

Civil Procedure-Forum Non Conveniens-Closing the Gap Between the Procedural Rights of Residents and Nonresidents in New York State

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Recommended Citation

Charles P. Schropp, *Civil Procedure-Forum Non Conveniens-Closing the Gap Between the Procedural Rights of Residents and Nonresidents in New York State*, 58 Cornell L. Rev. 782 (1973)

Available at: <http://scholarship.law.cornell.edu/clr/vol58/iss4/5>

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RECENT DEVELOPMENTS

Civil Procedure—FORUM NON CONVENIENS—CLOSING THE GAP BETWEEN THE PROCEDURAL RIGHTS OF RESIDENTS AND NONRESIDENTS IN NEW YORK STATE

New York Civil Practice Law and Rules,
Rule 327 (McKinney Supp. 1972)

Silver v. Great American Insurance Co., 29 N.Y.2d 356,
278 N.E.2d 619, 328 N.Y.S.2d 398 (1972)

Forum non conveniens is an equitable doctrine embracing the discretionary power of a court to decline to exercise its jurisdiction when it believes the action before it should more appropriately be tried in another forum.¹ Application of the doctrine presupposes another forum in which the action could be brought, and is grounded on both the public interest in restricting litigation to cases bearing some relation to the forum, and private interests, such as litigating where witnesses are easily and inexpensively available.²

Acceptance of forum non conveniens by American courts was retarded by the contention that the doctrine violated the privileges and immunities clause of the United States Constitution.³ Although this argument was eventually rejected by the Supreme Court,⁴ the legacy

¹ *Leet v. Union Pac. R.R.*, 25 Cal. 2d 605, 609, 155 P.2d 42, 44 (1944); see *Hayes v. Chicago, R.I. & Pac. R.R.*, 79 F. Supp. 821, 824 (D. Minn. 1948); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1008 (1960) [hereinafter cited as *State-Court Jurisdiction*]. The origins of the doctrine are obscure, although the term forum non conveniens first appeared in Scottish cases in the late nineteenth century. Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386-87 (1947).

² See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-09 (1947); accord, *Cullinan v. New York Cent. R.R.*, 83 F. Supp. 870, 871 (S.D.N.Y. 1948); *Varkonyi v. Varig*, 22 N.Y.2d 333, 337, 239 N.E.2d 542, 544, 292 N.Y.S.2d 670, 673 (1968).

³ The courts maintained that the privileges and immunities clause guaranteed the citizens of any state access to the courts of any other state. Thus, any use of forum non conveniens which would deprive nonresidents of the right to sue when residents would have the right was thought to violate this constitutional provision. Barrett, *supra* note 1, at 389-90; *State-Court Jurisdiction* 1009-10. Apparently this view developed from the early case of *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (E.D. Pa. 1823), in which the court stated that the "right . . . to institute and maintain actions of any kind in the courts of the state" was one of the "fundamental" indices of state citizenship embraced by the privileges and immunities clause. *Id.* at 552 (dictum). Subsequent Supreme Court decisions approved this dictum. See, e.g., *Miles v. Illinois Cent. R.R.*, 315 U.S. 698, 704 (1942).

⁴ See *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929).

of prior uncertainty persists. Dismissal on the ground of *forum non conveniens* is now a clearly permissible and useful procedure; yet, the doctrine is not recognized in a number of states.⁵

I

THE FORMER NEW YORK RULE

Many of the states that have accepted the doctrine have not fully utilized its potential. *Forum non conveniens* rules are generally judge-made,⁶ and the courts in many jurisdictions have developed exceptions with regard to types of actions and classes of parties to which the

In *Douglas* the Supreme Court upheld the constitutionality of a New York statute limiting the right of nonresidents to bring actions against foreign corporations in New York, although granting unqualified access to residents for this purpose. *See* notes 19-20 and accompanying text *infra*. The Court concluded that "resident" and "citizen" were not equivalent terms, and that the distinction between residents and nonresidents was based on rational considerations in the context of the case, provided that nonresident New York citizens were placed on an equal footing with nonresident citizens of other states. 279 U.S. at 386-87.

Subsequently, in *Mayfield*, the Court broadened the holding and rationale of *Douglas*, stating that

if a State chooses to "[prefer] residents in access to often overcrowded Courts" and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. . . . Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here.

340 U.S. at 4.

The reasoning of these cases has frequently been criticized on the ground that citizenship and residence are usually coextensive, particularly in view of the fourteenth amendment (U.S. Const. amend. XIV, § 1), which provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *See, e.g., Barrett, supra* note 1, at 391 & n.50; *State-Court Jurisdiction* 1010 n.656.

In 1947, the Supreme Court affirmatively approved the use of *forum non conveniens* in the federal courts. *See Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁵ *See Barrett, supra* note 1, at 393. Some states have considered and affirmatively rejected the doctrine. *See, e.g., Lansverk v. Studebaker-Packard Corp.*, 54 Wash. 2d 124, 338 P.2d 747 (1959).

⁶ *See, e.g., Running v. Southwest Freight Lines, Inc.*, 227 Ark. 839, 303 S.W.2d 578 (1957); *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 184 N.E. 152 (1933); *Jackson & Sons v. (American) Lumbermens Mut. Cas. Co.*, 86 N.H. 341, 168 A. 895 (1933); *Gore v. United States Steel Corp.*, 15 N.J. 301, 104 A.2d 670 (1954); *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972); *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 139 N.E. 223 (1923); *Barnett v. Baltimore & O.R.R.*, 119 Ohio App. 329, 200 N.E.2d 473 (1963).

One important exception is Wisconsin, where the *forum non conveniens* rule is statutory in nature. *See Wis. STAT. ANN. § 262.19* (Supp. 1972); *cf. UNIFORM INTERSTATE & INTERNATIONAL PROCEDURE ACT § 1.05*.

doctrine will not be applied.⁷ Foremost among these exceptions are limitations attached when a party is a resident of the forum state.⁸ An example of such a judicially-created constriction was the New York rule announced in *de la Bouillierie v. de Vienne*:⁹

Our courts are bound to try an action for a foreign tort when either the plaintiff or the defendant is a resident of this State. It is only when an action is brought by one nonresident against another for a tort committed outside the State that our courts may refuse to take cognizance of the controversy.¹⁰

Although *de la Bouillierie* dealt only with foreign tort actions, its principle was soon extended to contract and property litigation,¹¹ where it had the anomalous effect of enlarging, rather than constricting, the availability of forum non conveniens.¹² Thus, *de la Bouillierie* came to stand for the general principle that New York residents possessed an unqualified right to sue and an obligation to be sued in New York courts.¹³ The use of forum non conveniens was thereby limited to

⁷ For example, prior to 1952 New York held that forum non conveniens relief was not available in any case based on contract. See note 11 *infra*. Arkansas has held the doctrine inapplicable between counties of the state. See *Hicks v. Wolfe*, 228 Ark. 406, 307 S.W.2d 784 (1957).

