what law applies, a frequently difficult problem in the conflict of laws,[110] the avoidance of which is one of the reasons for allowing dismissals. As much trouble would no doubt have been created

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108 Compare Usatore v. Compania Argentina Navegacion Mihanovich, 49 F. Supp. 275 (S. D. N. Y. 1942), and The Bee, Fed. Cas. No. 1,219 (D. C. Me. 1836) (salvage cases under *jus gentium*), with The Belgenland, *supra* n. 99 (collison under *jus gentium*).

109 Compare One Hundred and Ninety-four Shawls, Fed. Cas. No. 10,521 (S. D. N. Y. 1848) (British law in salvage case), with Black Diamond Steamship Corp. v. Robert Stewart & Sons Ltd., 336 U. S. 386 (1949).

110 For an example of the intricacy of this type of problem, see the very recent case of Black Diamond Steamship Corp. v. Robert Stewart & Sons Ltd. (5-4 decision), in which the court experienced much difficulty with, and found in its ranks a wide area of disagreement on the question of what law is to be applied to a collision in Belgian waters involving a ship owned by the United States and chartered to libellant.

in cases which would otherwise have been dismissed anyway as might have been avoided in others. Moreover, even had the rule been simplified so as to effect a dismissal whenever a common forum exists, it would, thus inflexibly stated, still be inadequate because it does not take into account valid circumstances, such as the presence of all witnesses here, which should cause retention of an action, if this kind of jurisdiction is to continue to exist at all. Nor would it be easy to explain why a case, conversely, is retained, though there be great inconvenience to defendant, because a common forum does *not* exist.

It may be argued with some force that jurisdiction over this class of cases should be entirely abandoned. There is no valid reason for retaining it, such as the desire to protect seamen. No need has been felt to give Federal law courts jurisdiction over suits between foreigners, and they have none.[111] The state courts are open, though their jurisdiction is discretionary also,[112] and they could not, to be sure, exercise the special powers vested in admiralty courts. Occasionally there will be a case which involves the immunities of a foreign sovereign,[113] or the efforts of a subject of an ally to sue a citizen of a common enemy,[114] and which thus impinges on the conduct of minor foreign affairs and should probably therefore stay in the Federal courts. But the same situation may come up in a case at law, though perhaps less frequently. However, it is simply not feasible at this late date to abolish so established a segment of the Federal jurisdiction, and it is doubtful whether it could be done through the exercise of any but the treaty-making power.

Since no workable rule can be laid down in this area, it is apparent that the only way to avoid the occasional acute discomfort to parties in the exercise of this jurisdiction, which must continue to exist, and to relieve the courts of the considerable burden of it whenever it is possible to do so, is to vest in the trial judge the power of *ad hoc* decision on facts as they come up. However, that power has not so far served much of a purpose, as evidenced by the relatively small number of dismissals in the books. While no criteria for its exercise can be established, lines of policy can be drawn around it by appellate courts to give direction at least to its use. For without them, as has been indicated, the trial courts' reluctance to "abdicate" jurisdiction must be contended

111 See Cunard S.S. Co. v. Smith, 255 Fed. 846 (2d Cir. 1918).

112 Gardner v. Thomas, 14 Johns. 134 (Sup. Ct. N. Y. 1817).

113 See Mexico v. Hoffman, 324 U. S. 30 (1945); The Pesaro, 255 U. S. 216 (1920); The Attualita, 238 Fed. 909 (4th Cir. 1916).

114 See Watts, Watts & Co. v. Unione Austricia di Navigatione, 248 U. S. 9 (1918), 32 HARV. L. REV. 285 (1919); The Kaiser Wilhelm II, 246 Fed. 786 (3d Cir. 1917).

with as an existing line of policy, and its effect is not here desirable. Thus appellate courts should determine which way a presumption lies in the many cases in which the trial court's mind is in equilibrium on factors of convenience. Another way of drawing this line would be to use the burden-of-proof technique. At any rate, it should be made clear that if no affirmative reason appears for retaining a case, it must be dismissed.[115] This will not lead to automatic results, but neither need its effect on the decision of close cases be negligible.[116] It should eliminate, if nothing else, retentions on the ground that the other possible forum, considering distances of travel for witnesses, is no less inconvenient than this one.[117] It may not be for the parties, but it is for our busy courts.

