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Notes

Requirement of a Second Forum for Application of Forum Non Conveniens

Principles underlying the doctrine of forum non conveniens—convenience of the court or of the parties—may suggest that a court defer consideration of a particular case in favor of a more appropriate forum, even though the defendant is not subject to involuntary process in that second forum. The author of this Note analyzes the considerations and concludes that it is desirable, under these circumstances, to permit the court to order a dismissal conditioned upon the defendant's submitting to the jurisdiction of the more appropriate forum.

Introduction

The doctrine of forum non conveniens "deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." The trial court may dismiss an action if, in its discretion, it decides that the action would be more appropriately tried in another forum because of considerations such as residence of the parties, availability of witnesses, ease of access to sources of proof, place where the cause of action arose, or convenience of the court. Before an action may be dismissed under this doctrine there must necessarily be another forum available in which the plaintiff can subject the defendant to jurisdiction. If there were not, a dismissal would leave the plaintiff with no way to get his cause of action to trial unless the original forum would permit him to recommence his action there.

In addition to Blair's article, supra note 1, for discussions of the doctrine of forum non conveniens, see Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1947); Brauer, The Inconvenient Federal Forum, 60 Harw. L. Rev. 908 (1947); Danow, The Inappropriate Forum, 29 Ill. L. Rev. 887 (1935); Foster, Place of Trial—Interstate Application of Intrastate Methods of Adjustment, 44 Harv. L. Rev. 41 (1930).
3. Some courts do permit a plaintiff to re-enter if he shows he was prejudiced by the dismissal. See, e.g., Gore v. United States Steel Corp., 15 N.J. 301, 314, 104 A.2d 670, 677 (1954).
Trial courts in Minnesota and New Jersey have granted conditional dismissals on grounds of forum non conveniens upon the defendant's consent to appear in the more appropriate forum even though he was not amenable to involuntary process there. The judgment of the Minnesota trial court was reversed in *Hill v. Upper Mississippi Towing Corp.*, because the Minnesota Supreme Court understood the doctrine to require "at least two forums in which the defendant is amenable to involuntary process at the time the suit is started." On the other hand, in *Vargas v. A. H. Bull S.S. Co.* the Supreme Court of New Jersey affirmed the dismissal. The purpose of this Note is to determine which court reached the more


6. The Minnesota trial court dismissed on condition that the defendant appear within twenty days in an action "of the same scope and nature" brought by the plaintiff in Tennessee, that he submit to in personam jurisdiction there, waive the defense of forum non conveniens there, and agree to a jury trial. The court further provided that if the defendant failed to appear, or the Tennessee court refused to accept the case, the action would be reinstated "to the calendar with the same force and effect" as if it had never been dismissed. Record, pp. 50-51, *Hill v. Upper Miss. Towing Corp.*, 89 N.W.2d 654 (Minn. 1958).

The order of the New Jersey trial court provided that the plaintiffs had ninety days in which to bring their actions in Puerto Rico. If the defendants appeared and carried out the terms of the order, the New Jersey action would thereupon be dismissed. The order provided that the defendants agree to waive the statute of limitations, and pay plaintiffs' costs and attorneys' fees incurred in instituting the actions in New Jersey so that the plaintiffs might "have the same relative position in the courts of Puerto Rico as they [had] . . . in the courts of this State as of the date these actions were begun." *Vargas v. A. H. Bull S.S. Co.*, 44 N.J. Super. 536, 552, 131 A.2d 39, 48 (L. 1957).

Although the orders were not identical, since the court in *Vargas stayed* the action pending the outcome of proceedings in Puerto Rico, while the trial court in *Hill dismissed* but provided for reinstatement (however, the supreme court thought the trial court's action amounted to a stay, see 89 N.W.2d 654, 658 (Minn. 1958)), they are sufficiently similar that both are included within the term "conditional dismissal" as used in this Note. See definition, text accompanying notes 12-13 infra.

7. The court in *Vargas v. A. H. Bull S.S. Co.*, 44 N.J. Super. 536, 539, 131 A.2d 39, 40 (L. 1957), found, for purposes of the motion to dismiss, that the defendants were not amenable to involuntary process in Puerto Rico. Likewise, the court in *Hill v. Upper Miss. Towing Corp.*, 89 N.W.2d 654, 661 (Minn. 1958), stated that the defendant was not amenable to involuntary process in Tennessee.