⁸ See, e.g., *Atlantic Coast Line R.R. v. Wiggins*, 77 Ga. App. 756, 49 S.E.2d 909 (1948); *Davis v. Minneapolis, St. P. & S. Ste. M. Ry.*, 134 Minn. 455, 159 N.W. 1084 (1916); *Herrmann v. Franklin Ice Cream Co.*, 114 Neb. 468, 208 N.W. 141 (1926).

⁹ 300 N.Y. 60, 89 N.E.2d 15, rehearing denied, 300 N.Y. 644, 90 N.E.2d 496 (1949).

¹⁰ 300 N.Y. at 62, 89 N.E.2d at 15-16.

¹¹ So many of the cases applying the *forum non conveniens* doctrine are in tort, that it was thought, or held, at one time that only tort cases felt the doctrine's impact. . . . However, it is now clear that the courts have power, in contract and other kinds of property litigation between nonresidents, to decline, as well as to accept, jurisdiction.

Bata v. Bata, 304 N.Y. 51, 56, 105 N.E.2d 623, 625-26 (1952) (citations omitted).

¹² Prior to *Bata v. Bata*, 304 N.Y. 51, 105 N.E.2d 623 (1952), the New York rule was that jurisdiction could not be declined in *any* case involving contract or property litigation, regardless of the residence or nonresidence of the parties. In *Wertheim v. Clergue*, 53 App. Div. 122, 65 N.Y.S. 750 (1st Dep't 1900), the court stated that it knew

of no reason founded in public policy, and certainly nothing resting in precedent, which will close the courts of this State to non-resident suitors who invoke their aid against other non-residents sojourning within our borders for the enforcement of causes of action arising out of commercial transactions and affecting property or property rights. . . . [W]e certainly do not intend to establish a precedent which would shut our courts to great numbers of foreign merchants, non-residents of the State, who may find their non-resident debtors, fraudulent or honest, temporarily within our jurisdiction

Id. at 125-26, 65 N.Y.S. at 753; accord, *McMahon v. National City Bank*, 142 Misc. 268, 254 N.Y.S. 279 (N.Y. City Ct. 1931).

¹³ See, e.g., *Burk v. Sackville-Packard Corp.*, 29 App. Div. 2d 515, 285 N.Y.S.2d 214

actions between nonresidents. This limitation remained in force for twenty-two years, and has only recently been modified by the decision of the Court of Appeals in *Silver v. Great American Insurance Co.*¹⁴

In deciding *de la Bouillierie*, the Court of Appeals apparently believed that restriction of the use of forum non conveniens was compelled by prior decisions.¹⁵ In support of its holding, the court cited *Crashley v. Press Publishing Co.*,¹⁶ in which it had upheld the right of a nonresident plaintiff to maintain a tort action against a domestic corporation, noting that

[a]s a personal action, sounding in tort, [the cause of action] was transitory in its nature; following the person of the defendant. Our courts were open to the plaintiff for the redress of any personal injury, suffered by reason of the defendants' acts.¹⁷

Conversely, another case cited in *de la Bouillierie*, *Gregonis v. Philadelphia & Reading Coal & Iron Co.*,¹⁸ had permitted a New York resident to maintain an action against a foreign corporation on a tort committed outside the state. *Gregonis*, however, turned on a New York statute giving a resident the right to sue a foreign corporation on any cause of action.¹⁹ The Court of Appeals construed this statute as a

(1st Dep't 1967) (per curiam); *Export Ins. Co. v. Mitsui S.S. Co.*, 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966) (per curiam); *Franco v. Standard Marine Ins. Co.*, 11 App. Div. 2d 643, 201 N.Y.S.2d 230, *reargument and appeal denied*, 11 App. Div. 2d 682, 204 N.Y.S.2d 81 (1st Dep't 1960).

¹⁴ 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

The Court of Appeals preferred to describe its decision in *Silver* as "relaxing" the *de la Bouillierie* rule. *Id.* at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404. This language is consistent with, and adds force to, the court's caveat that a reviewing court must still consider the New York residence of a party as an important factor militating against the application of forum non conveniens. See notes 78-84 and accompanying text *infra*.

¹⁵ The exposition of the rule was extremely brief. At least in the opinion of the Court of Appeals, the major issue raised in *de la Bouillierie*, and the only one given even cursory consideration, was whether residence acquired after the cause of action arose but before the institution of suit was sufficient to defeat forum non conveniens dismissal. The Court of Appeals answered in the affirmative. Although the issue of "after-acquired" residence in time became one of the abuses which eventually prompted the re-examination of the entire resident-nonresident distinction (see note 48 and accompanying text *infra*), it necessarily rested on the underlying premise so casually announced by the *de la Bouillierie* court.

¹⁶ 179 N.Y. 27, 71 N.E. 258 (1904).

¹⁷ *Id.* at 32, 71 N.E. at 259.

¹⁸ 235 N.Y. 152, 139 N.E. 223 (1923).

¹⁹ This statute, with minor changes, is now codified as N.Y. BUS. CORP. LAW § 1314(a) (McKinney 1963): "An action or special proceeding against a foreign corporation may be maintained by a resident of this state or by a domestic corporation of any type or kind for any cause of action."

legislative demarcation of an area of subject matter over which jurisdiction must be exercised,²⁰ provided that proper jurisdiction over the defendant was also present.²¹

These precedents did not warrant the sweeping result reached in *de la Bouillierie*. *Crashley*, for example, could have been distinguished—primarily because it was decided in 1904, when forum non conveniens was a new and relatively unaccepted doctrine.²² Its precedential value is further reduced because the alternative forum in *Crashley* was Brazil. The court may have been influenced in its decision by serious doubts as to the plaintiff's ability to obtain redress if the action were dismissed.²³

Although *Crashley* may furnish some support for the proposition that forum non conveniens relief is not available to a resident defendant, *Gregonis* does not present a like obstacle in all cases involving resident plaintiffs. *Gregonis* dealt only with a specific statutory exception—the case of a resident plaintiff suing a foreign corporation.²⁴

Despite the *de la Bouillierie* court's implicit assertion that its rule was merely a creature of precedent,²⁵ the breadth of its decision cannot be so easily explained. Rather, *de la Bouillierie* must be viewed as as a concrete expression of the New York courts' long-standing interest

²⁰ The Court of Appeals traced the history of the statute granting residents unqualified access to prosecute suits against foreign corporations. The court concluded that the intent of the statute was mandatory rather than permissive. Finding no case law to the contrary, it asserted that

[d]iscretion implies a power to make a choice. We do not think that as to a resident of this state the court has any such discretion. The statutes from a very early date have controlled or regulated somewhat the right of a resident to bring an action against a non-resident corporation.

²³⁵ N.Y. at 156, 139 N.E. at 224.

²¹ See *Simonson v. International Bank*, 14 N.Y.2d 281, 285, 200 N.E.2d 427, 428-29, 251 N.Y.S.2d 433, 436 (1964).

²² See notes 3-4 and accompanying text *supra*.

