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FORUM NON CONVENIENS IN WASHINGTON— A DEAD ISSUE?

PHILIP A. TRAUTMAN*

The Washington Supreme Court in the recent case of *Lansverk v. Studebaker-Packard Corp.*¹ held the doctrine of forum non conveniens not to be a part of the law of this state. Probably as good a description of the doctrine as can be found is set forth in the *Lansverk* case, namely, that although a court in which a transitory action is commenced has jurisdiction to hear and determine it, the court can, nonetheless, in its discretion decline to exercise its jurisdiction and dismiss the action whenever it appears that there is another forum available where trial will best serve the convenience of the parties and the ends of justice. The result of the holding is that the superior courts of Washington do not possess such discretionary power.

Several questions may be posed as a result of this decision. Will the superior courts in the future be able to reach the same results without referring to the doctrine by name as they would by application of the doctrine? Will the supreme court be willing to recede in future cases from the position it has taken? If not, should action be taken in terms of a rule of court or a statute to implement the doctrine? In short, is the doctrine of forum non conveniens now a dead issue in the state of Washington?

In the *Lansverk* case the plaintiffs, residents of North Dakota, brought an action against a foreign corporation, licensed to do business in Washington, but engaged primarily in the business of manufacturing automobiles in Indiana. The plaintiffs sought to recover for injuries sustained by the plaintiff wife as a result of a fall while visiting the defendant's plant in Indiana and for failure to properly diagnose and treat the injury. The defendant was properly served with process in Washington and was conceded to be subject to the jurisdiction of the superior court. The defendant moved for dismissal on the ground of forum non conveniens, which motion was granted by the lower court. As indicated, the supreme court reversed.

In reaching its conclusion the court stated that there was nothing in the constitution, statutes, rules, or decisions in this state that recognized the existence of any discretion in the superior courts to decline

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¹ 154 Wash. Dec. 114, 338 P.2d 747 (1959).

to exercise jurisdiction, vested by the constitution or statutes, by application of the doctrine. This statement necessitates an examination of several earlier decisions.

Two such earlier cases were discussed in the opinion. In *Smith v. Empire State-Idaho Mining & Dev. Co.*² an action was commenced in a superior court of Washington by citizens and residents of Idaho against a corporation, organized and existing under the laws of New York, engaged in operating a mine in Idaho, and with its principal office and place of business in Washington. The plaintiffs sought to recover damages for a death which resulted from an accidental injury to an employee of the defendant while working in the mine in Idaho. The action was subsequently removed to a federal court in Washington on the basis of diversity of citizenship. A motion was made to dismiss for lack of jurisdiction. The court concluded that by maintaining its principal office in Washington the defendant corporation had consented to suit in this state and that service of process had been proper under the Washington statutes. Thus there was jurisdiction.

The holding did not reach the issue of whether, granting there was jurisdiction, the courts of Washington had discretion to refuse to exercise it. It is true that the court said, "the jurisdiction does not rest upon comity, but upon the positive provisions of law. Therefore the court has no discretionary power to refuse to take cognizance of the case." However, this was dictum. Moreover, the court indicated that it would be better if the action were litigated in the state where the accident occurred and the plaintiffs resided since the witnesses to the accident resided there and could be compelled to appear and testify. This would be less inconvenient to the witnesses and less expensive to the parties. This perhaps suggests that if actually confronted with the problem by proper motion, jurisdiction might have been declined. At most, the case is inconclusive on the point.

The other decision discussed in the *Lansverk* case is *Reynolds v. Day*.³ This case held only that the Washington court had jurisdiction to hear a transitory action for personal injuries accruing in another state, when personal service was had in Washington. Again, the holding did not reach the issue of whether the superior court had discretion to decline to exercise jurisdiction, though it was said that the expense to taxpayers and the inconvenience to the courts of hearing cases aris-

² 127 Fed. 462 (1904).

³ 79 Wash. 499, 140 Pac. 681 (1914).

ing in other states was not a valid objection to the exercise of jurisdiction.

In neither case then did the court have to resolve the problem of the existence of the doctrine of *forum non conveniens*. As recognized in the *Lansverk* case, neither could be taken as direct authority for concluding that the superior courts of the state lacked the discretionary power embodied in the doctrine.⁴

In several cases, however, not mentioned in the *Lansverk* opinion, the court has indicated that some discretionary power does exist, though the doctrine of *forum non conveniens* has not been applied by name. In *Olympia Mining & Milling Co. v. Kerns*,⁵ an action was initiated by an Idaho corporation against a resident of Idaho on a contract made and to be performed in Idaho. The action involved the title and possession of mining claims in Idaho. The superior court held that there was jurisdiction over the defendant, but that it had discretion whether to hear the case. Exercising that discretion, the lower court concluded it should not entertain jurisdiction, but rather the parties should be left to adjudicate their rights in Idaho. The supreme court affirmed. The reason for the affirmance is not absolutely clear. In part, the opinion seems to rest on the proposition that the Washington court had no jurisdiction to determine title to Idaho land. The court also stated, however, "the subject-matter of the action being situate in, and the parties being domiciled or resident within, the state of Idaho, we take it that it will require no argument to sustain the proposition that the jurisdiction of our courts cannot be invoked as a matter of right, but rests in the doctrine of comity. That a court may refuse to entertain jurisdiction where the parties are nonresidents and the cause of action originated and is to be performed beyond the limits of the state, is well established." Though the court spoke in terms of comity, there seemed to be a recognition of a discretionary power in the superior court, comparable to the doctrine of *forum non conveniens*.⁶