Secondly, some rules, which will not decide cases, but eliminate factors which have been erroneously allowed to do so, can be formulated. Thus it should be laid down that no case will be retained simply because plaintiff's security is in the court's power, unless defendant refuses to give security in another forum. Nor should the mere absence of a common forum for the parties be sufficient ground for retention, if the present forum is not deemed convenient.

Thirdly, the impression should be dispelled that the courts are here freed of the restraints of stare decisis.[118] Saying that they are empowered to make *ad hoc* decisions means that they must do so when dealing with the hard core of so-called close cases. In the clear ones around the fringes they should not act any differently than they would in any of their other activities. For this reason it is harmful for the Supreme Court in cases such as *Charter Shipping*[119] to rest wholly on trial court discretion rather than enumerating the factors which make these clear cases and expecting that in the manner normal to common law develop-

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115 The need for this type of general indication as to how trial court discretion should be exercised was felt on the law side by at least one commentator examining the result of the *Gilbert* and *Koster* cases. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 404 *et seq.* (1947).

116 The lower courts have attempted to formulate presumptions such as this when dealing with seamen's suits. See n. 40, *supra*. They have come out both ways, in favor of retaining, and in favor of declining jurisdiction, and neither formulation has had any effect on results. But the reason for that in seamen's suits, is that there are other considerations which are controlling, which are definite ones, and which do not when weighed balance evenly sometimes.

117 In at least two close cases assumption of jurisdiction was based on a calculation which showed that distances of travel for witnesses to this and another possible forum were about even. See The Canadian Commander, 43 F. 2d 857 (E. D. N. Y. 1930); Dominion Combing Mills v. Canadian Pac. Ry. Co., 300 Fed. 992 (E. D. N. Y. 1924).

118 See n. 81 *supra*.

119 See n. 104 *supra*.

ment they will be followed unless they can be distinguished. It would have been helpful in the *Charter Shipping* case to say that where foreign law governs, the parties have a common forum, and, let us suppose, only three out of ten witnesses are in this country, there should be a dismissal. It does not cover many cases, and need not be followed, for instance, if the home forum is at war.[120] But that is why it is not framed in terms of a rule. The decision should merely have been made to rest on the facts after review, rather than on inability to find abuse of discretion. As the number of such decisions by appellate courts around the fringes increases, and it is clear that they must be followed if by common law standards they apply, the hard core of cases with unduplicated material facts will not disappear, but it will perhaps diminish.

Suits Involving Parties Who Are American Citizens

The discussion till now has concerned itself with *forum non conveniens* techniques applicable, if at all, in three types of suits in admiralty between foreigners. The inquiry now will center around the question of whether and how these techniques are affected by the United States citizenship of one, or the other, or both parties. The assumption will be that, apart from considerations dependent on the parties' citizenship, the courts have acted in a manner consonant with what has been said down to here.

Libellant United States Citizen: Since it is unlikely that an American citizen would rather try a case in a foreign forum than at home unless his place of business is overseas, this subdivision covers all situations in which one of the parties is a foreigner. Where the American libellant has a derivative right to sue only, no real problem is presented, and the result should be no different than if both parties were foreigners.[121] It has been so held by Judge Learned Hand in *U. S. Merchants' & Shippers Ins. Co. v. A/S Den Norske Afrika Og Australie Line.*[122] That was a suit by the American insurer of a Dutch shipper against a Nor-

120 The absence of *any* other forum should always result in retention of the case, if this kind of jurisdiction is to continue to exist at all. The fact that the only other forum is under enemy occupation, which has disrupted the administration of justice approximates the absence of another forum. *See* A. N. Hand, J. in The Wilja, *supra* n. 103, at 647.

121 This statement assumes that a libellant with a derivative right to sue will be found only in collision, salvage, charter-party cases and the like. No case has been found of a foreign seaman assigning his claim for wages or for recovery in tort. Clearly there would be a vast difference between that case and the normal one of suit by a foreign seaman. It would seem that all considerations of admiralty's duty to protect its seamen-wards would, in the former, fly out the window, and the whole basis for the theory of *forum non conveniens* in seamen's suits, as worked out in this paper—with them.