²³ This inference is reinforced by the court's statement that the cause of action was "transitory in its nature; following the person of the defendant." 179 N.Y. at 32, 71 N.E. at 259. Such language is normally associated with the transient rule of jurisdiction. See note 102 and accompanying text *infra*. Although not strictly applicable in *Crashley* because the defendant was a domestic corporation, the transient rule was developed as a means of preventing defendants from avoiding their just obligations. See *State-Court Jurisdiction* 1009. A later case which held that forum non conveniens could not be raised by a resident defendant, *Vigil v. Cayuga Constr. Corp.*, 185 Misc. 675, 54 N.Y.S.2d 94 (N.Y. City Ct.), *aff'd mem.*, 269 App. Div. 934, 58 N.Y.S.2d 343 (1st Dep't 1945), apparently proceeded on the similar theory that a plaintiff should be certain of at least one forum in which he could bring suit. See *State-Court Jurisdiction* 1011 n.668.

²⁴ See notes 19-20 and accompanying text *supra*.

²⁵ See note 15 and accompanying text *supra*. But see notes 22-24 and accompanying text *supra*.

in providing special consideration for state residents,²⁶ a policy articulated as early as 1923 when the *Gregonis* court noted in dictum that

[t]he courts of this state [are] primarily for the residents of this state. There must be some forceful and controlling reason entering into the very nature and essence of the action which would close their doors to its own citizens.²⁷

Although the *de la Bouillierie* rule has subsequently been modified,²⁸ significant vestiges of this favoritism remain.²⁹

II

DIFFICULTIES WITH THE FORMER RULE

A policy of strict refusal to allow forum non conveniens relief in suits involving residents increasingly became recognized as an unacceptable method of protecting resident interests. When the rule was applied to resident defendants, the paradox became obvious: the resident himself was seeking dismissal.³⁰ However, even with regard to resident plaintiffs, the rule was justifiable only if it could reasonably be assumed that inability to obtain jurisdiction would effectively insulate the forum from those claims having an insufficient nexus with the state to justify their resolution there.

Such an assumption was questionable at the time *de la Bouillierie* was decided;³¹ its tenability was further eroded by subsequent jurisdic-

²⁶ See note 27 and accompanying text *infra*.

New York courts have justified the special consideration afforded to residents of the state by characterizing the convenience of the courts as the basis of forum non conveniens. See, e.g., *Vaage v. Lewis*, 29 App. Div. 2d 315, 318, 288 N.Y.S.2d 521, 524-25 (2d Dep't 1968); cf. *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361, 278 N.E.2d 619, 621, 328 N.Y.S.2d 398, 402 (1972); *Varkonyi v. Varig*, 22 N.Y.2d 333, 338, 239 N.E.2d 542, 543, 292 N.Y.S.2d 670, 673 (1968). But see note 68 and accompanying text *infra*. Courts which emphasize this rationale have been particularly prone to adopt forum non conveniens rules discriminating in favor of residents, apparently on the theory that since residents support the state's court system through their taxes they should be permitted to make greater impositions on the convenience of the court. *State-Court Jurisdiction* 1011 & n.668.

²⁷ *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 159, 139 N.E. 223, 225 (1923). This attitude of special solicitude toward residents has not been confined to the area of forum non conveniens; it has strongly influenced other procedural developments as well. See note 45 *infra*.

²⁸ See notes 62-65 and accompanying text *infra*.

²⁹ See text accompanying note 79 *infra*.

³⁰ This was the factual setting in *Silver*. See notes 55-57 and accompanying text *infra*.

³¹ Although the more sophisticated devices for subjecting defendants to jurisdiction in a variety of forums had not yet developed (see notes 32-45 and accompanying text *infra*), one significant exception, the transient rule of jurisdiction (see text accompanying

tional developments. Several specific jurisdictional innovations were cited by the Court of Appeals as justification for the re-examination of the *de la Bouillierie* rule which it undertook in *Silver*.³² Among these innovations were the increased ease of securing personal jurisdiction over a defendant pursuant to the Supreme Court decision in *International Shoe Co. v. Washington*,³³ and the subsequent enactment of the New York long-arm statute.³⁴ Although the New York statute requires that, as a minimum, the injury occur within New York, the relaxation of due process requirements for personal jurisdiction served to create a potential gap between situations in which jurisdiction could be obtained consonant with due process, and situations in which it should be exercised with reference to the considerations underlying *forum non conveniens*.³⁵

note 102 *infra*) was already firmly established. See *State-Court Jurisdiction* 1009. Perhaps one reason the transient rule did not generate such great concern was that it was available against only individual, not corporate, defendants. I A. EHRENZWEIG, *CONFLICT OF LAWS* 110 (1959).

³² It has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary. . . . The fact that litigants may more easily gain access to our courts—with the consequent increase in litigation—stemming from enactment of the long-arm statute . . . changing choice of law rules . . . and decisions such as *Seider v. Roth* . . . requires a greater degree of forbearance in accepting suits which have but minimal contact with New York. 29 N.Y.2d at 361-62, 278 N.E.2d at 622, 328 N.Y.S.2d at 403 (citations omitted).

³³ 326 U.S. 310 (1945). *International Shoe* held that the due process clause requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

³⁴ N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1972):

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

³⁵ The statute permits the acquisition of personal jurisdiction over a defendant committing a tortious act outside the state in certain circumstances. *Id.* § 302(a)(3). This provision generates the most potential tension between the policy underlying *forum non conveniens* and that underlying long-arm jurisdiction. In these cases, the private

The controversial decision of the Court of Appeals in *Seider v. Roth*³⁶ served to undermine further the assumption upon which the *de la Bouillerie* rule rested. The court in *Seider* held that the contingent liability of an insurer constituted a debt which might be attached as the basis for quasi-in-rem jurisdiction in New York.³⁷ Since the sole prerequisite to attachment was that the insurer do business in New York, the claim underlying the attachment need have no connection whatsoever with the state.³⁸

Furthermore, increasing reluctance by New York courts to apply traditional choice of law rules in transitory tort actions threatened to deprive defendants of substantive advantages as well as to burden them with defending in an inconvenient forum. For example, in *Kilberg v. Northeast Airlines, Inc.*,³⁹ the New York Court of Appeals held that New York courts were not bound by a statutory limitation on damages recoverable in a wrongful death action imposed by the jurisdiction in which the injury occurred. Similarly, in *Babcock v. Jackson*,⁴⁰ the Court of Appeals refused to apply the guest statute of the place of injury which would have barred any recovery.

Kilberg and *Babcock* themselves did little violence to the values underlying enlightened forum non conveniens policy. Forum non conveniens dismissal would have been inappropriate in *Kilberg*, since events central to the claim occurred in New York.⁴¹ And in *Babcock*, both the plaintiff and the defendant were New York domiciliaries, a

interests underlying the doctrine, such as accessibility of witnesses (*see* note 2 and accompanying text *supra*), may often be best served by trial in the forum in which the alleged tort was committed. *Cf.* *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

This potential for tension has not gone unnoticed by the courts. For example, in *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F.2d 184 (2d Cir.), *cert. denied*, 338 U.S. 867 (1949), the circuit court noted that "due process may be compatible with situations of greater inconvenience . . . than those inconveniences which would support the plea [of forum non conveniens]." 175 F.2d at 186.