The phrase "amenable to involuntary process" apparently means that the forum has such contacts with a defendant that he may be subjected to its jurisdiction even though he is not physically present within the forum. For example, an individual or corporation may be domiciled within the forum, and so "amenable to involuntary process" there. Apparently neither court considered a defendant to be "amenable to involuntary process" in a particular forum even though he may have occasionally been found there. See *Vargas v. A. H. Bull S.S. Co.*, *supra* at 536, 131 A.2d at 40; *Hill v. Upper Miss. Towing Corp.*, *supra* at 661.

8. 89 N.W.2d 654 (Minn. 1958).

9. *Id.* at 655 (syllabus by the court).

desirable result. In answer to this inquiry the Note will first examine the device of the conditional dismissal to determine whether it comports with the reasons for applying the doctrine of forum non conveniens, and then consider independent arguments against applying the doctrine when the defendant is not amenable to involuntary process in the more convenient forum.

I. THE CONDITIONAL DISMISSAL

A. Description

The type of conditional dismissal with which this Note is concerned is one whereby a trial court, through its inherent powers, dismisses an action upon certain conditions when it determines itself to be an inappropriate forum, even though the defendant is not

11. The question of which court reached the more desirable result cannot be answered satisfactorily by examining authorities. Both courts cited many of the same authorities, but where one would emphasize a particular authority, the other would distinguish it.

For example, in both Vargas, 44 N.J. Super. at 551, 131 A.2d at 47, and Hill, Hill v. Upper Miss. Towing Corp., 141 F. Supp. 692 (D. Minn. 1956), a federal district court had transferred the same, or a similar action to a more convenient forum by authority of 28 U.S.C. § 1404(a) (1952). See note 52 infra. In Vargas, the state court said of the transfer of the similar actions, which involved the same parties defendant: "It would be odd indeed to say it is convenient for the parties and witnesses to try their cases in this court on Market Street, but not in the federal court on Broad Street, and that the interest of justice is different in the two locations." 44 N.J. Super. 536, 551, 131 A.2d 39, 47 (L. 1957). The Minnesota Supreme Court refused to follow the example of the Minnesota federal district court, which had transferred the Hill action to a Tennessee federal district court. The state supreme court said § 1404(a) has a "broader application" than forum non conveniens since the former calls for mere transfer, while the latter calls for dismissal. 89 N.W.2d 654, 659 (Minn. 1958).

Another example is the treatment the respective courts accorded a New York case, Rodriguez v. A. H. Bull S.S. Co., 143 N.Y.S.2d 618 (App. Div. 1955) (memorandum decision), where the court granted a conditional dismissal upon the defendant's consent to appear in a more appropriate forum. The New Jersey court in Vargas thought the "controlling consideration" in the Rodriguez case was the defendant's consent to appear in Puerto Rico. 44 N.J. Super. at 542, 131 A.2d at 42 (L. 1957). The Minnesota court in Hill rejected Rodriguez, and Vargas as well, saying they had not "met the test of appellate review in the jurisdictions from which they came." 89 N.W.2d at 658.

Other examples illustrating the diametrical approaches taken by the two courts could be discussed, but such would be superfluous since no authority has yet considered whether a conditional dismissal is a desirable device in light of the reasons for the application of forum non conveniens.

amenable to involuntary process in a more appropriate forum. At
the same time, the court retains jurisdiction in order that it may,
if necessary, reinstate the action.15

The conditions which are attached to any given order will vary
with the needs of the litigants in the particular case. Their purpose
is to assure the plaintiff either that he will be able to enter the
courts of the second forum in essentially the same condition he was
in in the original forum, or that he will have his cause reinstated in
the original forum.14 Typical conditions are:

(1) Consent to appear in the more convenient
forum.16 There
are various devices by which the court can secure the defendant’s
consent to appear. For example, the court may simply incorporate
the defendant’s previous consent to appear as a term of the dis-
missal order. Even though the court can put teeth in such an order,10
it is not the surest method to use since the defendant may take
the risks of noncompliance in order to delay the action by not ap-
pearing in the second forum. A more positive method would be one
by which jurisdiction of the defendant would be presently con-
ferred17 on the courts of the second forum so that if the defendant
did not appear the plaintiff could obtain a default judgment there.
There are two practical means of accomplishing this. First, the de-
fendant could appoint an attorney for service of process who would
appear and be served in the second forum.18 Second, the defendant

13. Technically, the court stays the action pending the outcome of proceedings
in the more appropriate forum. If the defendant appears there and performs as
agreed, the original action is thereafter dismissed. See discussion and authorities
note 6 supra.