122 65 F. 2d 392 (2d Cir. 1933), 47 HARV. L. REV. 535 (1934).

wegian carrier to recover for a loss of freight which had been made good to the shipper. There was a discretionary dismissal below, and the court stated it would have not hesitated to affirm if the libellant had not been an American citizen. It then proceeded to affirm anyway, on the ground that a subrogee is subject to the same disabilities as his principal and that there is no reason why the fact of American citizenship should work a change in the well-established rules of the law of principal and surety. It may be added that the carrier's contract here was with a Dutch shipper. It would be strange to allow the unilateral action of the shipper in obtaining insurance to change the situation with respect to place of possible suit from what the carrier could have expected it would be at the time of contract. The cases are substantially in accord with Judge Hand's holding,[123] which indeed seems unanswerable. They also support this result in the *a fortiori* case of an assignment, otherwise than by virtue of an insurance contract, and whether colorable or not, of a right to sue by a foreigner to an American.[124]

Nor need the result be different even if it could be successfully contended that under the article setting up jurisdiction over all cases in admiralty,[125] citizens are given a constitutional right of access to the

123 *E.g.*, Insurance Co. of North America *et al.* v. British India Steam Nav. Co., 38 F. Supp. 47 (E. D. La. 1941). *Cf.* The Maria, 4 F. Supp. 168 (S. D. N. Y. 1933) (jurisdiction retained on basis of such factors of convenience as presence of witnesses here, thus evidencing assumption that libellant insurer's American citizenship is not alone conclusive; this in spite of fact that insured shipper in whose shoes libellant stood was also American citizen). *But cf.* Bengochea v. Dampskib Selskabet Orient A/S, 1 F. Supp. 934 (S. D. N. Y. 1931).

124 *E.g.*, Libby, McNeill & Libby v. Bristol City Line of Steamships, 41 F. Supp. 386 (S. D. N. Y. 1941); The Lady Drake, 1 F. Supp. 317 (E. D. N. Y. 1932); Wittig v. Canada S. S. Lines, 59 F. 2d 428 (W. D. N. Y. 1932); The Beaverbrae, 60 F. 2d 363 (E. D. N. Y. 1931); Goldman v. Furness, Withy & Co. Ltd., 101 Fed. 467 (S. D. N. Y. 1900); *see* The Mandu, 102 F. 2d 459, 462 (2d Cir. 1939). *Contra:* The Eemdyjk, 268 Fed. 385 (W. D. Wash. 1923) (where assignment to American, even though for purposes of suit, is for value, there can be no dismissal); Chubb v. Hamburg-American Packet Co., 39 Fed. 431 (E. D. N. Y. 1889). In Asiatic Petroleum Corp. v. Italia Societa Anonima di Navigazione, 119 F. 2d 610 (3d Cir. 1941), jurisdiction was retained as a matter of discretion, the court expressly refusing to decide what effect libellant's American citizen ship may have. However, in this case, the assignment by virtue of which libellant sued was not of a claim, but of a contract, before any cause of action under it arose. The doubts which the court seemed to have on whether it could here have dismissed had it wanted to, therefore have no bearing on cases such as the above in which a claim is assigned after the cause of action has arisen. It is only in the latter instance that the full reasoning of Judge Hand in the *Merchants' & Shippers* case applies. Another case which assumes jurisdiction on grounds which do not conflict with the result of the *Merchants' & Shippers* case is Jose Toya's Sons Co. of New Orleans v. Compania Arrendatoria de Tobacos de Espania, 280 Fed. 825 (2d Cir. 1922).

125 See n. 128 *infra.*

courts. Not a word would have had to be changed in the *Merchants' & Shippers* case if the court had expressly assumed, *arguendo,* that jurisdiction over suits in admiralty by citizens is mandatory. And understandably so, for it is doubtful whether the Constitution and the Judiciary Act, under the most extreme construction, could have intended to impose on the courts something resembling champerty and maintenance and to change long-settled rules regarding subrogees who stand in their principals' shoes. Moreover, and quite clearly, if a constitutional right had to be upheld under these circumstances, all discretion in suits by foreigners would effectively disappear, since cases in which dismissal is a possibility would be assigned to an American, and therefore have to be retained.[126]

