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Procedure—Intrastate Application of Forum Non Conveniens

Peter Thomas Denny

West Virginia University College of Law

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the normal birth of a normal child. Both courts also recognized that plaintiffs could recover damages for these injuries. This conclusion appears to be a reasonable one when considered in relation to well established rules of law regarding damages. Under these rules there appear to be no barriers to the recovery of damages by plaintiffs in cases similar to *Custodio*.

The problems presented by these cases are novel ones and are not easily resolved, but the courts appear to have arrived at a very satisfactory solution. Certainly it is not possible to predict to what extent, if at all, other courts will follow the holdings of the *Custodio* and *Bishop* cases. Nevertheless the decisions in these cases appear to lay a solid foundation on which other courts may base their decisions when confronted with similar problems of this nature in the future.

James Alan Harris

Procedure—Intrastate Application of *Forum Non Conveniens*

P was injured in an automobile accident and brought suit against *D*, a foreign insurer, in the jurisdiction where *D* was domiciled. *P* could elect to proceed against *D* in alternate jurisdictions, either the situs of the accident or the domicile of *D*. Upon *D*'s motion, a change of venue to the situs of the accident was granted inasmuch as a crowded court docket would be relieved and the convenience of the litigants and witnesses would best be served by reducing travel time. *P* appeals, charging the transfer as error. *Held*, reversed. The doctrine of *forum non conveniens* is foreign to Louisiana jurisprudence and contrary to the general venue statute which provides a change of venue may be had only where a fair and impartial trial cannot be obtained in the forum in which the action has been initially brought.¹ *Trahan v. Phoenix Insurance Co.*, 200 So. 2d 118 (La. 1967).

The doctrine of *forum non conveniens* deals with the discretionary power of a court to decline to exercise a possessed jurisdiction when it appears that the cause before it could be more conveniently and appropriately tried elsewhere.² One of the functions of the doctrine

¹ LA. STAT. ANN.—C.C.P., art. 122 (West 1961).

² Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

is to furnish criteria for deciding where is the most convenient forum.³ Some of the more important considerations are: ease of access to sources of proof, possibility of a view of the premises, cost of obtaining attendance of witnesses, and the convenience to witnesses and litigants.⁴ The origins of the doctrine of *forum non conveniens* are obscure, but it appears to have first developed in the Scottish courts in the late 1800's. The doctrine was quickly recognized, theoretically at least, in the American courts.⁵ The term *forum non conveniens* was first brought into American law in 1929 by Paxton Blair, a law review writer, who contended that all American courts had inherent power to decline jurisdiction under the doctrine.⁶ By 1941 the term had fallen into such general use that it was referred to by Justice Frankfurter as the "familiar doctrine of *forum non conveniens*."⁷ The doctrine's acceptance has far from subsided since 1941. Today, many states have incorporated variations of the doctrine into their state codes.⁸

State statutes providing for intrastate transfer of civil suits generally fall into one of three broad categories. Twenty-one states have statutes which set forth "prejudice" as sufficient grounds for transfer.⁹ The word "prejudice" is used to cover objections to both the court and the jury. Twenty-three states specifically provide for a change of venue "for the convenience of witnesses."¹⁰ As in *Trahan*,

³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1946).

⁴ *Id.* at 508.

⁵ Comment, *Venue: Forum Non Conveniens—the Florida View*, 15 U. MIAMI L. REV. 420 (1961).

⁶ Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 388 (1947).

⁷ *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 55 (1941).

⁸ The scope of this comment is limited to a consideration of the doctrine of *forum non conveniens* only insofar as the doctrine may be used to effect intrastate transfers of civil suits. The federal doctrine of *forum non conveniens* and the doctrine as applied to effect interstate transfers are outside the scope of the discussion.

⁹ The states providing for a change of venue on the grounds of prejudice are: Alabama, Arkansas, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Vermont. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 62-64, (1931); Annot., 74 A.L.R.2d 16, 24 (1960). Efforts were made to correct errors and inconsistencies between the two sources and to update the information contained therein.