⁴ Other cases of like import which were concerned with the presence or lack of jurisdiction rather than the doctrine of *forum non conveniens* are *Gerson v. Sussman*, 176 Wash. 567, 30 P.2d 379 (1934); *Oregon Mortgage Co. v. Hartford Fire Ins. Co.*, 122 Wash. 183, 210 Pac. 385 (1922); *Grant v. Pacific Gamble Robinson Co.*, 22 Wn.2d 65, 154 P.2d 301 (1944); *Davis v. Harris & Co.*, 25 Wn.2d 664, 171 P.2d 1016 (1946). The latter two cases recognize the principle that the courts of this state will not exercise jurisdiction if an action is based upon a statute of another state and by the terms of the statute the right given is to be enforced by prescribed proceedings within the state of its enactment, the remedy so provided being exclusive.

⁵ 64 Wash. 545, 117 Pac. 260 (1911).

⁶ See *Smith v. Fletcher*, 102 Wash. 218, 173 Pac. 19 (1918) for an interpretation of the meaning of the *Kerns* case.

A case which definitely recognized the doctrine is *In re Yarbrough's Estate*.⁷ The facts were summarized by the court as follows: X, a citizen of the state of Oregon, died there, leaving no property, but a right in his estate to begin suit for his death against an Oregon corporation, whose wrongful act occurred in Oregon, the suit to be governed and the proceeds to be distributed according to the laws of Oregon. A few months later, Z, a stranger, applied in the state of Washington for letters of administration, under a law which permitted administration where there was property of the deceased.

The question posed by the court was whether the courts of this state had jurisdiction to appoint an administratrix. The court first stated that the wrongful death action could not be brought until an administration had been granted in Oregon. But the court went on to say that the decision could better be rested on the ground that to allow the proceeding was so liable to abuse and confusion that the parties would not be allowed the use of the state's probate courts.

The court quoted with approval the following statement from a New York case:

The habit of importing such litigations as this into this jurisdiction, consuming the time of the courts, and requiring the people of the state of New York to bear the burden and expense of trying actions which ought to have been brought in other jurisdictions, where the home courts of litigants are open to afford adequate remedies, has become a great abuse and a just subject of complaint and protest. If it is to be encouraged . . . the flood gates of litigation in similar cases will be wide open, if not to establish a new legal industry, at all events to impose upon our already overworked courts the obligation to try actions imported from foreign jurisdictions. . . .

Thus, while the court posed the question in terms of lack or presence of jurisdiction, it relied upon forum non conveniens without applying that label.⁸

There have been other cases in which the court has indicated that the doctrine was part of the law of this state. In *Hunter v. Wenatchee Land Co.*⁹ an action was initiated by residents of Minnesota against a corporation doing business in Minnesota concerning a contract made in

⁷ 126 Wash. 85, 216 Pac. 889 (1923).

⁸ The Yarbrough case is discussed in *In re Ludwig's Estate*, 49 Wn.2d 312, 301 P.2d 158 (1956), and *In re Waldrep's Estate*, 49 Wn.2d 711, 306 P.2d 213 (1957). In either instance is the language in the quotation set forth above disapproved. In fact, in the Waldrep case it is again quoted with approval. See Samuelson, *Administrators—Right to Sue Under Foreign Wrongful Death Statute*, 32 WASH. L. REV. 70 (1957).

⁹ 36 Wash. 541, 79 Pac. 40 (1905).

Minnesota, whereby plaintiffs were made the exclusive sales agents of Washington land. The court conceded the general rule was that if it appeared that an action was brought by an alien, with alien apparently meaning a nonresident of the place of suit, for the purpose of obtaining any undue advantage in that jurisdiction, the courts would not lend themselves to the investigation and determination of such a case. The defendant contended that such an advantage was sought in the immediate case in that the laws of Minnesota would preclude recovery by the plaintiff whereas the laws of Washington might not and further that all the witnesses were in Minnesota. The Washington court answered this by saying that no burden would be imposed upon the defendant since the laws of Minnesota, that being the place of making of the contract, would govern in the Washington suit and since the action depended mostly upon the construction of legal documents rather than the testimony of witnesses. Further, the property which was the subject of the controversy was in Washington and there was no showing by the defendant that any property existed in Minnesota which could respond to a judgment there. In all of this, while the court was directly concerned with the lack or presence of jurisdiction, its language was not that of the superior courts having to take jurisdiction, but rather whether jurisdiction should be taken under the circumstances. The court did exactly what is done in applying the doctrine of *forum non conveniens*, namely, balancing the factors involved to determine which was the more convenient and appropriate forum. The conclusion was not that the courts of Washington had to take jurisdiction, but rather that since no great burden would be imposed by trying the cause here, there was no justification for denying the aid of the Washington courts to the plaintiffs.