14. The Minnesota trial court thought that the purpose of the conditions was
to protect the interests of the plaintiff. Interview with Judge Irving R. Brand, Min-
neapolis, Minnesota, March 12, 1959. The court in Vargas said “the plaintiffs, of
course, are entitled to have the same relative position in the courts of Puerto Rico
as they [had] . . . in the courts of this State as of the date these actions were
begun.” 44 N.J. Super. at 552, 131 A.2d at 48.

15. This condition was found in the orders of both trial courts. See, Record, pp.
50–51, Hill v. Upper Miss. Towing Corp., 89 N.W.2d 654 (Minn. 1958); Vargas
the foundation upon which every conditional dismissal order is built, since it sup-
plies the plaintiff with the necessary second forum which would otherwise be un-
available.

16. See section on remedies for breach of conditions, text accompanying notes
27–33 infra. The threat of these remedies would usually be enough to coerce a de-
fendant into obeying the order, especially since he has already agreed to its terms.

17. Of course, the original forum cannot force the court of the second forum
to exercise its jurisdiction. Within constitutional limits a court may refuse to exer-
cise its jurisdiction. See note 52 infra. Also, the court of the second forum may de-
cide that the methods of conferring jurisdiction on it, stated at notes 17–19 infra,
do not comply with its local law of jurisdiction and thereby refuse the case for
lack of jurisdiction. However, were it to so decide, the action would be reinstated
in the original forum. See notes 28–29 infra.

18. Service on such an attorney will subject the appointor to personal jurisdic-
tion. Restatement, Judgments § 18(d) (1942).
could be served with process of the second forum while still in the original forum, and required to sign an express written acknowledgement of service and waiver of further notice.  

(2) Waiver of the statute of limitations. This would prevent a defendant from raising the statute of limitations in the second forum where the statutory period for initiating an action may have expired.

(3) Posting a bond. If property has been attached in the original forum and the plaintiff is fearful of losing the benefits of this attachment should the suit be tried in another forum, the order could require the defendant to post a bond in the second forum equal to the value of the property attached in the first forum.

(4) Payment of plaintiff’s costs and attorney’s fees. In any case appropriate for such a condition the plaintiff would not be forced to consider the costs and fees of instituting the action in the original forum as money wasted when his case is dismissed. Such a condition would also make the defendant pause to reflect whether a change of forum would be worth the expense of paying the plaintiff's costs and attorney’s fees.

(5) Waiver of the defense of forum non conveniens in the second forum. This condition would assure the plaintiff that the defendant would not obstruct the trial in the second forum by interposing this defense which, even if unsuccessful, would serve to delay and obstruct a trial on the merits.

B. Remedies for breach of conditions

If the defendant is sincere in his claim that another forum is a more convenient one for trial, and that he would rather have trial


21. See Foster, supra note 2, at 50.


23. To determine whether the case is one appropriate for awarding the plaintiff his costs and attorneys fees the court could look at the equities to determine whether the plaintiff should be awarded these expenses. If, for example, the plaintiff wanted to remain in the original forum so that he might harass the defendant, the court probably would conclude he was undeserving of such costs and fees.


25. A motion to dismiss in the second forum would probably be denied for the court there would very likely view the equities of the case in much the same light as did the court in the original forum.