More difficulty is encountered in dealing with cases in which an American citizen sues in his own right. The question of the effect of libellant's citizenship under these circumstances has been given conflicting answers in suits by seamen for wages or recovery for injuries. It has been held that a treaty withdrawing from the courts jurisdiction over disputes between the master of a foreign ship and his crew applies where the libellant seaman is an American citizen and must result in dismissal.[127] On the other hand, there are a number of decisions holding categorically that a citizen has an indefeasible constitutional right of access to United States courts of admiralty, which, presumably, cannot be taken away even by treaty.[128] This is a dubious doctrine. The purpose of the Constitutional provision was to draw a jurisdictional line between Federal and State courts, and it was surely not meant to interfere with the treaty-making power of the Executive and the Senate.[129]

126 In Bengochea v. Dampskib Selskabet Orient A/S, *supra* n. 123, the court retained a suit by a foreign consignee of cargo lost on a foreign vessel, on the ground that the consignee's underwriters were American. Dismissing this suit, said the court, would be a waste of effort since, as the court erroneously assumed, the underwriter could then sue on the same claim, and against him there could be no dismissal

127 The Albergen, 223 Fed. 443 (S. D. Ga. 1915); The Welhaven, 55 Fed. 80 (S. D. Ala. 1892); The Burchard, 42 Fed. 608 (S. D. Ala. 1890). *Cf.* Braucher, *supra* n. 1, at 925: "Even in admiralty, however, no case seems ever to have permitted dismissal of the claim of a United States citizen suing in his own right. . . ."

128 The Epsom, 227 Fed. 158 (W. D. Wash. 1915); The Neck, 138 Fed. 144 (W. D. Wash. 1905); The Falls of Keltie, 114 Fed. 357 (D. C. Wash. 1902); Bolden v. Jensen, 70 Fed. 505 (D. C. Wash. 1895) (a citizen is "entitled to obtain redress in a court of his own country"). It is to be noted that these cases were all decided in the same district court. In fact, the last three were all handed down by the same district judge. (Hanford, J.)

129 In a case passing on the constitutionality of treaties withdrawing jurisdiction over seamen as applied to foreigners, this point was forcefully made, and The Neck, *supra* n. 128, roundly disapproved. The Koenigen Luise, 184 Fed. 171 (D. C. N. J. 1910). In all logic, if the constitutional language of the cases cited in n. 128 *supra* does not exteud to limiting

There should be some good reason for reading into it so inflexible and unintended a guaranty as this court does. In fact, however, there is only a reason against doing so, for the guaranty would undoubtedly militate against the hiring by foreigners of American seamen, at least where treaty provisions covering foreigners exist. And this is a consideration to which, under similar circumstances, though in another context, the Supreme Court has shown itself to be sensitive.[130]

Treaties aside, the question, as it touches seamen, becomes somewhat academic. In suits for wages, discretion should probably not exist. If it does, and is at all sensibly applied, it would be abused if invoked to dismiss even against a resident, let alone citizen libellant.[131] In tort cases the same is true as to abuse of discretion.[132] Where discretion is exercised to let a foreign consul give compensation, if the law under which he operates applies to an American citizen, there should be a stay, not a dismissal. Surely the Constitution does not immunize citizens against a stay. After compensation has been received from the consul, there is no cause of action. If one remains, the court should and would hear it anyway.

In other than seamen's cases, it is also not often crucial to determine whether a constitutional gnarantee of access to the courts protects the American libellant from dismissal. For there are valid reasons why, if discretion exists, it should be sharply restricted. To dismiss is not to send libellant to another American court, nor to his own country, nor to another forum as foreign to him as this, but to the courts of defendant's country. The court should be very certain, therefore, that the other forum will entertain this suit despite libellant's foreignness there, and the balance of convenience should be pretty heavily against libellant before there is a dismissal. For while there should not probably be placed on the courts a constitutional duty to hear any American citizen suing a foreigner, to ask them to open their doors to him if no other forum will entertain his suit is quite a different matter, and not unreasonable. And an American libellant after all pays taxes toward the support

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the treaty-making power, it must lose all its validity. For it would be a most peculiar constitutional guaranty which exists only when it is not overridden by a treaty. See also 29 HARV. L. REV. 219 (1915).