It has been suggested that the refusal of courts to try suits for trespass to land when the land is located in another state is a part of the doctrine. The refusal is upon the ground that the matter can be better tried elsewhere and not that there is a lack of jurisdiction.¹⁰ Under this analysis the Washington court has adopted the doctrine in indicating that it will not entertain such an action for trespass.¹¹

It has also been suggested that the rule that a court will not ordinarily interfere with the internal management of foreign corporations is

¹⁰ STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 169 n. 98 (2d ed. 1951). See *RESTATEMENT (SECOND), CONFLICT OF LAWS* §§ 117i and 117j, (Tent Draft No. 4, 1957).

¹¹ See *Olympia Mining & Milling Co. v. Kerns*, *supra* note 5.

a part of the doctrine of forum non conveniens.¹² In applying this principle, the language used by the Washington court has been that of lack of jurisdiction.¹³ However, it would seem that jurisdiction actually existed but that the court was declining to exercise it.¹⁴

Even ignoring the trespass to land and "internal affairs" cases, however, there have been the other aforementioned cases recognizing the existence of discretion to decline jurisdiction. Though the label has not been attached, it is submitted that in fact these cases represent an application of forum non conveniens.

It should be noted that the *Lansverk* case places Washington in the minority, as was recognized by the court. The federal courts, of course, may exercise discretion and decline jurisdiction.¹⁵ In addition, most states presented with the problem have adopted the doctrine as indicated by the addendum to the *Lansverk* case.¹⁶ Others have recognized the doctrine without having yet applied it.¹⁷ Some have indicated that the doctrine will be accepted when a proper case arises.¹⁸

In view of the fact that Washington rejected the doctrine, particular attention should be given to the other states which have done so and

¹² STUMBERG, *supra* note 10. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 117e, comment d (Tent. Draft No. 4, 1957).

¹³ Meade v. Pacific Gamble Robinson Co., 21 Wn.2d 866, 153 P.2d 686 (1944); Fuller v. Ostruski, 48 Wn.2d 802, 296 P.2d 996 (1956).

¹⁴ See CHEATHAM, GOODRICH, GRISWOLD & REESE, CASES & MATERIALS ON CONFLICT OF LAWS 225 (4th ed. 1957) and cases cited therein; EHRENZWEIG, CONFLICT OF LAWS 133 (1959).

¹⁵ Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); 28 U. S. C. § 1404(a).

¹⁶ Arkansas: Running v. Southwest Freight Lines, 227 Ark. 839, 303 S.W.2d 578 (1957); California: Price v. Atchison, T. & S. F. Ry., 42 Cal.2d 577, 268 P.2d 457 (1954); Illinois: Whitney v. Madden, 400 Ill. 185, 79 N.E.2d 593 (1948); Louisiana: Union City Transfer v. Fields, 199 So. 206 (La. App. 1940); Maine: Foss v. Richards, 126 Me. 419, 139 Atl. 313 (1927); Massachusetts: Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 184 N.E. 152 (1933); Minnesota: Johnson v. Chicago, B. & Q. R.R., 243 Minn. 58, 66 N.W.2d 763 (1954); Missouri: Loftus v. Lee, 308 S.W.2d 654 (1958); New Hampshire: Jackson & Sons v. Lumbermen's Mut. Cas. Co., 86 N.H. 341, 168 Atl. 895 (1933); New Jersey: Starr v. Berry, 25 N.J. 573, 138 A.2d 45 (1958); New York: De La Bouillerie v. De Vienne, 300 N.Y. 60, 89 N.E.2d 15 (1949); Oklahoma: St. Louis-San Francisco Ry. v. Superior Court, 290 P.2d 118 (1955).

¹⁷ District of Columbia: Rice v. Salmier, 86 A.2d 175 (D. C. Mun. App. 1952); Florida: Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936); Utah: Mooney v. Denver & R. G. W. R. R., 118 Utah 307, 221 P.2d 628 (1950).

¹⁸ Indiana: Hartunion v. Wolflick, 125 Ind. App. 98, 122 N.E.2d 622 (1954); Iowa: Bradbury v. Chicago, R. I. & P. Ry., 149 Iowa 51, 128 N.W.1 (1910); Mississippi: Strickland v. Humble Oil & Refining Co., 194 Miss. 194, 11 So.2d 820 (1943), and Tri-State Transit Co. v. Mondy, 194 Miss. 714, 12 So.2d 920 (1943); Oregon: Horner v. Pleasant Creek Mining Corp., 165 Ore. 683, 107 P.2d 989 (1940); Vermont: Morissette v. Canadian Pac. Ry., 76 Vt. 267, 56 Atl. 1102 (1904), and Wellman v. Mead, 93 Vt. 322, 107 Atl. 396 (1919).

the reasons therefor. Three states—Alabama,¹⁹ Ohio,²⁰ and Texas²¹—have rejected the doctrine because a statute so required. The Alabama court indicated that it would prefer to apply the doctrine to avoid the added burdens upon the court and the added expense and inconvenience of hearing out of state controversies between outsiders, but the statute precluded this. It is to be noted that while the Washington court in the *Lansverk* case referred to the fact that jurisdiction was present under the constitution and statutes of this state, the decision was not based upon the controlling effect of the constitution or any statute, but rather on more general policy considerations.