26. Of course, waiver of forum non conveniens would only be needed where the more appropriate forum has adopted the doctrine.
there, this desire to escape from the first forum would be sufficient incentive for him to appear in the second, since a failure to do so would result in reinstatement in the original forum. But if he is seeking a dismissal for purposes of delay, the court has means at its disposal either to discourage his asking for a dismissal, or if he does, to insure that he will perform.\textsuperscript{27}

For example, since the court has retained jurisdiction the plaintiff may recommence the action in the original forum if the defendant does not appear in the second forum,\textsuperscript{28} or if the court in the second forum refuses to accept the case.\textsuperscript{29} In addition, the court could grant the plaintiff reimbursement for any expenses, including attorney's fees, he has incurred in attempting to commence the action in the second forum, plus the costs of recommencing in the original forum.\textsuperscript{30} The court might also demand, as a price for dismissing the action, that the defendant consent to entry of judgment against him in the original forum if he does not perform as he has agreed.\textsuperscript{31} The defendant should have no qualms about consenting to this judgment if he was sincere in his claim that he would appear voluntarily in the more convenient forum.

Somewhat more drastic remedies at the court's disposal are contempt proceedings against the defendant and his attorneys if they disobey the order of the court or in any way obstruct justice,\textsuperscript{32} or disbarment of the defendant's attorneys if they deceive the court by claiming that their client will appear knowing that he does not intend to do so.\textsuperscript{33} Although these remedies are mainly for the purpose of upholding the dignity and authority of the court, they likewise coerce the defendant to perform as he has agreed.

\textsuperscript{27} It should be noted that the court, when it attaches these conditions to its order, is not compelling the defendant to perform in the same sense that a defendant would be compelled to perform if a mandatory injunction were issued. Rather, the court would depend on the deterrent effect the remedies would have on a defendant who entertains thoughts of disobeying the order.

\textsuperscript{28} See Record, p. 51, Hill v. Upper Miss. Towing Corp., 89 N.W.2d 654 (Minn. 1958).

\textsuperscript{29} Ibid.


\textsuperscript{31} Such a consent to judgment would be binding on the defendant. Western Realty v. Phelps, 86 Minn. 52, 90 N.W. 11 (1902); see Minneapolis Gas Light Co. v. City of Minneapolis, 140 Minn. 400, 168 N.W. 588 (1918). The defendant could not unilaterally revoke this agreement. Burnett v. Poage, 239 Iowa 31, 29 N.W.2d 431 (1947).

\textsuperscript{32} See, e.g., Madison v. Montgomery, 208 Ga. 199, 56 S.E.2d 292 (1949); see also Minn. Stat., \S\S 588.01(3)(3), 02 (1957).

\textsuperscript{33} E.g., Griffith v. State Bar, 40 Cal. 2d 470, 254 P.2d 22 (1953); cf. State Bd. of Examiners in Law v. Lane, 93 Minn. 425, 101 N.W. 613 (1904) (per curiam).
II. DOES THE CONDITIONAL DISMISSAL COMPORT
WITH THE REASONS FOR APPLYING FORUM NON
CONVENIENS?

A. Reasons for applying forum non conveniens

Several reasons exist for applying the doctrine: \(^{34}\) (1) The plaintiff may have selected the particular forum to harass the defendant. \(^{35}\) (2) Witnesses and evidence may be in another state hundreds of miles away, making a trial much more difficult and expensive than need be. \(^{36}\) (3) Court dockets may be crowded with foreign based causes of action, burdening courts and taxpayers with litigation with which they have little or no interest. \(^{37}\)

Although there are arguments for and against forum non conveniens itself, \(^{38}\) this Note assumes that it is a salutary doctrine. Whether the doctrine should be applied when the defendant is not amenable to involuntary process in the more appropriate forum depends on whether the reasons for applying the doctrine are equally valid when there is no such second forum.

(1) Harassment

When the plaintiff has a choice between two or more forums in which he can bring his action, and he chooses the one which is most inconvenient in order to harass the defendant, he is forum-shopping. \(^{39}\) Some authorities take the view that forum non conveniens may not be validly applied unless to relieve the defendant from forum-shopping. \(^{40}\) According to this view, the doctrine may be applied only when the defendant is amenable to involuntary process

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\(^{34}\) The leading case which spells out reasons for the application of forum non conveniens is Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). The basic purpose of the doctrine is, of course, to secure trial of the action in the most appropriate forum available, regardless of particular factors emphasized by a given court.

