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an accused juror, charged with perjury on a *voir dire* examination, to show by cross examination of the other jurors how the panel voted.[10] This is limited to instances in which a mistrial occurred and the inqury concerned a crime committed prior to the jurors' retirement.[11]

Inasmuch as the principal case is not one in which a member of the jury claims the privilege of being protected against disclosure, the point is whether or not the privilege of the other jurors should cease when supervened by the defendant-juror's right to reasonable latitude of cross-examination. Here the juror had participated in a case which ended in a mistrial; furthermore, he was charged with a crime committed before retiring to the jury room. According to the above reasoning where these factors are present, the privilege should end and cross-examination as to the other jurors' voting should be permitted. The privilege has not proved invulnerable when it has come in conflict with a paramount policy, such as the protection of the integrity of the jury. It should not be upheld where it restricts the right to cross-examine; a fundamental right of a defendant accused of a crime.[12]

FEDERAL COURTS—JURISDICTION—EXTENSION OF THE DOCTRINE OF FORUM NON CONVENIENS

An action was brought in federal district court against the directors of a New York corporation by shareholders therein, alleging misuse of corporate funds. At the time suit was instituted, an action based upon the same claims brought against substantially the same defendants, but by different shareholders, was pending in the state court. The federal court stayed further proceedings pending the determination of the suit in the state court. An appeal by petitioner to review the order staying proceedings was dismissed by the Court of Appeals on the ground that such an order was not a "final order" from which plaintiff could appeal.[1] Petitioner then requested a writ of mandamus directing the district court judge to proceed with the trial of the action. *Held*, petition denied; the right of access to a federal court is not absolute and an action commenced in such court based upon diversity of citizenship may, in the discretion of the trial court, be stayed, or not even heard, under the doctrine of *forum non conveniens*. *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949) (Frank, J. dissenting.)

Originally a citizen was allowed an absolute privilege of access to a federal court, even though its exercise resulted in inconvenience, delay and

10. Serpas v. State, 188 La. 1074, 179 So. 1 (1938).
11. See note 9 *supra*.
12. Alford v. United States, 282 U.S. 687 (1931).

1. Mottolese v. Preston, 172 F.2d 308 (2d Cir. 1949).

expense to the defendant.[2] But today, under the doctrine of *forum non conveniens,* a court having jurisdiction may decline its facilities to a suit whenever the cause of action is not sufficiently related to the forum,[3] even when jurisdiction is authorized by the venue statute.[4] The discretionary power of the federal courts to refuse to exercise jurisdiction given to them by Congress has been allowed because of expense to taxpayers, cluttered dockets, additional jury duty, and most important, to prevent vexatious actions.[5]

Generally speaking, where from the circumstances of the case it is apparent that there is a real unfairness to one of the suitors in permitting the choice of a forum because of the residence or domicile of the parties or inconveniences of trial, the doctrine of *forum non conveniens* is properly applied.[6] Usually, the plea of *forum non conveniens* is proper where both plaintiff and defendant are non-residents and the cause of action arose in some other jurisdiction, or where for kindred reasons the litigation can be more appropriately conducted in a foreign tribunal.[7] The doctrine has also been applied because of the complexity of the governing foreign law or the impossibility of making an effective decree in cases or controversies involving denial of due process,[8] where the argument of the defendant was that a court should decline to exercise its jurisdiction whenever an interstate carrier could show that a serious burden to interstate commerce would result from holding the trial in that forum,[9] in cases involving foreign mining law,[10] real estate law,[11] or requiring the supervision of the internal affairs of a foreign corporation.[12]

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2. McClellan v. Carland, 217 U.S. 268 (1910); Kline v. Barke Construction Co., 260 U.S. 226 (1922); Ironton v. Harrison Construction Co. 212 Fed. 353 (6th Cir. 1914); Great North Woods Club v. Raymond, 54 F.2d 1017 (6th Cir. 1931).