In the other states that have apparently rejected the doctrine, the cases were usually decided at a comparatively early date and were based entirely or in part on the theory that the privileges and immunities clause of Article 4, section 2 of the Federal Constitution required that result.²² It has been made clear by United States Supreme Court, however, that the clause does not preclude adoption of the doctrine so long as differentiation is on the basis of residence and not citizenship.²³

One other state listed by the Washington court in the addendum to the *Lansverk* case as rejecting the doctrine no longer fits that category. While the Missouri court had earlier held in a Federal Employers' Liability Act case that since Missouri allowed its citizens to maintain suits it must likewise allow suits by non-citizens,²⁴ recently the court has concluded that the doctrine of *forum non conveniens* does apply to other than F.E.L.A. cases.²⁵

It is interesting to note that in addition to Missouri, two other states,

¹⁹ State *ex rel.* Southern Ry., 254 Ala. 10, 47 So.2d 249 (1950).

²⁰ *Mattone v. Argentina*, 123 Ohio St. 393, 175 N.E. 603 (1931).

²¹ *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App. 1932).

²² Michigan: *Cofrode v. Gartner*, 79 Mich. 332, 44 N.W. 623 (1890), with which compare *Gober v. Federal Life Ins. Co.*, 255 Mich. 20, 237 N.W. 32 (1931); Nebraska: *Herrmann v. Franklin Ice Cream Co.*, 114 Neb. 468, 208 N.W. 141 (1926); North Carolina: *McDonald v. MacArthur Bros. Co.*, 154 N.C. 122, 69 S.E. 832 (1910); Wisconsin: *Bourestom v. Bourestom*, 231 Wis. 666, 285 N.W. 426 (1939); Virginia: *Morgan v. Pennsylvania Ry.*, 148 Va. 272, 138 S.E. 566 (1927).

In two recent cases in southern states it was held that there was no discretion to decline jurisdiction where the plaintiff was a resident of the state wherein suit was initiated. This left open the question whether the doctrine would be applied if both parties were nonresident and the cause of action was foreign. *Atlantic Coast Line R. R. v. Wiggins*, 77 Ga. App. 756, 49 S.E.2d 909 (1948); *Chapman v. Southern Ry.*, 230 S.C. 210, 95 S.E.2d 170 (1956).

²³ *Douglas v. New York, N. H. & H. Ry.*, 279 U.S. 377 (1929). See Leon, *Equity: Availability in California of the Doctrine of Forum Non Conveniens as a Ground for Refusal to Exercise Jurisdiction*, 1 U.C.L.A. L. Rev. 602 (1954), and Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L. J. 1234 (1947).

²⁴ State *ex rel.* Southern Ry. v. Mayfield, 362 Mo. 101, 240 S.W.2d 106 (1951).

²⁵ *Loftus v. Lee*, *supra* note 16.

California²⁶ and Minnesota,²⁷ which earlier rejected the doctrine, have more recently adopted it. While the original Restatement of Conflict of Laws recognized the doctrine only as to certain matters dealing with the internal affairs of foreign corporations,²⁸ the second Restatement adopts it more generally.²⁹ As one leading commentator has stated, the modern trend is toward general acceptance of the rule of forum non conveniens in some form.³⁰

It is true that nothing compels a state to adopt the doctrine and that jurisdiction may be exercised despite the fact that it is an inappropriate forum.³¹ Assuming a state has acquired jurisdiction, it may reject or accept the doctrine for all causes begun in its courts.³² Still, with the considerable general authority favoring the doctrine, plus the earlier indications in this state that the doctrine was part of the law of Washington, one reasonably could have expected its acceptance in the *Lansverk* case. Why then was it rejected?

While the few other states rejecting it have done so primarily on the basis of explicit statutes or the privileges and immunities clause, the Washington determination was a policy decision. This necessitates an analysis of the policy issues involved.

In aligning itself with the minority, the court concluded that the doctrine created more problems than it solved. In the first place, it was stated that the Washington courts have not been confronted much with plaintiffs shopping for a forum in order to vex and harass a defendant so as to force him to settle at a high price. While this may have been true in the past, one may question whether the complete rejection of the doctrine will not encourage plaintiffs to seek relief in the courts of this state since they now know that the superior courts do not have the discretionary power embodied in the doctrine. In short, may not the holding of the case encourage the very thing that the court says does not now exist to any great extent, namely, forum shopping by the plaintiffs in Washington? Is this not particularly likely since most other states have adopted or indicated they will adopt the doctrine?

Further, with the enactment by the last legislature of chapter 131, Session Laws of 1959, one may expect a greater number of plaintiffs

²⁶ *Price v. Atchison, T. & S. F. Ry.*, *supra* note 16.

²⁷ *Johnson v. Chicago, B. & Q. R.R.*, *supra* note 16.

²⁸ See GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 23, n. 49 (3d ed., 1949).

²⁹ RESTATEMENT (SECOND), CONFLICT OF LAWS § 117e (Tent. Draft No. 4, 1957).

³⁰ LEFLAR, THE LAW OF CONFLICT OF LAWS 88 (1959).

³¹ RESTATEMENT (SECOND), CONFLICT OF LAWS § 117e, comment *g* (Tent. Draft No. 4, 1957).