\(^{35}\) See, e.g., Gulf Oil Corp. v. Gilbert, supra note 34; O’Herin, Forum Non Conveniens in F.E.L.A. Cases, 1 DEFENSE L.J. 48 (1957).


\(^{37}\) See, e.g., De la Bouillerie v. De Vienne, 330 N.Y. 60, 89 N.E.2d 15 (1949); Blair, supra note 1.


\(^{39}\) Although a plaintiff may be said to be forum-shopping when he is selecting a forum that will be of most benefit to him, as, for example, because the state has a reputation for generous verdicts, this Note uses it in the sense of vexatious forum-shopping, with an eye to harassing the defendant.

in more than one forum, since otherwise the plaintiff, having no choice of forums, could not be accused of forum-shopping.

However, the plaintiff may be forum-shopping even though originally he has only one forum if, before he commences the action, the defendant executes and delivers a consent to jurisdiction in a more convenient forum. Since the plaintiff would then have two forums in which to commence the action a choice of one to harass the defendant would be forum-shopping. If the plaintiff commences his action before the defendant is able to offer to appear in the more convenient forum, it cannot be said that the plaintiff is forum-shopping. But if the plaintiff chooses to remain in the forum to harass the defendant after he has received prompt notice of the defendant’s willingness to consent to appear in another forum and pay any costs already incurred by the plaintiff, he is engaged in the same type of conduct condemned as forum-shopping where he has a choice of forums originally. The harassment may be equally as great in either case.

(2) Convenience and expense of trial

When convenience of parties and witnesses and expenses of trial are considerations in determining whether an action should be dismissed under forum non conveniens, these considerations remain the same whether or not the defendant is amenable to involuntary process in another forum. If the defendant’s amenability is made a prerequisite to the application of the doctrine, the trial judge must look to local law of jurisdiction in another forum to determine whether he may dismiss the pending action, even if he feels that the action would be more appropriately tried in another forum.

For example, suppose X, a resident of Minnesota, struck and injured a Boston resident, Y, while riding a bicycle on a Boston public street. Immediately thereafter X left Massachusetts and returned to Minnesota, where Y brought suit against him. Even assuming that the case were one appropriate for trial in Massachusetts because witnesses and sources of proof were there, the action could not have been dismissed by a Minnesota trial court following the Hill rule even upon X’s consent to appear in a Massachusetts court since X was not amenable to involuntary process there. Yet, if all facts were identical except that X was driving a car instead of riding a bicycle, the action could have been dismissed because of X’s amenability to involuntary process under the Massachusetts motor vehicle statute.41

41. Mass. Ann. Laws, ch. 90, § 3A (Supp. 1958). This statute provides that by operating a motor vehicle on the highways of Massachusetts a nonresident is deemed to have appointed the registrar of motor vehicles his attorney for service of process.
It is clear that the success of a motion to dismiss on grounds of forum non conveniens in a Minnesota trial court is dependent upon the local law of Massachusetts. Whether a Minnesota court may apply forum non conveniens to this case which would be more appropriately tried in Massachusetts depends on such a tenuous distinction as whether X was riding a bicycle or driving an automobile. Whatever relevance this distinction has for the legislature of Massachusetts in formulating that state’s local law, it has no relevance here since the criteria of convenience of the parties and witnesses, and expenses of trial are exactly the same whether X was riding a bicycle or driving an automobile. Therefore, since forum non conveniens is a doctrine “which resists formalization and looks to the realities which make for doing justice,” to permit a conditional dismissal in the case of X v. Y comports with a purpose of the doctrine which emphasizes convenience of parties and witnesses, and expenses of trial.

(3) Convenience of the court

It might be argued that when the criterion is convenience of the court, an action should almost never be dismissed when the defendant is not amenable to involuntary process in another forum since in such a situation a domiciliary is almost invariably involved; therefore the state has a legitimate interest in the dispute and should not dismiss.

This argument is not sound for two reasons. First, even though the defendant is not amenable to involuntary process in “another forum” he is not necessarily a domiciliary of the original forum.