³⁶ 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

³⁷ *See* N.Y. JUDICIAL CONFERENCE, SIXTEENTH ANNUAL REPORT A 31-32 (1971) [hereinafter cited as 1971 REPORT].

³⁸ The *Seider* decision has provoked substantial criticism among legal writers. *See, e.g.,* Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 COLUM. L. REV. 660 (1971). Even prior to *Silver*, however, the practical significance of *Seider* was somewhat mitigated by the practice of removing such cases to the federal courts and then transferring them to a more appropriate forum under the federal venue statute, 28 U.S.C. § 1404(a) (1970). This procedure was possible, of course, only when the \$10,000 jurisdictional amount required in diversity cases could be met, and left New York in the rather embarrassing position of retaining the trifling cases but remitting the substantial claims to their proper forum.

³⁹ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

⁴⁰ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁴¹ *See* Carpenter, *New York's Expanding Empire in Tort Jurisdiction: Quo Vadis?*, 22 HASTINGS L.J. 1173, 1174 (1971); *cf. id.* at 1177.

situation in which the state would appear to have paramount interest in deciding the claim.⁴² The danger is that similar rules will be applied to the detriment of defendants whose suits should properly be adjudicated in another forum.⁴³ Indeed, this danger was realized in two New York lower court decisions in which the *Kilberg* rule was invoked against a Missouri defendant in a suit involving a Missouri auto accident⁴⁴ and against a Virginia corporation in an action arising from a worker's death in Virginia.⁴⁵

The practice of assigning claims to New York residents to insulate the action from forum non conveniens dismissal also served to enervate the *de la Bouillierie* rationale. Such assignments have been explicitly approved by the courts,⁴⁶ even when made for the sole purpose of precluding the court from applying the doctrine.⁴⁷ New York courts have also adopted a broad definition of "resident" in potential forum non

⁴² In *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), Chief Judge Fuld, concurring, laid down the general rule that

[w]hen the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

Id. at 585, 249 N.E.2d at 404, 301 N.Y.S.2d at 532; *accord*, *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

⁴³ See *Carpenter*, *supra* note 41, at 1194-200.

⁴⁴ *Tjepkema v. Kenney*, 31 App. Div. 2d 908, 298 N.Y.S.2d 175 (1st Dep't 1969) (*per curiam*).

⁴⁵ *MacKendrick v. Newport News Shipbldg. & Dry Dock Co.*, 59 Misc. 2d 994, 302 N.Y.S.2d 124 (Sup. Ct. 1969). The rationale of the *MacKendrick* court, and the danger to legitimate nonresident interests posed by New York's changing choice of law rules, is manifested in the court's statement that "[c]learly, the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of recovery in another jurisdiction." *Id.* at 1011, 302 N.Y.S.2d at 140.

One recent case, *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), appears to represent at least a partial retreat from New York's headlong rush to extend the scope of its own law whenever possible. In *Neumeier*, the Court of Appeals refused to ignore an Ontario guest statute in an action arising out of an automobile accident occurring in Ontario brought by the administratrix of an Ontario domiciliary against the administratrix of a New York resident. The rationale of the decision was that the Ontario legislation should apply, at the very least, to an Ontario domiciliary traveling within its borders, and that no substantive policy of New York would be advanced by ignoring it. However, the court's statement that "New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state" (*id.* at 125, 286 N.E.2d at 456, 335 N.Y.S.2d at 68) makes it doubtful that similar restraint would be exercised if the situation were reversed, and a New York domiciliary were suing an Ontario resident over an accident occurring in Ontario.

⁴⁶ See, e.g., *Wagner v. Braunsberg*, 5 App. Div. 2d 564, 173 N.Y.S.2d 525, *reargument and appeal denied*, 6 App. Div. 2d 790, 175 N.Y.S.2d 568 (1st Dep't 1958); *In re Banque de France v. Supreme Court*, 287 N.Y. 483, 41 N.E.2d 65, *cert. denied*, 316 U.S. 646 (1942).

⁴⁷ See *McCauley v. Georgia R.R. Bank*, 239 N.Y. 514, 147 N.E. 175 (1924); *accord*, *Segal Lock & Hardware Co. v. Markey*, 124 N.Y.S.2d 181 (Sup. Ct. 1953).

conveniens situations; residence acquired after the cause of action arose but before the institution of suit has been held sufficient to preclude dismissal.⁴⁸

An unwise forum non conveniens policy has drawbacks in addition to those generated by its interaction with other procedural policies of the forum. A litigant who is "locked-in" to an inappropriate forum by such a policy has no recourse except to appeal in the hope that the rule will be changed. Since the doctrine is not jurisdictional, an adverse decision is entitled to full faith and credit and may not be collaterally attacked.⁴⁹ Moreover, continued adherence to an anachronistic and parochial policy, particularly by an influential state such as New York, can have a detrimental effect on interstate relations, since other states may be prompted to develop similar rules from defensive or retaliatory motives.⁵⁰

III

RECENT CHANGES—*Silver* AND RULE 327

The increasing inequity resulting from application of the *de la Bouillerie* rule did not escape judicial attention. As early as 1967, the Court of Appeals suggested that the rule be re-examined.⁵¹ Shortly

⁴⁸ *De la Bouillerie v. de Vienne*, 300 N.Y. 60, 89 N.E.2d 15, rehearing denied, 300 N.Y. 644, 90 N.E.2d 496 (1949). See also N.Y. JUDICIAL CONFERENCE, FIFTEENTH ANNUAL REPORT A 114 (1970) [hereinafter cited as 1970 REPORT].

A leading case emphasized this factor as a reason for applying New York law in a choice of law situation. See *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

⁴⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84(g) (1971). Section 84(g) provides, in pertinent part:

If a state chooses to exercise such judicial jurisdiction as it possesses despite the fact that it is an inappropriate forum, its action in this regard is valid and will be recognized in other states. As between States of the United States, this result is required by full faith and credit.

⁵⁰ Such a possibility was noted in *Export Ins. Co. v. Mitsui S.S. Co.*, 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966), where the court argued that

[i]f our courts are to insist on jurisdiction where the dictates of fairness and convenience indicate otherwise, we can surely expect foreign courts to do the same, with the consequence that residents of this State will be forced to sue or defend actions in foreign courts, which actions should appropriately be tried here.

Id. at 438, 274 N.Y.S.2d at 980-81.

⁵¹ See *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). In *Simpson*, Chief Judge Fuld, writing for the majority in a reaffirmation of the *Seider* doctrine, opined that

[u]nder the circumstances, it would be both useful and desirable . . . to conduct studies in depth and make recommendations with respect to the impact of in rem jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, considera-

thereafter, the New York Judicial Conference proposed a bill providing, in part, that "[t]he domicile or residence in this state of any party to [an] action shall not preclude the court from staying or dismissing the action."⁵² Although measures embodying this recommendation were introduced at the 1969, 1970, and 1971 legislative sessions,⁵³ they failed to gain sufficient support on each occasion.

