

Practice: Equitable Relief from Suit in an Inconvenient Forum

Edward R. Kaiser

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The equitable servitude device may be useful in protecting a manufacturer from suits of breach of warranty by allowing him to have his labels removed by a wholesaler or retailer before the goods are sold to the consumer. Manufacturers have been held liable for their products when they were not up to the standard indicated by the label.⁴⁸ Thus, the risk of liability would be placed upon the retailer if the goods are faulty and are sold without a label. However, if the manufacturer's label is not removed he could possibly recover damages⁴⁹ from the one who had the duty to remove the labels and also by the use of the equitable servitude device he could enjoin him from putting more of his labelled goods on the market.⁵⁰

CONCLUSION

The application of real estate principles to personalty is not unusual in equity courts. The rights of a *cestui que trust* developed in real estate, but now the majority of trust property consists of personalty.⁵¹ Other notable equitable interests in personal property that had their origin in land are specific performance in the sale of certain chattels and the interest created by a contract to deliver certain chattels.⁵² Therefore, the extension of the real property doctrine of equitable servitudes to include chattels has had early precedents.

Thus, the California Supreme Court in applying a real estate principle to chattels was one of the first courts to speak in terms of equitable servitudes. Prior to this decision, the development of the law concerning restrictive agreements placed upon personalty was conflicting both as to the legal principle upon which these agreements rested and as to the justification of certain types of restrictions. Although the far reaching effect of the decision in the principal case remains to be seen, it will undoubtedly give the doctrine of equitable servitudes as applied to chattels more clarity as well as new impetus.

THOMAS W. BERTZ

Practice: Equitable Relief from Suit in an Inconvenient Form—
Plaintiffs brought an action in Walker County, Georgia, to enjoin defendants as residents of Walker County from prosecuting a pending action in the Circuit Court of Tennessee against the plaintiffs for damages arising out of an alleged cause of action originating in Walker

⁴⁸ Lane v. C. A. Swanson & Sons, 130 Cal. App, 2d 210, 278 P. 2d 723 (1955); Rogers v. Toni Home Permanent Co., 105 Ohio App. 53, 139 N.E. 2d 871 (1957), *aff'd*, 167 Ohio 244, 147 N.E. 2d 612 (1958).

⁴⁹ 1 Pomeroy, Equity Jurisprudence §112 at 147 (5th ed. 1941).

⁵⁰ Note that the use of the equitable servitude device for this purpose might not be upheld by the courts because it might be contrary to public policy especially when the merchandise is food and drink. See *supra* note 1.

⁵¹ Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 960 (1928).

⁵² Lord Strathcona Steamship Co. v. Dominion Coal Co., (1926) A.C. 108.

County. The complaint of the plaintiffs stated as grounds for injunctive relief that: All witnesses (except medical) resided in Walker County, Georgia, and could not be compelled to appear in the courts of Tennessee; that the plaintiffs could not compel witnesses residing in Georgia to appear before a court commission to give evidence in the form of depositions for use in the courts of another state; and that the selection of the forum and the method of obtaining jurisdiction "smacks of an attempt to locate a soft spot in the courts of the land far removed from the court having complete jurisdiction of the controversy and the parties."

The complaint for injunctive relief was dismissed on demurrer by the trial court. The Supreme Court of Georgia reversed.

It was held that a state court in equity had the power to act in personam where both parties to an action in a sister state are domiciliary residents of the state exercising jurisdiction (in this case residents of the state of Georgia) and could direct the parties by injunction to proceed no further with the action in the foreign forum (namely Tennessee); that while the injunctive power could not be exercised arbitrarily nor merely to force litigants to use courts of their own state, the allegations of the complaint were sufficient to indicate a purpose to obtain an inequitable advantage to which the defendants (as plaintiffs in the pending action in Tennessee) were not entitled in the domiciliary state of Georgia, and therefore the petition stated a cause of action which was good against demurrer.¹

The decision seems to rest on a policy in favor of granting relief where the choice of forum, though technically correct, is inconvenient and unjust. Such a policy is part of a growing trend by courts and legislatures² manifested in more liberal attitudes of the courts in granting injunctive relief under fact situations comparable to *Sanders v. Yates* and by their interpretations of the change of venue statutes³ on the grounds of convenience of witnesses and interests of justice along with increasing recognition of the doctrine of forum non conveniens which is that a court may resist imposition upon its jurisdiction by dismissal of the action because of convenience of witnesses and in-

¹ *Sanders v. Yates*, 215 Ga. 218, 109 S.E. 2d 739 (1959).

² Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380 (1947) 384; 62 Stat. 937 (1948), 28 U.S.C. §1404 (a) (1958); Wis. Stat. §§262.01-20 (1959).