3. E. L. Barrett, Jr., *The Doctrine of Forum Non Conveniens,* 35 CALIF. L. REV. 380 at 386 (1947).

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

5. Collard v. Beach, 87 N.Y. Supp. 884 (1st Dep't 1904) (but here the action was on a tort committed in another state).

6. Société du Gaz de Paris v. Société Anonyme de Navigation Les Armateurs Francais, Sess. Ca. 13 H.L. (1926).

7. Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413 (1932); *accord,* Atchison, Topeka & S.F. Ry. v. Wells, 265 U.S. 101 (1924). *But cf.* Davis v. Farmer's Co-op Eq. Co., 262 U.S. 312 (1923); Société du Gaz de Paris v. Société Anonyme de Navigation Les Armateurs Francais, *supra;* Logan v. Bank of Scotland (1906) 1 K.B. 141. For an extensive collection of authorities, see Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COL. L. REV. 1 (1929); Roger S. Foster, *Place of Trial in Civil Actions,* 43 HARV. L. REV. 1217 (1930); *Place of Trial—Interstate Application of Intrastate Methods of Adjustment,* 44 HARV. L. REV. 41 (1930).

8. Pennoyer v. Neff, 95 U.S. 714 (1878).

9. Davis v. Farmer's Co-op Eq. Co., *supra; accord,* International Milling Machine Co. v. Columbia Transportation Co., 292 U.S. 511 (1936).

10. Ophir Silver Mining Co. v. Superior Ct., 147 Cal. 467, 82 Pac. 70 (1905).

11. Van Ommer v. Hageman, 100 N.J.L. 224, 126 Atl. 468 (1924).

12. Howell v. Chicago & N.W. Ry., 51 Barb. 378 (N.Y. 1868); *accord,* Rogers v. Guaranty Trust Co. of N.Y., 188 U.S. 123 (1932) (but qualified by the court by stating that considerations of convenience, efficiency and justice require that the cause be heard in the state where the association has its principal, or at least a substantial place of business. (*Id.* at 130). Even more recently, it was held that no rule of law requires

Clear reasons for a federal court not exercising its jurisdiction, and the application of the doctrine of *forum non conveniens,* have also been found to exist where one or both of the parties were aliens,[13] where plaintiff's choice of forum imposed an unnecessary burden on defendant in defending a suit at a place other than his residence or locality where the cause of action arose,[14] where the expense of transporting witnesses and records was out of proportion to the amount in suit, where the desirability of viewing the place where the action arose was essential to the proper understanding of the defense,[15] where a critical issue in the federal action was the proper construction of a state statute,[16] or where there was an adequate local administrative procedure provided by the state.[17]

Clearly the rule of *forum non conveniens* was designed and is applied as an instrument of justice, applicable where maintenance of suit away from the domicile of the defendant, whether defendant be a corporation or an individual, might be vexatious or oppressive.[18] A Massachusetts court stated all this very cogently by remarking that where it appears that complete justice cannot be done in the court in which action has been brought against a non-resident, that the defendant will be subjected to great and unnecessary inconvenience and expense, and that trial of the action will be attended with difficulties which all would be avoided without special hardship to the plaintiff if action is brought in the jurisdiction in which the defendant is domiciled, where service can be had, where the cause of action arose and where justice can be done, the court

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dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation, but that convenience of witnesses, accessibility of proof, applicability of the law of another state, and enforceability of the judgment should all be considered before applying the doctrine. Koster v. American Lumbermen's Mutual Casualty Co., 330 U.S. 518 (1947). In a companion case, decided the same day, the Supreme Court further restricted the applicability of the doctrine of *forum non conveniens* by requiring a consideration of factors of public interest such as relative administrative difficulties, burden of jury duty and appropriateness of forum for particular question involved. Gilbert v. Gulf Oil Co., *supra.* It added the suggestion that while a plaintiff may not, by choice of an inconvenient forum, vex, harass or oppress the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy i.e., having to bring numerous witnesses and documents from afar in order to prove his defense the plaintiff's choice of forum should not be disturbed unless the balance of convenience is strongly in favor of the defendant.

13. Canada Malting Co. v. Paterson Steamships, Ltd., *supra* at 423.

14. Gulf Oil Co. v. Gilbert, *supra.*

15. Di Lella v. Lehigh Valley R.R., 7 F.R.D. 192 (1947) (in determining whether doctrine of *forum non conveniens* should be applied, the court should consider relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses, possibility of view of premises, all other practical problems that make trial easy, expeditious and inexpensive, but unless the balance is strongly in favor of the defendant, plaintiff's choice of forum should rarely be disturbed).