These failures were followed by a short period of strict judicial construction of *de la Bouillierie*.⁵⁴ Nevertheless, it was still against a background of substantial injustice that Maurice Silver, a neurosurgeon residing and practicing in Hawaii, filed suit in the New York Supreme Court against Great American Insurance Company, a New York corporation licensed to do business in all fifty states.⁵⁵ His complaint alleged that Great American had defamed him and had participated in a conspiracy to injure him professionally. Silver demanded injunctive relief in addition to compensatory and punitive damages totaling four million dollars.⁵⁶

Great American moved to dismiss the complaint on the ground of forum non conveniens, stating that the claim arose out of incidents occurring in Hawaii, and in no way related to events occurring in New York.⁵⁷ The company further stipulated that it would consent to service in Hawaii and would waive any statute of limitations defense that might have accrued during the delay caused by the institution of the suit in New York.⁵⁸ On the strength of *de la Bouillierie*, the supreme court denied the motion.⁵⁹ On appeal, the appellate division unanimously but reluctantly affirmed;⁶⁰ however, it then certified the issue

tion will undoubtedly be given to the relationship *inter se*, of in rem jurisdiction, in personam jurisdiction and *forum non conveniens*.

Id. at 312, 234 N.E.2d at 672, 287 N.Y.S.2d at 638.

⁵² See 1970 REPORT A 113. The same bill was sponsored by the Conference the following year. See 1971 REPORT A 31.

⁵³ (1969) Sen. Int. No. 3168 (Mr. Hughes), (1969) Assy. Int. No. 4426 (Mr. Lerner); (1970) Sen. Int. No. 3168 (Mr. Hughes), (1970) Assy. Int. No. 2239 (Mr. DiCarlo); (1971) Sen. Int. No. 1642 (Mr. Hughes), (1971) Assy. Int. No. 3624 (Mr. DiCarlo).

⁵⁴ For example, in *Pharo v. Piedmont Aviation, Inc.*, 29 N.Y.2d 710, 275 N.E.2d 333, 325 N.Y.S.2d 750 (1970), the Court of Appeals held that the presence of a domestic corporation among multiple defendants did not preclude forum non conveniens dismissal as to foreign corporations and other nonresident defendants.

⁵⁵ See *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

⁵⁶ See *id.* at 359, 278 N.E.2d at 620, 328 N.Y.S.2d at 400-01.

⁵⁷ *Id.*, 278 N.E.2d at 621, 328 N.Y.S.2d at 401.

⁵⁸ *Id.* at 359-60, 278 N.E.2d at 621, 328 N.Y.S.2d at 401.

⁵⁹ See *id.* at 360, 278 N.E.2d at 621, 328 N.Y.S.2d at 401.

⁶⁰ 35 App. Div. 2d 317, 316 N.Y.S.2d 186 (1st Dep't 1970). The appellate division

to the Court of Appeals, suggesting that since the *de la Bouillierie* rule had been judge-created, it was susceptible to judicial reconsideration.⁶¹

Thus prodded, the Court of Appeals unanimously concluded that "reason and substantial justice" required that the former rule be relaxed,⁶² stating that

[t]he great advantage of the [forum non conveniens] doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation.⁶³

Although the *Silver* decision left no doubt that the former rule was no longer controlling, the contours of its replacement were left imprecise. Henceforth, the court announced, the availability of forum non conveniens in a particular case would "turu on considerations of

noted that, were it not for the dictates of stare decisis, it would have granted the motion to dismiss. *Id.* at 317-18, 316 N.Y.S.2d at 187.

⁶¹ *Id.* at 318, 316 N.Y.S.2d at 187.

The judicial reversal of a previously well-settled rule of law requested by the appellate division has substantial precedent in New York practice. *See, e.g.,* *Greenberg v. Lorenz*, 9 N.Y.2d 194, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (abolished concept of privity of contract as limitation on warranty); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951) (granted infants right to sue in tort for injuries incurred prior to birth).

This willingness to legislate judicially is particularly strong when the Court of Appeals has exhausted its patience awaiting legislative action. For example, the court had long refused to abolish intrafamily immunity for unintentional torts, arguing that "[b]ecause of the changes envisioned by a repudiation of the rule, and because of the unprecedented disposition requested, it [was] suggested that the Legislature take the initiative in the area." *Gelbman v. Gelbman*, 23 N.Y.2d 434, 437, 255 N.E.2d 192, 193, 297 N.Y.S.2d 529, 530 (1969). However, legislative inaction prodded judicial action, and in *Gelbman* the court abolished the immunity, stating that

[s]even years have passed since [the request for legislative action]. During that period, there has been a judicial erosion of the intrafamily immunity doctrine for nonwillful torts by courts of sister States. During that same interval, legislative intervention has not been forthcoming. While I agreed with the majority in *Badigian* [*Badigian v. Badigian*, 9 N.Y.2d 472, 215 N.Y.S.2d 35 (1961)] that the doctrine should be abrogated by the Legislature, I no longer adhere to that view. As the courts of other States have indicated in abandoning it, the doctrine of intrafamily immunity for nonwillful torts *was a court-created rule and, as such, the courts can revoke it.* The inactivity of the Legislature since the time of our decision in *Badigian* illustrates the fact that the rule will be changed, if at all, by a decision of this court.

Id. (emphasis added).

Of course, the question remains as to whether the New York forum non conveniens doctrine is entirely court-created, and is thus subject to similar judicial alteration. *See* notes 70-72 and accompanying text *infra*.

⁶² 29 N.Y.2d at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404.

⁶³ *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402-03.

justice, fairness and convenience";⁶⁴ this determination would, in turn, generally be "committed to the discretion of the courts below, to be exercised by reviewing and evaluating all the pertinent competing considerations."⁶⁵

Soon after the *Silver* decision, the New York Judicial Conference moved to formalize its holding as a rule of court. The new rule, Rule 327,⁶⁶ embodied the exact language which the Conference had previously presented to the legislature. It provided:

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

In addition to reaffirming such well-established doctrines as the court's power to attach conditions to its dismissal,⁶⁷ Rule 327 added one significant reservation to the holding in *Silver*: it explicitly denied courts the power to raise the plea of *forum non conveniens* on their own motion. This limitation is sound, for it recognizes the practical dependence of the court on the parties to supply the evidence necessary to evaluate the appropriateness of the doctrine in a particular case. This was not the rationale advanced in support of this limitation, however; an earlier Judicial Conference report indicated that it was included because "the convenience of the court alone should not be sufficient to

⁶⁴ *Id.*, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

Parenthetically, it should be noted that since the *Silver* appeal was on a certified question, the Court of Appeals did not reach the merits of the case. *Id.* at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404. However, on remand, by unanimous vote the appellate division predictably granted the motion to dismiss on the ground of *forum non conveniens*. 38 App. Div. 2d 932, 330 N.Y.S.2d 156 (1st Dep't 1972).

⁶⁵ 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402, quoting *Varkonyi v. Varig*, 22 N.Y.2d 333, 337, 239 N.E.2d 542, 544, 292 N.Y.S.2d 670, 673 (1968). In *Varkonyi*, the court stated:

Among the pertinent factors to be considered and weighed, in applying the doctrine of *forum non conveniens*, are, on the one hand, the burden on the New York courts and the extent of any hardship to the defendant that prosecution of the suit would entail and, on the other, such matters as the unavailability elsewhere of a forum in which the plaintiff may obtain effective redress and the extent to which the plaintiff's interests may otherwise be properly served by pursuing his claim in this State.