130 See Strathearn S. S. Co. v. Dillon, *supra* ns. 57, 58.

131 *E.g.*, The Alnwick, 132 Fed. 117 (S. D. N. Y. 1904) (existence of discretion in suit by citizen for wages against British ship affirmed, but jurisdiction retained on ground of libellant's American citizenship).

132 See, *e.g.*, Elder Dempster Shipping Co. Ltd. v. Puoppirt, 125 Fed. 732 (4th Cir. 1903); Patch v. Marshall, Fed. Cas. No. 10,793 (C. C. Mass. 1853) (discretion exercised in suits by American citizens to recover from foreign ships for personal injuries, and jurisdiction assumed largely on ground of libellant's citizenship).

of the Federal courts and is therefore somewhat entitled, where a foreigner has no claim at all, to burden them with a not excessive measure of inconvenience. At the very least, the presumption in cases where other factors are in equilibrium should be turned in favor of an American libellant.

Nevertheless, assuming no Constitutional gnaranty, discretion should not be abolished altogether in these cases. As suggested by one court,[133] a specially narrow area of discretion can be circumscribed to protect foreign defendants in cases of great hardship. These should be dismissal only when flagrant injustice would be done by allowing the suit to proceed. This would mean cases in which all factors of convenience point to the defendant's forum and the libellant's only possible purpose in bring suit here was to harass defendant into an unfavorable settlement. It should mean also and as significantly that the parties would remain free to determine by contract where suit should be brought, for under this standard, an agreement to sue or arbitrate elsewhere should also be sufficient ground respectively for dismissal or stay of the action.[134] However, no cases have been found which dismiss a suit by an American citizen other than a seaman covered by a treaty, against a foreigner in admiralty.

Both Parties United States Citizens: The Supreme Court quite early, held, in *Atkins v. The Disintegrating Co.*,[135] that venue provisions of the Judiciary Act have no application to admiralty. Lower courts must of course look to the reasons for a rule so favorable to plaintiffs before deciding whether they are empowered to give discretionary dismissals in spite of it or not. The reason given by the court is that libellant's security in admiralty is of a transitory nature, and that therefore the *forum rei sitae* is a proper one. But it has been noted that this reasoning

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133 The Saudades, 67 Fed. Supp. 820 (E. D. Pa. 1946). The court, in taking jurisdiction in a suit by an American libellant against a foreigner, said discretion should exist, but be exercised only in cases in which it would be unjust to allow a citizen to proceed in his own courts. No mere inconvenience should suffice. For other cases which take jurisdiction over such suits, but appear to recognize no absolute duty to do so in every case, regardless of anything else, see, *e.g.*, The Sailor's Bride, Fed. Cas. No. 12,220 (C. C. Mich. 1859); The Maria, 4 F. Supp. 168 (S. D. N. Y. 1933).

134 See n. 103 *supra.*

135 18 Wall. 272 (U. S. 1873); *accord, In re* The Louisville Underwriters, 134 U. S. 488 (1890) Service by foreign attachment is of course permitted. *E.g.*, Aktieselskabet Dea v. Wrighton, 26 F. 2d 175 (5th Cir. 1928); The Roosevelt, 23 F. Supp. 620 (S. D. N. Y. 1938); Cavanaugh v. Starbuck Towing Corp., 261 Fed. 656 (E. D. N. Y. 1919); Shamrock Towing Co. v. Manufacturers' & Merchants' Lighterage Co., 262 Fed. 844 (E. D. N. Y. 1918). But service outside the court's district is not good. Connecticut Fire Ins. Co. v. Lake Transfer Corp., 74 F. 2d 258 (2d Cir. 1934); *but cf.* Downs v. Wall, 176 Fed. 657 (5th Cir. 1910).

is satisfied consistently with a discretionary dismissal by granting a stay, and making that dismissal conditional on defendant's offering equal security in the other forum. While the same considerations which militated against dismissal of suits by foreign seamen for wages or in tort hold against sending admiralty's wards chasing after a master across the American continent, there is no reason why the doctrine of *forum non conveniens,* now established on the law side, should not apply to all *other* suits in admiralty between citizens, as long as libellant's security is safeguarded.