³² *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950).

to seek relief in this state. That statute³³ expands the in personam jurisdiction of the courts of this state to the limits permitted under the due process clause of the fourteenth amendment.³⁴ In Illinois, which has a similar statute, it has been suggested that in instances where jurisdiction exists under the statute but the exercise of such jurisdiction would be unduly burdensome upon the defendant or the administration of justice, there could be dismissal under the doctrine.³⁵ This is not possible in Washington, however, in view of the *Lansverk* case.

Moreover, under the new statute, a nonresident defendant will in many instances be able to obtain removal of the cause to a federal district court in this state.³⁶ After such removal, a motion will lie in some situations to transfer the cause to a more convenient federal district.³⁷ While this may provide an avenue of escape from an inconvenient forum in some instances, would it not be better to make available to the defendant the possibility of successfully presenting his motion to the state court rather than taking the step of removing to the federal court and then making the very same motion? On the other hand, a plaintiff confronted with the possibility of initiating an action in either the state or federal court will certainly be encouraged to sue in the former, where the doctrine is not available, with the hope that the defendant will not seek removal to the federal court. Even if such removal is sought, the end result will be that the state courts are likely to be burdened with more litigation than has been true in the past and that instead of sharing the trial of transitory causes of action with the federal courts, the state courts will become at least the initial repository for such causes of action.³⁸

The court in the *Lansverk* case continued that since forum shopping by plaintiffs was rare it would not adopt the "drastic remedy of dismissal." However, adoption of the doctrine would not require that the remedy be one of unconditional dismissal. It is true that a state court

³³ By section 2, chapter 131, Session Laws of 1959, a person is deemed to have submitted to the jurisdiction of the courts of Washington as to any cause of action arising from (a) the transaction of any business within this state, (b) the commission of a tortious act within this state, (c) the ownership, use, or possession of any property whether real or personal, situated in this state, or (d) contracting to insure any person, property or risk located within this state at the time of contracting.

³⁴ See discussion of the statute by Trautman, *In Personam Jurisdiction Expanded—Force and Effect of Service of Process Outside of State*, 34 WASH. L. REV. 323 (1959).

³⁵ See discussion in 110 ILL. ANN. STAT. § 17, at 170.

³⁶ 62 STAT. 937 (1948), 28 U.S.C. § 1441 (1952).

³⁷ 62 STAT. 937 (1948), 28 U.S.C. § 1404(a) (1952).

³⁸ See *Johnson v. Chicago, B. & Q. R.R.*, *supra* note 16, where this factor was considered by the Minnesota court in relation to Federal Employers' Liability Act cases.

could not transfer the case to a court of another state, whereas under the federal statute there can be transfer from one district or division to another. But a dismissal could be made conditional in requiring that the defendant consent to the jurisdiction of the more convenient forum or stipulate not to plead a statute of limitations or submit to any other condition which the court might feel necessary to do justice to both parties.³⁹ Or, instead of dismissing, a court might simply stay the proceedings to await the defendant's further actions elsewhere and to assure itself that the plaintiff was able to obtain relief elsewhere.⁴⁰ Under the doctrine there are readily available alternatives to the "drastic remedy" of which the court speaks.

The court went on to say that the application of the doctrine would replace certainty as to forum with confusion and a variety of holdings on almost identical facts. That the exercise of discretion by different trial courts in balancing the relative conveniences and inconveniences would result in differences of opinion cannot be denied. But this is nothing new. In ruling on motions for trial amendments to the pleadings, for continuances, for inspection by the jury of premises, for special verdicts and special interrogatories, and for many motions for new trials, to name only a few, the superior court judges exercise their discretion. In each instance a variety of holdings on almost identical facts may be expected which may vitally affect the ultimate outcome, but it is felt the trial courts must be allowed to consider the circumstances and equities of the particular issue in the particular case. If the superior court judges are capable of exercising their discretion in these other situations without creating excess confusion, it seems that the same would be true in this instance. Certainly the supreme court could still check any abuse of discretion by a superior court.

The court spoke also of the chaos and confusion resulting from the almost invariable practice of railroads and other corporations doing business in many states, of moving for dismissal upon the grounds of forum non conveniens and of the flood of affidavits, counter-affidavits, and testimony which might precede the trial court's ruling on the motion. While such corporations have usually been the defendants in forum non conveniens cases in the past, with the expansion of in personam jurisdiction which is present the trend as exemplified by the aforementioned chapter 131, Session Laws of 1959, one may expect more

³⁹ See *Wendel v. Hoffman*, 259 App. Div. 732, 18 N.Y.S.2d 96 (1940), for an example of such a conditional dismissal.

⁴⁰ See cases cited in CHEATHAM, GOODRICH, GRISWOLD AND REESE, *CASES & MATERIALS ON CONFLICT OF LAWS* 218 4th ed., 1957).

and more private persons to be in the position of defendants needing the benefits and protection of the doctrine. As to the affidavits and testimony, the superior court judges could by appropriate rulings keep these reasonable in scope and number without unduly burdening such courts just as may be done, for example, in summary judgment proceedings.⁴¹

So far as the court's concern with the likelihood that defendants will invariably submit motions seeking to invoke the doctrine, this serves to raise what this commentator believes is the most convincing argument against the doctrine, namely, the potential delaying tactics which are made available to the defendant. However, the making of such motions and the time necessary for their consideration and determination would not create any more of a problem than any of the other pre-trial motions which a defendant might make, such as for continuances, judgments on the pleadings or summary judgments. Also, the superior courts have the power to keep any motions invoking the doctrine within bounds.