Id. at 338, 239 N.E.2d at 544, 292 N.Y.S.2d at 673.

⁶⁶ N.Y.R. CIV. PRAC. 327. Rule 327 went into effect on September 1, 1972.

⁶⁷ See *Aetna Ins. Co. v. Creole Petroleum Corp.*, 27 App. Div. 2d 518, 275 N.Y.S.2d 274 (1st Dep't 1966); cf. *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 359-60, 278 N.E.2d 619, 621, 328 N.Y.S.2d 398, 401 (1972).

bring this equitable doctrine into operation where all parties prefer to carry on the litigation in this state."⁶⁸ This statement ignores the fact that a plaintiff's choice of forum is often motivated by inability to obtain jurisdiction over the defendant elsewhere and not by personal preference. The real reason that forum non conveniens is unavailable in such a situation is that the sanctions which may currently be employed—stay or dismissal of the action—are completely ineffective against a defendant who prefers to be sued in the inconvenient forum and therefore makes no motion for forum non conveniens treatment. Forum non conveniens relief for such plaintiffs must await the development of an interstate system of venue transfer operating independently of the transferee forum's jurisdiction over the defendant.⁶⁹

IV

SHORTCOMINGS OF REFORM

One serious shortcoming of the court's opinion in *Silver* was its failure to deal adequately with the dual decisional and statutory underpinnings of the former forum non conveniens rule. Despite Chief Judge Fuld's casual assertion that this rule was entirely court-created,⁷⁰ a substantial segment of it—that portion dealing with a resident plaintiff suing a foreign corporation—was the product of a statute still in force and the interpretation of that statute.⁷¹ Since controlling canons of construction declare that this interpretation has become "as much a part of the enactment as if incorporated into the language of the act itself,"⁷² that portion of the rule was less amenable to judicial reappraisal.

⁶⁸ 1970 REPORT A 114.

⁶⁹ Cf. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 312-14 (1956).

⁷⁰ 29 N.Y.2d at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404.

⁷¹ See text accompanying note 24 *supra*.

⁷² N.Y. STATUTES § 72(a) (McKinney 1971). The statute provides that [g]enerally, a judicial interpretation of a statute, having once been made is binding on subsequent courts in accordance with the rule of stare decisis and the doctrine of precedents, so that the interpretation becomes as much a part of the enactment as if incorporated into the language of the act itself.

Id.; accord, *People v. Ferguson*, 55 Misc. 2d 823, 831-32, 286 N.Y.S.2d 924, 934 (Sup. Ct. 1968); *Federal Land Bank v. Pickard*, 169 Misc. 753, 9 N.Y.S.2d 696 (Sup. Ct. 1938).

The binding effect of the *Gregonis* precedent is unaffected by the fact that the statutory provision it construed was subsequently twice repealed and simultaneously reenacted into different portions of the Consolidated Laws. The provision currently may be found in N.Y. BUS. CORP. LAW § 1314(a) (McKinney 1963). Another statute provides that "[t]he provisions of a law repealing a prior law, which are substantial reenactments

There can be little argument that the new approach to forum non conveniens exemplified by *Silver* and Rule 327 is far superior to the old rule, and that this new approach is notably more consistent since it is unfettered with the *Gregonis*⁷³ exception. Further, the court's elision of the statutory foundation of *Gregonis* is rendered somewhat understandable in light of the consistent misinterpretation of that decision⁷⁴ and the fact that *Silver* was decided in the face of legislative resistance to, or at least lack of enthusiasm for, forum non conveniens reform.⁷⁵ Nevertheless, the statutory underpinnings of the *Gregonis* decision strongly commend that this exception be squarely confronted by the Court of Appeals or, preferably, eliminated by legislative action.⁷⁶ The need for definitive disposition is reinforced by the fact that an argument can be

of the provisions of the prior law, are to be construed as a continuation of such provisions, and not as new enactments." N.Y. STATUTES § 373 (McKinney 1971).

⁷³ *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 139 N.E. 223 (1923).

There is a substantial argument that *Gregonis*, in addition to having stare decisis effect, was correctly decided. Two plausible interpretations of the statute which the case construed are possible. The first, of course, is that adopted by the court: that the statute represented a legislative mandate that jurisdiction be exercised whenever a New York plaintiff sues a foreign corporation. The second is that the statute only blocks out an area of permissible subject matter jurisdiction for New York courts. This second interpretation has been expressly adopted by the Court of Appeals for another portion of the same statute, N.Y. BUS. CORP. LAW § 1314(b) (McKinney 1963), which limits to five specific situations the right of a *nonresident* plaintiff to sue a foreign corporation. See *Simonson v. International Bank*, 14 N.Y.2d 281, 200 N.E.2d 487, 251 N.Y.S.2d 433 (1964). *Simonson* is a completely proper interpretation of § 1314(b) because that portion of the statute narrows what would otherwise be the limits of the courts' subject matter jurisdiction. To extend such an interpretation to § 1314(a), however, would render that portion of the statute entirely meaningless, since the court would have exactly the same scope of subject matter jurisdiction in the absence of the statute. Such a construction would also be in conflict with N.Y. STATUTES § 231 (McKinney 1971), which provides that

[i]n the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning,

since the alternative interpretation adopted in *Gregonis* is also available.

⁷⁴ For example, the New York Judicial Conference, citing *Gregonis*, remarked: [O]ne rather arbitrary and clearly inequitable rule has been gradually engrafted upon the forum non conveniens doctrine—namely, the rule that, no matter what the circumstances may be, the doctrine is inapplicable whenever the plaintiff is a New York resident.

1970 REPORT A 113-14.

⁷⁵ See text accompanying notes 52-53 *supra*.

⁷⁶ It seems improbable at this late date that the Court of Appeals would hold that *Gregonis* still controlled. Should legislative action be desired to remove any remaining doubt, however, it might be substantially easier to achieve since *Silver* has reversed the polarity of forum non conveniens policy. Although *Gregonis* previously represented only a single segment of a monolithic rule, it would now stand out as an unwarranted exception to general policy.

made that *Silver* may be read consistently with the survival of this statutory exception.⁷⁷

From a practical standpoint, a more distressing defect of *Silver* is the omission of standards for delineating the proper balance between the new forum non conveniens approach and the longstanding court policy of extending special consideration to state residents.⁷⁸ The statement in *Silver* that "residence is, of course, an important factor to be considered"⁷⁹ demonstrates that the protection of residents remains an important judicial policy in New York. It is also significant that in *Silver* the defendant was a New York resident—a factual context in which the defendant's plea of forum non conveniens is not only inherently weak,⁸⁰ but also one in which the resident protection rationale has no validity.⁸¹ Yet neither the *Silver* opinion nor Rule 327 provides lower courts with any criteria for accommodating these inherently conflicting policies. Although the value of any pro-resident bias in a modern procedural system is doubtful,⁸² the Court of Appeals should at least have instructed lower courts to deny residence consideration in those cases in which the claim has been assigned to a New York resident⁸³ or in which

⁷⁷ Such an argument might proceed as follows: *Gregonis* contains both a narrow statutory holding and broader dicta, such as that quoted in the text accompanying note 27 *supra*. Although the holding is treated as "part of the enactment," and is thus entitled to precedential deference, its dicta are not. See N.Y. STATUTES § 72 (McKinney 1971).