16. United States v. New York, 175 F.2d 75 (2d Cir. 1949); East Coast Lumber Terminal, Inc. v. Babylon, 174 F.2d 106 (2d Cir. 1949). *But cf.* Koster v. American Lumbermen's Mutual Casualty Co., *supra* at 527.

17. Pennsylvania v. Williams, 294 U.S. 491 (1942).

18. Williams v. Green Bay & W. Ry., 326 U.S. 549 (1946).

may decline to entertain the action on the ground that the litigation may more appropriately be conducted elsewhere.[19]

In the absence of such cause, the court may not decline to exercise its jurisdiction. Chief Justice Marshall, in *Cohen v. Virginia*,[20] said, ". . . we have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." [21] Following this doctrine, in all cases in which dismissal of action in federal court was sought because action between same parties was pending in state court, the Supreme Court has held that a federal court having jurisdiction is under a duty to exercise it,[22] even where state statutes provided for exclusive remedy in state courts;[23] and where a prior suit was pending in state court, it was held not to abate a later suit in a federal court, even if between the same parties upon the same issue, and even if the two courts are in the same district of the same state.[24]

In the instant case, there appears to be no exceptional circumstance the same as or even remotely resembling any of those heretofore recognized for invoking the doctrine of *forum non conveniens*. It would seem a rather serious matter for a federal court to refuse to exercise jurisdiction over a matter definitely within the statutory authority of the court since one of the chief purposes of creating the diversity of citizenship jurisdiction was to afford to suitors an unclouded opportunity to assert their rights in the federal courts

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19. Universal Adjustment Corp. v. Midland Bank, 281 Mass. 303, 184 N.E. 152 (1933).

20. 6 Wheat. 264, 404 (U.S. 1821).

21. *Accord*, Bates v. Days 11 Fed. 529 (C.C. Mo. 1882) (wherein it was held that if the necessary diversity of citizenship and jurisdictional amount exist, the parties have a right to have their controversies determined in the federal courts.) *Also see* Willcox v. Consolidated Gas Co. of N.Y., 212 U.S. 19 (1909) (wherein the Supreme Court fixed the rule that when there is jurisdiction the federal court has no discretion to decline its exercise.)

22. McClellan v. Carland, *supra*.

23. Suydam v. Broadnax, 14 Pet. 66 (U.S. 1840); Union Bank of Tenn. v. Jolly's Adm'rs, 18 How. 503 (U.S. 1855); Hyde v. Stone, 20 How. 170, 175 (U.S. 1857).

24. Ironton v. Harrison Construction Co., *supra* at p. 355. Restated by Justice Cardozo in *Travis v. Knox Terpezone Co.*, [215 N.Y. 259, 261, 109 N.E. 250, 251 (1915)], "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of the corporation as the appropriate tribunal." In 1926 this was even more forcibly stated by Gibb in his book titled INTERNATIONAL LAW OF JURISDICTION c. XVI, pp. 212-213, ". . . the court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience then, must amount to actual hardship and must be regarded as a condition *sine qua non* of success in putting forward a defense of *forum non conveniens*. For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent." (Reviewed in 43 L.Q. REV. 144 (1927) *accord* Grodsky v. Sipe, 30 F. Supp. 656 (D.C.Ill. 1940) wherein the court held that the plaintiff should not be deprived of the right to federal jurisdiction except where the clearest of causes therefor exist.

when the exigencies of state court jurisdiction of subject matter or parties, or both together, render doubtful their ability to proceed in the state court.[25] A federal court may not refuse to assume jurisdiction in a diversity case merely on the ground that another remedy is available or because another suit is pending,[26] nor is the pendency of the same cause of action in a state court between the same parties ordinarily a ground for abating the action in the federal court.[27] In the absence of some recognized public policy or defined principle guiding the exercise of jurisdiction conferred on federal courts in diversity of citizenship cases, which could in exceptional cases warrant its non-exercise, it is the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to rendition of judgment.[28] If the maintenance of the suit in plaintiff's choice of forum be not vexatious or oppressive, the doctrine of *forum non conveniens* does not warrant a federal court's dismissal of suit, where requirements of diversity of citizenship jurisdiction and venue are satisfied.[29]

The instant case extends the doctrine of *forum non conveniens* to stay an action which to quote Justice Frank ". . . will kill the federal suit for all practical purposes." [30] In a decision without precedent, a decision directly contra to one rendered by the same court on a similar fact situation,[31] that court has gone ". . . a long way towards wiping out a substantial part of the diversity of citizenship jurisdiction of the federal courts, a jurisdiction with roots deep in our national history, a jurisdiction conferred because of a highly cherished policy." [32] After mentioning some of the reasons for sustaining a plea of *forum non conveniens,* the court goes on in the following ill-chosen words to extend the doctrine almost immeasurably, ". . . we can see no difference in kind between the inconveniences which may arise from compelling a defendant to stand trial at a distance from the place where the transactions have occurred, and compelling him to defend another action on the same claim." [33] (And this in spite of the fact that suit was brought in the federal district court in the same city.)