³ Numerous decisions repeat the rule that the change of venue for convenience of witnesses is a matter resting largely in the discretion of the trial court, see: *Marion v. Miller*, 239 Minn. 214, 58 N.W. 2d 185 (1953); *Kalb v. Luce*, 239 Wis. 256, 1 N.W. 2d 176 (1941); *Kopf v. Encking*, 91 Wis. 15, 64 N.W. 318 (1895), showing that the convenience of a large number of witnesses requires the change, may of itself be sufficient grounds for concluding that the ends of justice would be promoted thereby; *Thon v. Erickson*, 232 Minn. 323, 45 N.W. 2d 560 (1950) showing that a change of venue may be granted merely because it *promotes* the convenience of witnesses and ends of justice, and it is *not necessary* to show that the change is *required* for such purposes.

terests of justice when the forum is proper under the letter of a general venue statute.⁴

While the procedural aspects of these remedies by injunctive relief, change of venue statutes, and under the doctrine of forum non conveniens vary, and the types of relief granted are different, the fundamental factors guiding the courts in granting or denying these remedies are very similar. As to the procedural differences, injunctive relief is sought by commencing an action in the home state after service of process, and therefore is only available where that court can obtain jurisdiction over both parties. The order denying it can be appealed, of course, after entry of judgment. A dismissal of the action under the doctrine of forum non conveniens may be sought in the same court where the original action was initiated by a simple motion. An order denying the motion is not appealable until entry of adverse judgment in the action. In both cases the granting of relief is in the sound discretion of the trial court. The procedures for obtaining a change of venue within the same state in the state courts and for obtaining a transfer to a different district or division in the same district in the Federal system are both begun by a motion based on affidavits or on the record. The *Sanders v. Yates* case illustrates the type of situation where both the remedies of injunctive relief and dismissal of a suit under the doctrine of forum non conveniens are appropriate. The relative ease of making a motion for dismissal of the action in the court of the inconvenient forum makes it the natural first choice, and only if denied would the added expense and time-consuming procedure of an action for injunction at home be resorted to. The procedural advantages of the motion for dismissal under the forum non conveniens doctrine as well as the willingness with which courts have applied the doctrine, as compared to their hesitancy in granting injunctive relief,⁵ have given the former a role of increasing importance. Relief from an inconvenient forum under the doctrine of forum non conveniens or by injunction or under change of venue statutes is within the discretion of the trial court, and the factors guiding the court's discretion are substantially the same with respect to all three forms of relief.

The doctrine that a court may resist inequitable imposition on its jurisdiction even though venue is authorized by the general venue

⁴ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁵ The judicial policy of granting injunctive relief only in cases of manifest injustice, and the unfounded fear of interfering with the judicial processes of another state are illustrated in cases; Annot., 57 A.L.R. 77 (1928), and Annot., 115 A.L.R. 237 (1938). "Mere inconvenience to parties or witnesses is not sufficient to restrain the prosecution of a suit in a foreign jurisdiction." *Pittsburgh and L.E.R. Co. v. Grimm*, 28 Pa. Dist. R. 419 (1919). The fear is groundless since most courts concede that the injunction binds only the parties and therefore would not amount to extraterritorial interference.

statutes⁶ was first labeled in America in 1929 under its present name, *forum non conveniens*.⁷ After some hesitancy on the part of the state and Federal courts the expansion of the doctrine gained momentum,⁸ and in 1947 the United States Supreme Court, in *Gulf Oil Corp. v. Gilbert*,⁹ gave a classic statement of the factors which are to be considered by the courts in dismissing an action on the grounds of *forum non conveniens*. After questioning the wisdom of an attempt to catalog all the circumstances of granting relief under the doctrine, Mr. Justice Jackson lists two broad categories; namely, the private interest of the litigant, and factors of public interest. Under the former are such factors as relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if appropriate; the enforceability of a judgment if one is obtained; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. Under factors of public interest are: Administrative difficulties and delay when litigation is piled up in congested centers; imposing the burden and expense of jury duty on a community having no relation to the matters litigated; and finally, the appropriateness of having matters of local interest decided at home in the view of interested persons and by tribunals which are familiar with the law governing the case.¹⁰

From the courts' application of the doctrine as set forth in *Gulf Oil Corp. v. Gilbert* or as based on the venue statutes of the various states, several other general categories have emerged; viz., the convenience of witnesses and the ends of justice; the status of the parties as aliens;¹¹ the subject matter and the nature of the action; and the residence of the parties. As to the convenience of witnesses and the ends of justice, certain objective factors are ascertainable, such as the number of witnesses inconvenienced and the relative importance of their testimony;¹² the distance of travel; the possible interruption of busi-

⁶ *Paramount Pictures v. Rodney*, 186 F. 2d 111, 113 (3d Cir. 1950).