On the other hand, although the defendant in *Silver* requested that *Gregonis*, *Crashley*, and *de la Bouillerie* be overruled (see 29 N.Y.2d at 358, 278 N.E.2d at 620, 328 N.Y.S.2d at 400), the Court of Appeals carefully noted that its holding was intended only to modify them. *Id.* at 363, 278 N.E.2d at 623, 328 N.Y.S.2d at 404. The justification advanced for the holding was that stare decisis did not compel the court "to follow blindly a court-created rule." *Id.* From these facts it might be argued that *Silver* only modified *Gregonis* to the extent that it was a "court-created rule," and thus was not entitled to stare decisis deference. Its holding would thus remain controlling authority.

⁷⁸ See note 45 and text accompanying note 27 *supra*.

⁷⁹ 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

⁸⁰ It might be argued that the state of the defendant's domicile should be considered a convenient forum per se, at least as far as objection by the defendant is concerned. Cf. Schlesinger, *Methods of Progress in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. PUB. L. 313, 324 n.55 (1960). *Contra*, *State-Court Jurisdiction* 1011-13.

⁸¹ See text accompanying note 30 *supra*.

It may be more than coincidental that the two other states which have modified similar forum non conveniens policies by judicial decision did so in cases in which the plea was raised by a resident defendant. See *Winsor v. United Air Lines, Inc.*, 52 Del. 161, 154 A.2d 561 (1958); *Gore v. United States Steel Corp.*, 15 N.J. 301, 104 A.2d 670, *cert. denied*, 348 U.S. 861 (1954).

⁸² See note 50 and accompanying text *supra*.

⁸³ See notes 46-47 and accompanying text *supra*. One post-*Silver* case has made such a distinction. See *Taurus, Inc. v. Boeck Fuel Co.*, 38 App. Div. 2d 702, 328 N.Y.S.2d 366, *modified*, 39 App. Div. 2d 519, 330 N.Y.S.2d 451 (1st Dep't 1972).

residence was acquired after the cause of action arose.⁸⁴ In these cases, special consideration serves the purpose of neither enlightened forum non conveniens policy nor the protection of bona fide resident interests. More explicit standards would also prove useful in minimizing judicial overreaching in the application of New York's liberal choice of law rules.⁸⁵

V

OPPORTUNITIES FOR FURTHER IMPROVEMENT

Although *Silver* and Rule 327 represent a significant reform, much remains to be done before New York can be recognized as having a truly progressive forum non conveniens policy. Elimination of the pervasive resident-nonresident distinction has exposed other forum non conveniens issues which also require reappraisal. An example is the New York attitude toward forum selection clauses in contracts. The current view is that although such clauses may be honored in exceptional circumstances,⁸⁶ they are contrary to public policy insofar as they attempt to oust New York courts of their valid jurisdiction.⁸⁷ The deficiencies of this attitude were not particularly apparent when forum selection clauses could not be enforced by or against a resident. But in light of *Silver*, such a view must be considered somewhat parochial, especially when one considers that the Uniform Commercial Code grants contractual parties the right, within reasonable limits, to stipulate the law which will control any dispute.⁸⁸ Thus, failure to enforce the forum

⁸⁴ See note 48 and accompanying text *supra*.

⁸⁵ See notes 43-45 and accompanying text *supra*.

⁸⁶ "There may conceivably be exceptional circumstances where resort to the courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction." *Meacham v. James-town, F. & C.R.R.*, 211 N.Y. 346, 353, 105 N.E. 653, 655 (1914) (Cardozo, J., concurring).

⁸⁷ Under the present state of the New York authorities, a contract or agreement which attempts to confer exclusive jurisdiction upon the courts of another state or country to the exclusion of the New York courts will be declared to be void as against public policy, if it is attempted to be set up as a bar to an action which would otherwise be maintainable in New York

Kyler v. United States Trotting Ass'n, 12 App. Div. 2d 874, 874, 210 N.Y.S.2d 25, 26-27 (4th Dep't 1961) (citations omitted).

⁸⁸ N.Y. U.C.C. § 1-105(1) (McKinney 1964) provides:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

selection clause will often result in requiring New York courts to apply foreign law.⁸⁹

Another issue deserving more definitive treatment by the Court of Appeals is the availability of forum non conveniens relief against a plaintiff if a more convenient forum was not open to him when the suit was commenced in New York. The majority state view,⁹⁰ and the federal rule as enunciated in *Hoffman v. Blaski*,⁹¹ is that the doctrine is not available in such a case.⁹²

In the one post-*Silver* appellate division case which explicitly considered the issue, *Barry v. American Home Assurance Co.*,⁹³ relief was granted over a vigorous dissent which argued that a showing that the plaintiff could have availed himself of the alternative forum, but did not, should be a precondition to the granting of forum non conveniens dismissal.⁹⁴ In its subsequent per curiam affirmance of *Barry*,⁹⁵ the Court of Appeals failed to consider the issue raised by the appellate division dissent. That dissent, however, poses the possibility of substan-

⁸⁹ The value of permitting the parties to determine the forum in which they will litigate was fully recognized in *Export Ins. Co. v. Mitsui S.S. Co.*, 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966). This reasoning is now reinforced by the persuasive precedent of a recent Supreme Court decision, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which held such clauses binding on federal courts sitting in admiralty unless the plaintiff could meet a heavy burden of showing that enforcement would be unreasonable, unfair, or unjust. See generally 58 CORNELL L. REV. 416 (1972). Potential inequities in the application of the *Zapata* rule could be overcome by permitting a plaintiff to show that his consent was procured through manifest bargaining inequality, and by declaring forum selection clauses unreasonable as a matter of law in consumer contracts. See Schlesinger, *supra* note 80, at 324-25.

⁹⁰ Cf. *State-Court Jurisdiction* 1012-13.

⁹¹ 363 U.S. 335 (1960).

⁹² The federal rule, however, is based entirely on interpretation of the federal venue statute, 28 U.S.C. § 1404(a) (1970), which limits transfer to districts in which the action "might have been brought." From a policy standpoint, Justice Frankfurter's dissent in a companion case, *Sullivan v. Behimer*, 363 U.S. 335 (1960), would appear more persuasive. Justice Frankfurter argued that once the defendant has consented to transfer (or the court has accomplished the same result by conditioning its dismissal), the substantive purposes underlying forum non conveniens would be advanced by transfer (or dismissal), "while there is no way in which the plaintiff can be prejudiced by the lack of venue . . . or the impossibility . . . of serving the defendant there." *Id.* at 354.

⁹³ 38 App. Div. 2d 928, 329 N.Y.S.2d 911 (1st Dep't 1972) (memorandum opinion).