The cases of suits in admiralty between citizens in which discretionary dismissal could have been called for are very few.[136] Still, it is remarkable that none has been found in which the existence of discretion is even asserted,[137] let alone one which actually dismisses. Application of

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[136] *E.g.,* American Potato Corp. v. Boea Grande S. S. Co., 233 Fed. 542 (E. D. Pa. 1916). A *forum non conveniens* objection could perhaps have been raised in Murphy v. American Barge Line Co., 74 F. Supp. 886 (W. D. Pa. 1947), but if it had, it should have been disposed of on the ground that this was a suit by a seaman involving a personal injury. Panama R. R. Co. v. Napier Shipping Co., 166 U. S. 280 (1897), was a suit by a British corporation against an American one doing business in Panama, on a cause of action which arose in Panama. All witnesses were in Panama. Although no good reason appears why there should not here have been a dismissal, which was asked by the American defendant, with a view to more convenient suit in Panama, the Supreme Court disposed of the case on the merits, in defendant's favor.

The Suits in Admiralty Act of 1920, which is a waiver of United States immunity, provides in Section 2, 41 STAT. 525 (1920), 46 U. S. C. § 742 (1946), which foreshadows Section 1404 (a) of the new Judicial Code, that while venue is laid in the district where plaintiffs reside or do business, "Upon application of either party the cause may, in the discretion of the court be transferred to any other district court of the United States." Immunity was waived in this Act, however, so that seamen could sue for injuries suffered on board United States vessels. The Act has therefore received a liberal construction favorable to the seaman. See Nahmeh v. United States, 267 U. S. 122 (1924). For that reason, and given the analysis of the *forum non conveniens* problem in suits by seamen advanced in this paper, it does not appear that the transfer provision can have much application. It is difficult to conceive the case in which a court would feel free to let a court on the other coast hear the case, without the customary consideration of the merits. This expectation is fulfilled. In Simonsen v. United States, 22 F. Supp. 239 (E. D. Pa. 1938), a seaman was suing to recover from the United States for an injury sustained on one of its ships in the Canal Zone. The Government wanted to remove to the Canal Zone. The motion was denied, on the ground that now that plaintiff is here, where he lives and will presumably remain, it would be unjust to force him to travel to a distant place to sue. This case would seem to be a highly pertinent citation in similar suits, under the FELA for instance, in which the attempt is made to apply the new Section 1404 (a).

[137] *But see* Neptune Steam Nav. Co. v. Sullivan Timber Co., 37 Fed. 159 (S. D. N. Y. 1888). This was a suit in New York against a Florida corporation, doing business in Florida and having only an agent in New York. The court held that service had not been good and dismissed on that ground for lack of jurisdiction. But there was a dictum that had service been good, there might have been a dismissal in discretion with a view to more convenient suit in Florida.

the doctrine of *forum non conveniens* in admiralty suits between foreigners was a precedent relied on when the doctrine was extended to suits at law and in equity between citizens. It is curious, in this light, that the admiralty courts themselves have left the doctrine where they found it 150 years ago without appreciably extending the area of its operation.

Conclusion

The technique of discretionary dismissal is totally inadequate to the solution of the *forum non conveniens* problem in suits in admiralty by seamen for wages. In seamen's personal injury actions rules directed to the solution of that problem can be accurately formulated, and an area of discretion, if it is to exist at all, must be guided by those rules and restricted to situations which they do not envision. These two classes of suits illustrate therefore the undesirability of treating the technique of discretionary dismissal as a matter of the court's power to regulate its calendar, which if it exists, holds everywhere. This is shown again by the analysis of suits in admiralty in which libellant is an American, defendant a foreign citizen.

The field of admiralty's jurisdiction over foreiguers in all other types of cases is one in which a particularly acute *forum non conveniens* problem exists, to the solution of which the technique of discretionary dismissal is alone suited. But experience here demonstrates that without help in the form of policy pronouncements from appellate courts to give direction to the exercise of discretion, the result is a small percentage of dismissals and a large percentage of confusion.

It is to be hoped that courts, in applying Section 1404 (a) of the new Judicial Code on the law side will be careful to think of the technique that statute authorizes not in wholesale but in retail terms. Unless that is done, and unless in the manner normal to common law development but strangely ignored in many of the admiralty cases, reasoned development of rules is undertaken wherever possible, discretionary dismissals will be found not to be a very satisfying way out of the difficulties raised by suit in an inconvenient forum.