A more difficult problem so far as potential delay is concerned is created by the appeal possibilities. But, even as to this, the problem is not peculiar. If in exercising its discretion the superior court dismissed the action, the plaintiff could appeal since the dismissal would be a final order.⁴² In most instances, it is submitted, the trial courts' determination would be sustained as there is no reason to believe that the superior courts would be more apt to abuse their discretion in ruling on forum non conveniens motions than on any other pre-trial motions invoking the courts' discretion.

But what if the trial court, after exercising its discretion, denied the motion? As is pointed out in the *Lansverk* case, the defendant would have no immediate appeal since an order refusing to dismiss would not be an appealable order.⁴³ However, concern was expressed that the defendants would find a means to secure a review by the use of certiorari or some other extraordinary writ.

Under the doctrine, just as the superior courts have the power to keep motions for dismissal within bounds at the trial court level, it

⁴¹ WASH. RULES, PLEADING, PRACTICE, PROCEDURE 56.

⁴² WASH. RULES, APPEAL 14.

⁴³ The court further stated that unless the defendant could devise some means of securing a review by a special writ, an appeal after trial raising the issue that the trial court erred in denying the motion would usually be of little avail. A reversal would be unlikely because of the time and expense already devoted to the case. This illustrates the adaptability of the doctrine to the peculiar circumstances of an individual case.

would seem that likewise the supreme court could regulate any review proceedings initiated by the defendant so as to prevent abuse. Assuming that the particular writ was found to be appropriate for the relief sought by the defendant, if the supreme court concluded that the defendant was acting in bad faith for the purpose of delay, costs or damages could be awarded so as to tend to prevent such actions in the future. Certainly there are many other instances in which a defendant may seek delay by means of a special writ or by means of a supersedeas bond, and if the court can adequately protect the plaintiff in other instances, it can do the same here.⁴⁴ On the other hand, if the defendant was found to be acting in good faith in seeking to prevent an inappropriate and inconvenient court from hearing the case, he should be entitled to so act. After all, the plaintiff may likewise be acting in bad faith in initiating the action in the courts of this state in the first place.

Up to this point attention has been directed towards the court's criticisms of the doctrine. What, on the other hand, would be the advantages resulting from its adoption?

Probably as good a summation of the doctrine and its purposes as may be found is in *Gulf Oil Corp. v. Gilbert*.⁴⁵ As is there pointed out by the United States Supreme Court, jurisdiction and venue statutes are commonly drafted with considerable generality so as to assure a plaintiff of a forum in which he can secure relief. The result is that a plaintiff can use such statutes not only to obtain his just remedy but to harass a defendant by initiating an action at a place inconvenient to the defendant. The plaintiff's choice may have as its purpose, among others, to force the defendant into an unwilling settlement, to obtain higher damages than those available at a more convenient forum or to take advantage of procedures most favorable to the plaintiff.

Many states, including Washington,⁴⁶ have recognized the general problem by providing for change of venue to other courts within the state for the convenience of witnesses or to promote the ends of justice. If a state, such as Washington, recognizes the discretionary power of its trial courts to transfer actions from one part of the state to another, it is difficult to see why it should not recognize a comparable discretionary power in its trial courts to refuse to hear transitory causes of action which may be better tried in some other available state. To the sugges-

⁴⁴ See WASH. RULES, APPEAL 62.

⁴⁵ 330 U.S. 501 (1947).

⁴⁶ RCW 4.12.030(3).

tion of the court in the *Lansverk* case that there is no power to transfer but only to dismiss in the latter instance, one may point to the possibility of using conditional dismissals or stays of proceedings.

In determining whether jurisdiction should be declined, two major interests have been considered by the courts which have adopted the doctrine, the private interests of the litigants and the public interest. Included in the former category are such considerations as the residence of the parties; the financial ability to defend at the selected forum; the cost of transporting willing witnesses, records and other exhibits; the availability of compulsory process for obtaining unwilling witnesses and the possibility that depositions may have to be used instead of oral testimony; the need of viewing premises; the possibilities of consolidating actions at one forum; the feasibility of enforcing a judgment if one is obtained.

Factors of public interest to be considered are the expense to local taxpayers of maintaining judicial machinery for foreign causes of action, the possibility of overcrowding dockets so that local litigants cannot secure expeditious trials, and the loss of time to local citizens in serving as jurors. There is the additional factor that as more and more states join the federal courts in adopting the doctrine of forum non conveniens, those states not adopting it will receive more of the cases which the doctrine is designed to prevent. Also to be considered is the difficulty confronting a court of applying a foreign law and adapting an appropriate remedy. In other words, if the cause of action arose elsewhere between nonresidents, it is not only difficult to obtain the facts, but also to determine and apply the appropriate law.⁴⁷

Another aspect of the public interest relates to the question of who ultimately will bear the cost of an action by a plaintiff in an inconvenient forum. To the extent that defendants are railroads or other corporations engaging in interstate business, any costs imposed upon them will likely be passed on to the public in the form of higher prices. The public will benefit from an economic standpoint if plaintiffs in such instances are referred to the most convenient forum.⁴⁸

With the many factors to be considered in determining whether to decline jurisdiction, uncertainties as to results would be present, as

⁴⁷ This is not meant to suggest that jurisdiction should be declined for the convenience of the individual judge as contrasted with the convenience to the public interest and courts in general. See *Meredith v. Winter Haven*, 320 U.S. 228 (1943).