¹⁰ The states holding convenience of the witnesses as a proper ground for transfer are: Alaska, Arizona, California, Colorado, Idaho, Illinois, Indiana, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, New Hampshire, New York, Oregon, South Carolina, South Dakota, Utah, Virginia, Washington, Wisconsin, and Wyoming. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 62,

“good cause” or “sufficient cause” is pronounced as grounds for change in five states,¹¹ and in the remaining state, no code provision providing for a change of venue could be found.¹²

The “good cause” statutes, as found in *Trahan*, present a unique problem. Is the inconvenience of witnesses and litigants to be considered “good cause,” thus making it possible to effect a transfer of the suit to a more appropriate forum? *Trahan* clearly and unequivocally answers no. The court pointed out that a change of venue could only be granted if a fair and impartial trial could not be had because of two specifically enumerated conditions, namely, “undue influence of an adverse party” and “prejudice existing in the public mind.” It was felt that the phrase “or some other sufficient cause” was merely intended as an extension of the previously enumerated examples in the statute of circumstances which might prevent a fair and impartial trial. The court expressly refused to recognize the common law doctrine of *forum non conveniens*. Yet other states with similar statutes have leaned, perhaps unconsciously, in the opposite direction. In the other four states having good cause statutes, no clear-cut decision has been found which succinctly states that *forum non conveniens* is adequate grounds for transfer of a suit. But, in two of these good cause states, New Jersey and Michigan, there have been cases allowing transfers for the convenience of the litigants and the witnesses. Two New Jersey cases have allowed a cause of action to be transferred to a more appropriate forum, the sole reason for the transfers being the convenience of the witnesses.¹³ Likewise, Michigan, which had a good cause statute prior to 1963,¹⁴ took a course similar to New Jersey’s by holding that inconvenience to the parties and the witnesses was properly considered as a basis

63, 64 (1931); 74 A.L.R.2d 16, 24 (1960). Efforts were made to correct errors and inconsistencies between the two sources and to update the information contained therein.

¹¹ LA. STAT. ANN.—C.C.P., art. 122 (West 1961); ME. REV. STAT., ch. 201, tit. 14, § 508 (West 1964); N. J. REV. STAT., 2A:2-13 (West 1952); W. VA. CODE ch. 56, art. 9, § 1 (Michie 1966); TEX. R. CIV. P. 257 (Vernon’s 1962).

¹² No code provision could be found for a change of venue in Delaware.

¹³ *Galbraith v. Bd. of Education of Woodbridge*, 3 N.J. Misc. 156, 127 A. 572 (1925); *Saxton v. Ocean City*, 14 N.J. Misc. 825, 187 A. 650 (1936); cf. *Hoffman v. Trenton Times Corp.*, 127 N.J.L. 33, 21 A.2d 229 (1941).

¹⁴ On Jan. 1, 1963, Michigan’s General Court Rules went into effect. Rule 403 dispensed with the good cause statute and specifically provided for a change of venue for the convenience of parties and witnesses. MICH. STATS. ANN., RULES, RULE 403 (1963).

for a change of venue.¹⁵ The New Jersey and Michigan decisions are surprisingly similar in one important aspect. Both states chose to completely ignore the applicable good cause statutes. The courts decided the issue as if possessed with inherent common law powers enabling them to transfer the suits to a more convenient forum. Perhaps, then, it may be concluded that Paxton Blair did have a basis for his prophetic statement in 1929 that the doctrine of *forum non conveniens* "involves nothing more than an appeal to the inherent powers possessed by every court of justice—powers, that is to say, which are incontestably necessary to the effective performance of judicial functions."¹⁶ Remembering that the doctrine evolved from the common law, it would not be illogical to assume that the courts still possess the power to transfer cases, unless such activity is proscribed by statute, as was held in the *Trahan* case.