⁷ Two excellent discussions of the history and development of the doctrine can be found in Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Cal. L. Rev. (1929); and see *supra* note 2, Barrett.

⁸ *Broderick v. Rosner*, 294 U.S. 629 (1935), where the court mentioned that the doctrine of *forum non conveniens* is applicable in the state courts to Federal statutes if applied without discrimination.

⁹ *Supra* note 7.

¹⁰ For a discussion of the case and a thorough annotation on the refusal of the courts to entertain a foreign action see Annot., 48 A.L.R. 2d 800 (1956).

¹¹ The discretionary power of a court to refuse to entertain an action on a foreign nonstatutory tort, where the parties to the action are aliens, is generally admitted. *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 106 N.W. 821 (1906), *aff'd*, 208 U.S. 570, (1908). See also Annot., 32 A.L.R. 6 (1924) and Annot., 48 A.L.R. 2d 800, 813 (1956).

¹² *Cf. Cox v. Pennsylvania R. Co.*, 72 F. Supp. 278 (S.D.N.Y. 1947) (a *forum non conveniens* case) where the court said that a party relying on convenience of witnesses should give the names and addresses of the witnesses and state

ness or personal affairs for a long period of time and the same considerations as to the business records of key witnesses. The same formula (convenience of witnesses and ends of justice) appears in the change of venue statutes¹³ indicating that the same factual considerations which have evolved as to granting change of venue can serve as useful precedents in predicting or convincing a court to grant a motion for dismissal under the doctrine of *forum non conveniens*.

But as to the residence and the nature of the action, the decisions seem to be based rather on policy, as determined by the particular courts, than on the fact of residence of one or both of the parties, or whether the suit is in tort or on a contract. The results vary from complete rejection of the doctrine,¹⁴ to others who feel *jurisdiction* cannot be declined,¹⁵ with New York adding a further variant by basing acceptance or refusal of jurisdiction over foreign causes of action primarily on tort versus contract.¹⁶

The question of policy illustrates an important limitation on the usefulness of an objective list of factors which the courts have considered important in granting or denying the motion for dismissal on grounds of *forum non conveniens*. In the first place, it is frequently stated that no one factor, not even the convenience of the witnesses is

what their testimony would be, and *Postel v. Weinhagen*, 86 Wis. 302, 56 N.W. 913 (1893), where the court was faced with the problem of an equal number (30) of witnesses on both sides but affirmed the trial court's change of venue to the county where the subject matter of the action was located because ". . . It would seem to be most convenient for the witnesses to have the case tried in or near such locality" and ". . . The material witnesses must be able to testify . . ." and the ". . . witness who knew and could testify to the *most* of the matter . . ." would be residents of such county. (Emphasis supplied.)

¹³ Wis. Stats. §261.04 (1959).

¹⁴ See *Ex parte State ex rel. Southern R. Co.*, 254 Ala. 10, 47 So. 2d 249 (1950), where the court construes a statute to abolish the doctrine as to causes of action (tort or contract) arising outside the state.

¹⁵ Where one of the parties to an action is a resident of the forum the courts generally will not decline jurisdiction. For a discussion of an old line of minority cases to the contrary, see Annot., 32 A.L.R. 6, 26, (1924) and Annot., 48 A.L.R. 2d 800, 808 (1956); but one line of authority holds that a court has no discretion to decline jurisdiction in such cases. *Atlantic Coast Line R. Co. v. Wiggins*, 77 Ga. App. 756, 49 S.E. 2d 909 (1948). Where both parties are nonresidents there is a more even split of authority with the decision of those courts denying the power to decline jurisdiction usually relying on statutes. *Louisville and N.R. Co. v. Meredith*, 194 Ga. 106, 21 S.E. 2d 101 (1942). But *cf. Bourestom v. Bourestom*, 231 Wis. 666, 285 N.W. 426 (1939) where the court relied on the "privileges and immunities" clause of the Federal Constitution.

¹⁶ Where the cause of action arose outside of the state, but one of the parties was a resident of New York, the courts have (with some exceptions) retained jurisdiction generally. But where both parties are nonresidents a distinction seems to be drawn between tort and contract actions. The retention of the jurisdiction in contract cases regardless of the equities and opposite view as to extraterritorial torts has been attributed to an undue emphasis on the court's convenience and a recognition of the fact that an open door policy to contract litigation will ultimately benefit New York. See *supra* note 2, Barrett, at 405 and 410.

conclusive.¹⁷ Secondly, there are a number of cases in which the motion for dismissal was granted or denied without stating the particular basis of the decision.¹⁸ Thirdly, the combination of circumstances and the degree of presence or absence of each will rarely if ever be identical so that each case usually will stand on its own facts.¹⁹ But even substantially similar cases may be poor precedent in view of the courts' varying policies generally²⁰ or as interpreting legislative intent.²¹