⁴⁸ This consideration is developed in Note, *New Limitations on Choice of Federal Forum*, 15 U. CHI. L. REV. 332 (1948).

emphasized by the court in the *Lansverk* case. It is to be expected, however, that precedents would develop to remove some uncertainties. To the extent that this would not be true one may question whether some uncertainty is not preferable to a rigid rule requiring courts always to assume jurisdiction if the pertinent statutes are complied with. With the uncertainty would also come the advantage of the courts being able to adapt the exercise of their jurisdiction to the requirements and equities of the particular case rather than a *carte blanche* acceptance of jurisdiction regardless of the inconveniences to the public and the litigants.

It is constantly to be kept in mind that adoption of the doctrine would not mean that the trial courts would automatically reject hearing a suit because it involved a foreign cause of action or foreign parties or both. It would mean only that discretion could be exercised considering the circumstances of the particular case. As has been said by the United States Supreme Court, ". . . experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."⁴⁹ Such discretion would not be unlimited. Before a court could decline jurisdiction it would have to be established that there was another forum in which the defendant was amenable to process.⁵⁰ Further, the defendant would have the burden of proving that jurisdiction should be declined, with all doubts resolved in the plaintiff's favor. But if that burden were sustained and it were established that there was a more convenient and more appropriate forum, the trial court should have the power to act accordingly. As one commentator has stated, ". . . recalling the public trust placed in the bench, it does not seem too dangerous a step to permit a trial judge to turn away a suitor who has tried to tip the scales of justice by selecting a court with a view to harassing his opponent."⁵¹

Is one to conclude from the *Lansverk* opinion that a defendant hereafter will be completely unprotected against a plaintiff who initiates his action in Washington for the purpose, for example, of harassing the defendant into a large settlement? There is, of course, the possi-

⁴⁹ *Gulf Oil Corp. v. Gilbert*, *supra* note 44.

⁵⁰ The trial court's discretion could be further limited by requiring that the defendant be amenable to process in the other state at the time of the initiation of the suit in Washington. In *Hill v. Upper Mississippi Towing Corp.*, 252 Minn. 165, 89 N.W.2d 654 (1958), it was held that the trial court could not apply the doctrine upon the defendant's offer to submit to the more convenient forum, where Minnesota was the only state in which the plaintiff could obtain involuntary service of process at the time of initiation of the action.

⁵¹ Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L. J. 1234 (1947).

bility that the case might be overruled. California⁵² and Minnesota,⁵³ which originally rejected the doctrine, have since adopted it. And more recently, as has been mentioned, Missouri, which had rejected the doctrine for Federal Employers' Liability Act cases, has adopted it for other cases.⁵⁴

It is also possible in view of certain language in the *Lansverk* opinion that practically the same results will be reached in Washington as are reached in those states which apply the doctrine. The court stated, "If we were confronted with a manifest abuse of process, we would not need to rely upon the doctrine of forum non conveniens to deal with the situation, and that also would be true if the relief sought offended against the public policy of this state."⁵⁵

It is not certain what the court meant by this statement. Perhaps if it were clear that there was no reasonable relation of the cause of action or the parties to Washington and that the purpose of the plaintiff was to take unfair advantage of the defendant or unduly impose upon the courts of this state, there would be a manifest abuse of process and dismissal would be proper. Perhaps such an action would be contrary to the public policy of the state and dismissal could be ordered in the trial court's discretion.

Taking the facts of the *Lansverk* case, that the plaintiffs were residents of North Dakota, that the defendants were not subject to suit there and would not voluntarily submit to process there, and that the plaintiffs' son, who represented them, lived in Washington, the Washington court could conclude that there was no manifest abuse of process nor any offending of the public policy of this state in initiating an action here. Likewise, those courts applying the doctrine of forum non conveniens could in similar circumstances conclude that the defendant had not sustained the burden of showing that the considerations decisively favored a dismissal. Perhaps then the results in Washington will in the future accord with the results in those states applying the doctrine, with the difference being that our courts will talk in terms of "manifest abuse of process" and public policy rather than forum non conveniens.

On the other hand, to use the public policy concept in this sense would not accord with its ordinary usage in conflict of laws cases. In

⁵² Price v. Atchison, T. & S. F. Ry., *supra* note 16.

⁵³ Johnson v. Chicago, B. & Q. R.R., *supra* note 16.

⁵⁴ Loftus v. Lee, *supra* note 16.