There is a growing tendency in the lower federal courts, especially in congested areas such as the Southern District of New York, to seek all

25. Mr. Chief Justice Stone, dissenting in Brillhart v. Excess Ins. Co. of Amer., 316 U.S. 491, 501 (1942).
26. Maryland Casualty Co. v. Consumers Finance Serv., Inc., 101 F.2d 514 (3d Cir. 1938).
27. Butler v. Judge of U.S. Dist. Ct., 116 F.2d 1013, 1015 (9th Cir. 1941).
28. *In re* Pres. & Fellows of Harvard Univ., 149 F.2d 69 (1st Cir. 1945).
29. Williams v. Green Bay & W. Ry. *supra.*
30. Mottolese v. Kaufman, *supra* at 305.
31. Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004, 1006 (2d Cir. 1933), wherein it was held that although the causes of action were the same, it is well settled that the plea of *lis alio pendens* is bad when the other suit is in the state court.
32. Mr. Justice Frank *supra* note 30 at 305.
33. *Id.* at 303.

manner of excuses to remove a case from the docket. Judges deserve sympathy for the excessive amount of work to which they have been subjected, however, we cannot bring ourselves to believe that allowing a judge to be persuaded of his court's unsuitability less by the circumstances of the case than by his own overcrowded calendar would be a suitable remedy or a correct solution.[34] Under the revised Judicial Code[35] it would seem to be the intent of the Congress to limit the remedy to transfer only, there being no other indication in the Code of allowing dismissal of action, or refusal to exercise jurisdiction where other requirements therefor are met. It would seem to be a rather serious matter for a federal court to refuse jurisdiction to a litigant with an unadjudicated cause which is definitely within the statutory authority of the court. The right, or privilege, to litigate is not something which the court may grant or withhold simply for the sake of its convenience.

FEDERAL TAXATION—DEDUCTIBILITY OF ATTORNEY'S FEES IN CONTESTING GIFT TAX DEFICIENCY DETERMINATION

Petitioner made gifts of stock. Commissioner of Internal Revenue notified him of a deficiency in his gift tax return. A redetermination of liability was filed and an out of court settlement was reached. In filing his income tax return petitioner deducted attorney fees expended in defending said assessment. Commissioner refused deduction. On appeal, *held,* that said deduction was allowable under § 23(a)(2) of the Internal Revenue Code[1] as constituting expenses ". . . for the management, *conservation,* or maintenance of property held for the production of income."[2] *Lykes v. Commissioner,* 84 F. Supp. 537 (S.D. Fla. 1949).

Prior to 1944 one could deduct from gross income only those expenses incurred in the operation of a trade or business.[3] Since that time, Congress

34. *Forum Non Conveniens, a New Federal Doctrine,* 56 YALE L.J. 1234, 1247 (1947). *See* Justice Clark's dissent in Hammett v. Warner Bros., 176 F.2d 145, 152 (2d Cir. 1949).

35. 28 U.S.C. § 1404(a) (1948). "For 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." The Reviser in his note on this section states that it was drafted in accordance with the doctrine of *forum non conveniens,* permitting transfer to a more convenient forum, even though the venue is proper and cites Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44 (1941) as an example of the need of such a provision.

1. 56 STAT. 819, 26 U.S.C. § 23(a)(2) (1942). "Deductions from gross income. In computing net income there shall be allowed as deductions: . . . (2) non-trade or non-business expenses. In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

2. The court found Treasury Regulation 111 § 29.23(a)-15(b) as amended by T.D. 5513 in conflict with the Internal Revenue Code and therefore invalid.

3. Williams v. Burnett, 59 F.2d 357 (D.C. Cir. 1932) (expenses incurred in prosecution of claim for compensation against city property condemned by city were not deduct-