West Virginia is one of the five good cause states.¹⁷ Although there have been no cases directly deciding whether the convenience of the parties and the witnesses is to be considered as good cause, it is interesting to note the West Virginia case of *Shay v. Rinehart & Dennis Co.*¹⁸ In that case, 260 suits all of the same nature were pending in a circuit court. The court transferred sixty of these cases to another circuit court on motions of the plaintiffs because of a crowded docket. The defendants appealed, charging the transfers as errors. Summarily dispensing with the appeal, the West Virginia Supreme Court of Appeals held they were without appellate jurisdiction as no final judgment or decree had been entered in the case. The court declined to entertain the question of whether the circuit court had exceeded its discretion in transferring the cases. Although the convenience of witnesses was not directly involved in the *Shay case*, the case nevertheless demonstrates the willingness of a circuit court to decline to exercise its jurisdiction by transferring several cases to a forum which could more rapidly serve the parties' ends.

In the *Trahan* case, the Louisiana court viewed the adoption or rejection of the doctrine of *forum non conveniens* as a purely procedural matter, and as such falling only within the ambit of the

¹⁵ *Silvertone v. London Assur. Corp.*, 176 Mich. 525, 529; 142 N.W. 776, 778 (1913); cf. *Herpolsheimer v. A. B. Herpolsheimer Realty Co.*, 344 Mich. 657, 699-670; 75 N.W.2d 333, 340 (1956).

¹⁶ Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

¹⁷ W. VA. CODE ch. 56, art. 9, § 1 (Michie 1966).

¹⁸ 116 W. Va. 24, 178 S.E. 272 (1935).

legislature.¹⁹ But, in West Virginia the Supreme Court of Appeals has inherent power as well as statutory authorization to prescribe, promulgate, and amend rules of procedure.²⁰ Consequently, even if the West Virginia court takes the view that the doctrine of *forum non conveniens* is purely a procedural matter, recognition of the doctrine would be directly within the rule making power of the court.

Whether the West Virginia court will adopt the doctrine of *forum non conveniens* in the shadow of the good cause statute is a question yet to be answered. Two arguments that could be made for such an adoption would be the handling of the matter in other states with good cause statutes and the inherent common law power of courts to decline to exercise jurisdiction when a more appropriate forum exists. But the reasoning in *Trahan* could also be set forth, and perhaps convincingly enough to influence the court to render a similar decision.

Peter Thomas Denny

Torts—Comparative Negligence Adopted by Judicial Decision

Wrongful death action was brought for the death of *P*'s decedent. *P* failed to allege that decedent exercised ordinary care for his own safety at the time of the accident.¹ *P* did allege that if there was any negligence on the part of the decedent, it was less than the negligence of the *P* when the two were compared. The *D* moved to dismiss for failure to state a cause of action. Motion allowed, and *P* appealed to the Supreme Court of Illinois. The Supreme Court transferred the case to the Appellate Court for the Second District stating that the question of whether the rules that contributory negligence barred recovery should be changed, as a matter of justice and public policy, was a matter that needed consideration. *Held*, the action could not be defeated by negligence of *P*'s decedent unless such negligence was at least equal to that of defendant; but, *P*'s damages would be diminished in proportion to the amount of negligence

¹⁹ 200 So. 2d 118, 122 (La. 1967).

²⁰ Order of the Supreme Court of Appeals of W. Va., Oct. 13, 1959, promulgating the W. Va. Rules of Civil Procedure for trial courts of record, 144 W. Va. xii; W. VA. CODE ch. 51, art. 1, § 4a (Michie 1966).

¹ In Illinois the plaintiff has the burden of showing that he was not contributorily negligent. *Aurora Branch R.R. v. Grimes*, 13 Ill. 585, 587 (1852); *Clubb v. Main*, 65 Ill. App. 2d 461, 470, 213 N.E.2d 63, 67 (1965).