⁹⁴ Judge Kupferman, dissenting, said that

[i]n a case such as this, where the defendant seeks to have the assistance of the court for the purpose of transferring the action, it should first be shown that the plaintiff was given the opportunity to avail herself of the alternative and refused. Once the plaintiff has made a reasonable choice of a forum, and at the time of the commencement of the action, she, in fact, had no other choice, the court should not intervene.

Id. at 928-29, 329 N.Y.S.2d at 913. *Contra*, *State-Court Jurisdiction* 1012-13.

⁹⁵ *Barry v. American Home Assurance Co.*, 31 N.Y.2d 684 (1972).

tial judicial disagreement on this issue. If it were the intention of the Court of Appeals to sanction forum non conveniens dismissal in such a situation, it should have been considerably more explicit.

Of far greater value than such patchwork repairs would be the initiation of a comprehensive study of the forum non conveniens doctrine by the legislature or the Judicial Conference. Professor Rudolf Schlesinger underscored the need for such a study, and suggested its proper focus, when he noted that a major bar to the effective use of forum non conveniens

lies in the fact that most courts and writers treat the doctrine . . . as if it were a single, monolithic rule. It would be far easier to reach sensible, reasonably predictable results if the problem were broken down into smaller segments, predicated on categories and criteria related to the nature of the substantive claim for the trial of which the court seeks to establish the appropriate forum.⁹⁶

One possible means of accomplishing this breakdown for forum non conveniens review would be to classify suits according to the method by which jurisdiction over the defendant had been obtained. For example, in the area of in personam jurisdiction, cases based on implied consent would normally be inappropriate for forum non conveniens treatment,⁹⁷ except when a contract action was based on an appropriate forum selection clause⁹⁸ or when the claim arose from business activities conducted outside the state.⁹⁹ In long-arm cases, the fact that the injury or the tort occurred within the state would usually serve as an appropriate basis for retention.¹⁰⁰ An individual defendant sued in the state of his domicile would ordinarily have no cause for complaint; similarly, a multistate corporate defendant should bear the burden of showing that being sued in its state of incorporation or principal place of business is unjust.¹⁰¹

There are, however, two major classes of in personam cases in

⁹⁶ Schlesinger, *supra* note 80, at 324.

⁹⁷ Exacted or implied consent jurisdiction is normally limited to causes of action arising from an act committed or business transacted within the state. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 35-37 (1971).

The major exceptions are for torts committed outside the state but having effects within the state (see N.Y. CIV. PRAC. LAW § 302(a)(3) (McKinney 1972); notes 34-35 *supra*; text accompanying note 100 *infra*), and for nonrelated business activities when the business done in the state is continuous and substantial. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 35(3) (1971); note 99 and accompanying text *infra*.

⁹⁸ See notes 88-90 and accompanying text *supra*.

⁹⁹ See, e.g., *Antonana v. Ore S.S. Corp.*, 144 F. Supp. 486 (S.D.N.Y. 1956); *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432, 111 N.E. 1075 (1916).

¹⁰⁰ See note 35 and accompanying text *supra*.

¹⁰¹ Cf. Schlesinger, *supra* note 80, at 324 n.55. But cf. *State-Court Jurisdiction* 1011.

which a presumption should be made that New York will be an inappropriate forum for trial. The first class includes those suits falling under what is commonly known as the "transient rule of jurisdiction," in which in personam power arises from the presence of the defendant within the state's borders, jurisdiction is conferred by the service of process, and there is no other connection to the forum.¹⁰² The second class encompasses cases arising under the New York procedural rule,¹⁰³ enunciated in *Bryant v. Finnish National Airline*,¹⁰⁴ in which jurisdiction over an out-of-state claim is grounded solely on the defendant's unrelated business activities. In addition to these two classes of in personam cases, quasi-in-rem suits based on *Seider*-type attachments¹⁰⁵ should also normally be appropriate for forum non conveniens dismissal.

One procedure which might be applied to actions falling within one of the *Bryant*- or *Seider*-type classifications would be that employed by the Supreme Court as to forum selection clauses¹⁰⁶—the normal presumption of convenience would be reversed and the plaintiff required to come forward with evidence showing that New York was indeed an appropriate forum for trial.¹⁰⁷ The reviewing court, in the exercise of its discretion, would of course be permitted to retain jurisdiction of such a case when circumstances warranted—or, conversely, to allow forum non conveniens dismissal when the plaintiff had failed to meet the burden of proof.¹⁰⁸ But the risk of nonpersuasion would be shifted to the party by whom it should most properly be borne. In ad-

¹⁰² Schlesinger, *supra* note 80, at 314; *State-Court Jurisdiction* 1009.

¹⁰³ N.Y. CIV. PRAC. LAW § 301 (McKinney 1972), provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

¹⁰⁴ 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); *accord*, *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967).

¹⁰⁵ See notes 36-38 and accompanying text *supra*.

¹⁰⁶ See note 89 *supra*.

¹⁰⁷ See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

¹⁰⁸ The decision of the Court of Appeals to permit the lower courts latitude in receiving and evaluating evidence as to the propriety of forum non conveniens relief in a specific case has substantial merit. See note 65 and accompanying text *supra*. Although categorization of the main headings of the doctrine will assist these courts in reaching reasonable and consistent results by (1) suggesting whether the case is likely to have the "substantial nexus" with New York which will permit its just resolution within the forum, and (2) instructing the courts as to which party should have the burden of going forward to rebut the presumption which arises (see text accompanying note 97 *supra*), allowing them to consider and weigh any relevant evidence which tends to rebut this presumption in the case before them will ensure that the inflexibility of the former rule is not replaced by the tyranny of a new set of rigid standards.

dition to the immediate objective of promoting consistent and reasonable results throughout the courts of the state, implementation of these standards, or others developed through a comprehensive study, would serve to establish New York as a leader in the development of a workable system of interstate venue.¹⁰⁹

CONCLUSION

Parochial discrimination between residents and nonresidents was for a long time the primary obstacle to effective utilization of forum non conveniens in New York. Its amelioration, through *Silver* and Rule 327, will now permit the state's courts to evaluate forum non conveniens pleas in most cases with reference to the values which justify the doctrine.

Beyond its obvious benefits, this reform has served to highlight related issues also in need of reconsideration. Some, such as the New York attitude toward the contractual forum selection clause, merit prompt judicial attention; but the ultimate objective of a truly comprehensive and progressive forum non conveniens policy will only be reached through a thorough examination of the potentialities of this doctrine and its complex interrelationship with other procedural policies. Such a study should focus not only on finding methods by which the doctrine may be easily and consistently applied, but also on the proper position of the factor of residence in an enlightened forum non conveniens policy.

Charles P. Schropp

¹⁰⁹ Legal writers have stressed the need for such a system for many years. Among the reforms proposed have been federal legislation (*see Ehrenzweig, supra* note 69, at 313) and systemization and extension of forum non conveniens rules. *See Schlesinger, supra* note 80, at 322-27. Decisions such as *Silver* indicate increasing awareness of the shortcomings of the present situation, and make it appear inevitable that some type of reform will eventually be enacted. If New York were to assume leadership in bringing about such reform, it would undoubtedly have a large voice in determining the form it should take.