The impact of state and Federal legislation on the doctrine of forum non conveniens directly²² or indirectly by way of related statutes or the courts' interpretation of them cannot be ignored. In the Federal courts, 28 U.S.C. §1404(a) has not only given a specific alternate remedy to the doctrine of forum non conveniens, it has given a further impetus to the liberal principles underlying the forum non conveniens doctrine by undermining the reasoning of the cases which have rejected it on technical grounds. The similarity of considerations in the application of both the doctrine of forum non conveniens and 28 U.S.C. §1404(a) and the probable reciprocal extension of each should be noted, but this result will be somewhat tempered by the fact that 28 U.S.C. §1404(a) offers a milder remedy and therefore will be called into play on factual conditions not strong enough to support a complete dismissal of the action.

The new Wisconsin Statute, Wis. Stats. Ch. 262 §§262.01-.20 (1959) borrows heavily from the doctrine of forum non conveniens and from statutes authorizing transfer of a case from one venue to another on the ground of inconvenient forum. Following *International Shoe Co. v. Washington*,²⁴ the statute has extended the personal jurisdiction of the Wisconsin courts over a wider range of "minimal contacts"²⁵ which are deemed reasonable according to traditional concepts of

¹⁷ *Kantakevich v. Delaware, L. and W. R. Co.*, 18 N.J. Misc. 77, 10 A. 2d 651 (1940).

¹⁸ As was done in the Georgia case granting the injunction.

¹⁹ *Kantakevich v. Delaware*, *supra* note 21; *Castanos v. Public Service Coordinated Transport*, 140 N.Y.S. 2d 609 (1954).

²⁰ See Barrett, *supra* note 2 at 405 for a discussion of whose interests courts consider in retaining jurisdiction.

²¹ See *supra* note 19, as to cases relying on statutes and a Wisconsin case based on the privileges and immunities of the Federal Constitution. Now it is generally conceded, and the U.S. Supreme Court has made it clear, that there is no constitutional prohibition of the *indiscriminate* application of the doctrine. But it is suggested that current decisions may still be influenced by stare decisis, and the failure to distinguish some of the cases reversed were applying the doctrine so as to discriminate against non-residents' use of the courts.

²² 62 Stat. 937 (1948), 28 U.S.C. §1404 (a) (1958); Wis. Stat. §§262.01-.20 (1959).

²³ 62 Stat. 937 (1948), 28 U.S.C. §1404 (a) Change of Venue: For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

²⁴ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁵ Wis. Stats. §262.05 (1959).

"fair play and substantial justice."²⁶ A unique feature of Wis. Stat. Ch. 262²⁷ is designed to keep the Statute's application within the limits of fair play and "substantial justice." If a state court finds on the motion of any party that as a matter of "substantial justice" the pending action though grounded on a sufficient basis for the exercise of personal jurisdiction ought to be tried in another forum outside Wisconsin, it may enter an order to stay further proceedings in this State. A moving party must stipulate his consent to suit in the alternate forum and waive his right to rely on statutes of limitations which may have run in such other forum. A hearing is had on such motion, and separate findings made by the court on each issue in a single order which is appealable. This is a great improvement over the injunctive and forum non conveniens proceedings where appeal could only be taken after entry of judgment. Wis. Stat. Ch. 262 also lays down some general considerations to guide the courts in using their discretion to grant or deny the motion, such as amenability to personal jurisdiction in Wisconsin and in any alternative forum of the parties; convenience of parties and witnesses; and a catch-all section: "Any other factors having substantial bearing upon the selection of a convenient, reasonable, and fair place of trial." As similar general considerations are found in the change of venue statutes, Wis. Stat. §261.04 and 28 U.S.C. §1404(a), and in the area of forum non conveniens, it is to be expected that the particular objective factors considered important in these areas will also apply in granting or denying the motion under the Wisconsin statute.

EDWARD R. KAISER

Sales—Implied Warranty and Sales of Chicken Sandwich—Plaintiff ordered, paid for and consumed a sliced chicken sandwich at defendant's restaurant. The sandwich consisted of a layer of two or three pieces of thinly sliced white chicken meat and a layer of lettuce, between two slices of bread. After eating the sandwich plaintiff felt a sharp pain in his throat and upon investigation it was discovered that embedded in the lettuce and bread was a sharp fragment of chicken bone about one and one-half inches long and about one-eighth of an inch in diameter at its thickest point.

²⁶ International Shoe Co. *supra* note 28 at 320. ". . . It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there . . ." While some of the provisions go beyond the facts of that case, i.e., permit exercise of jurisdiction with less than the number or degree of contacts found there, they may be readily sustained in view of subsequent supreme court decisions, such as *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950) and *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (which indicate a continuing trend toward liberality).

²⁷ Wis. Stat. §262.19 (1) (1959).