⁵⁵ Lansverk v. Studebaker-Packard Corp., *supra* note 1, at 751 (1959).

declining to hear a case on public policy grounds, substantive law matters rather than the conveniences of litigants and courts are the typical governing considerations.⁵⁶ Presumably that is what the Washington court had in mind.⁵⁷

Similarly, in speaking of "manifest abuse of process" the court presumably had reference to something other than forum non conveniens. In the court's view it apparently will take a greater showing of some sort by the defendant to establish a manifest abuse of process. Otherwise, the court would have simply adopted the doctrine and would not have spoken in terms of not needing to rely upon it in such situations.

If the case cannot be interpreted to give the trial courts the discretion embodied in the doctrine and if the case is not to be overruled, how then are the benefits of the doctrine to be made available to litigants and the public of the state? The court stated that if the doctrine is to be adopted it must be by rule or statute.⁵⁸

⁵⁶ See GOODRICH, *HANDBOOK OF THE CONFLICT OF LAWS* § 11 (3d ed. 1949); STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS*, 168-171 (2d ed. 1951); LEFLAR, *THE LAW OF CONFLICT OF LAWS* § 48 (1959).

⁵⁷ *Richardson v. Pacific Power & Light Co.*, 11 Wn.2d 288, 118 P.2d 985 (1941), speaks of public policy as relating to substantive law matters.

⁵⁸ The following draft is proposed for consideration. This draft is adapted from Senate Bill No. 1960 which was passed by the 1953 session of the California legislature, but which failed to obtain gubernatorial approval.

1. The superior courts may dismiss an action upon motion of the defendant made at or before the time of answering, when it appears from affidavits or otherwise [that the cause of action did not arise within this state, and that at the time the cause of action arose the plaintiff was not a resident of this state, and] that a court of this state is not a convenient forum for the parties and witnesses and that the dismissal of the action will serve the interests of justice. If the court determines to grant the motion, it shall make an interlocutory order which shall impose such conditions as the court in its discretion deems just and reasonable, but, in any event, such interlocutory order shall require that there be filed in the action a written agreement executed by the moving defendant and such other defendants as the court shall determine, which agreement as to each defendant shall contain:

(a) Such stipulations as may be necessary to provide effectively that the plaintiff may bring and maintain an action upon the cause of action in such jurisdiction or jurisdictions as the court shall determine or, if such action cannot be brought and maintained in any such jurisdiction, that the interlocutory order and any final dismissal shall be vacated and that the time within which the action must be brought to trial shall commence on the date when the interlocutory order or dismissal is so vacated; and

(b) Such stipulations as may be necessary to suspend effectively all statutes of limitations which have not expired at the time the action was commenced for a period sufficient to make effective the provisions of the foregoing subdivision (a) which period shall be not less than 180 days after the dismissal shall become final; and

(c) Such stipulations as may be necessary to assure that the moving defendant, and such other defendants as the court shall determine, will voluntarily make a general appearance in, or be subject to the process of a court in the jurisdiction or jurisdictions determined by the court as provided in subdivision (a).

2. Upon proof that the conditions of the interlocutory order have been performed within the time allowed, the court, upon motion, shall thereupon enter a judgment of dismissal. If the conditions are not performed, the court, upon motion, shall vacate the interlocutory order and enter an order denying the motion or make

It is submitted that action should be taken to fill the vacuum in the law of this state left by the *Lansverk* case. Preferably this should be done by the supreme court under its rule-making powers. To await action by the legislature would mean a considerable lapse of time plus the uncertainty of steering a bill through the legislative channels. Action is needed to prevent plaintiffs, to the detriment of defendants and the public, from seeking relief in the courts of this state when there is a more convenient and appropriate forum elsewhere. As the supreme court of Missouri has recently said in adopting *forum non conveniens*, "We deem it also clear that the nondelegable duty inherently and primarily rests upon the courts to prevent abuse of their process, independently of the legislature."⁵⁹

such other order as is just. An interlocutory order hereunder is an appealable order.

3. The party making the motion shall have the burden of proof [that the cause of action did not arise within this state,] that a court of this state is not a convenient forum for the parties and witnesses and that dismissal will serve the interests of justice.

4. Should it appear to the satisfaction of the superior court at any time that any motions or affidavits presented pursuant to this [rule] [statute] are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of the reasonable expenses which the filing of the motions or affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

5. If the supreme court is satisfied by the record that any appellate proceedings involving an interlocutory order or a final judgment of dismissal under this [rule] [statute] were taken for delay only, the court may award such damages as will effectually tend to prevent the taking of such proceedings for delay only.

The first two sections of the above proposal would provide the superior courts with the power to condition any dismissal according to the circumstances of the particular case, thereby protecting the interests of the plaintiff, defendant, and the public. The bracketed language could be included or excluded depending upon the scope of discretion which is deemed desirable to repose in the superior courts. Section three would place the burden of proof upon the defendant. It could be further detailed as to the degree of proof required, if that were deemed necessary. Sections four (adapted from Washington Rules, Pleading, Practice & Procedure 56(g)) and five (adapted from Washington Rules on Appeal 62) would seem to provide adequate assurance that either the superior courts or the supreme court could act to prevent the delaying tactics by defendants foreseen by the court in the *Lansverk* case.

⁵⁹ *Loftus v. Lee*, *supra* note 16.