42. This is true not only in the hypothetical example posed in the text, but under Minnesota law as set down in the Hill case.
44. The logic is as follows: Since many states provide for service of process on domiciliaries who are out of the state, Ehrenzweig, Conflict of Laws, 95 (1959), the defendant who is not amenable to involuntary process in “another forum” almost certainly must be a domiciliary of the original forum, or some other state would be able to subject him to its domiciliary statute.
45. That is, since a domiciliary presumably contributes to the support of the courts by paying taxes, the courts should be open to him in order that he may have his disputes heard in his “home” forum.
46. It is not necessary to conclude that a defendant must be a domiciliary of the original forum just because a court may say, as the court did in the Hill case, 89 N.W.2d 684, 680 (Minn. 1958), that the defendant is not “amenable to involuntary process in more than one jurisdiction at the time the suit is started.” (Emphasis added.) Although that statement was true upon the facts of Hill, what the court obviously meant was simply that the defendant was not amenable to involuntary process in the more appropriate (not merely another) forum. The following

arising out of any accident in which he may be involved while operating such a motor vehicle in Massachusetts. This statute provides a means whereby a non-resident can be subjected to in personam jurisdiction even though he is not physically present within the forum. Hess v. Pawloski, 274 U.S. 352 (1927).
42. This is true not only in the hypothetical example posed in the text, but under Minnesota law as set down in the Hill case.
Second, even if the defendant is a domiciliary of the original forum, the court probably would not have a sufficient interest, from this fact alone, to justify retention of jurisdiction. The defendant is the party seeking to avoid the jurisdiction of the court of the original forum; it would be tenuous indeed to base the deciding interest of the court on a defendant who wants to leave the forum.

B. Independent arguments

1. It could be argued that to apply forum non conveniens when the defendant is not amenable to involuntary process in the more convenient forum gives the defendant a delaying tactic. In addition to the delay which the plaintiff suffers by unsuccessfully attempting to bring his action in the second forum, he may also encounter considerable delay in the original forum upon recommencement if he has lost his place on the calendar. Of course, this argument takes on merit here only where the defendant does not appear in the second forum, since if he does appear the delay is no greater than if the defendant were amenable to involuntary process there. In either case the plaintiff would have to wait his turn in the second forum.

The answer to this delay argument lies in the stringency of the example illustrates that even though a court might use such language, the defendant could very well be a domiciliary of some third forum:

Suppose the facts in Hill were such that the defendant corporation was domiciled in Alaska and did business in Minnesota, so as to have been amenable to involuntary process in both states, when one of its agents committed a tort in Texas, where the defendant was not amenable to involuntary process. If the action were brought in Minnesota but Texas happened to be the most appropriate forum, it would have been ridiculous to permit a dismissal simply because the defendant was amenable to involuntary process in "another forum"—Alaska, which had no real connection with the case. Even though it would have satisfied the literal requirement of the court since "another forum" would have been available, it seems clear from the tenor of the Hill opinion that the Minnesota court would not have permitted a dismissal on grounds of forum non conveniens under such a state of facts. The requirement of the Hill case is not that the defendant merely be amenable to involuntary process in some other forum; he must be so amenable in the more appropriate forum.

47. Of course, the forum may have interests independent of the fact that the defendant is a domiciliary. However, this Note will not treat these independent interests.

48. The plaintiff could lose his place on the calendar if the defendant waited until the trial stage to raise the defense of forum non conveniens. This is unusual, and the court would most likely deny the motion when presented at such a late stage in the proceedings unless the defendant's reason for seeking a dismissal were extremely compelling. There seems to be no justification, outside of a rare change in circumstances such as a mass migration of key witnesses to a distant state, for even permitting the defendant to raise forum non conveniens after the answer stage. However, in New York, cases have been dismissed when the defense was raised at trial. See, e.g., Waiskoski v. Philadelphia & R. C. & I. Co., 159 N.Y.Supp. 906 (App. Div. 1916); and even on appeal, on the court's own motion. See, e.g., Collard v. Beach, 81 N.Y.Supp. 619 (App. Div. 1903). For a discussion and additional cases see Barrett, supra note 2, at 418.
remedies which the court may provide. It is unlikely that a defendant will attempt to use the dismissal for delaying purposes when doing so could lead to a default judgment, a contempt proceeding, or disbarment of his attorney. Further, the court can, as it should in every forum non conveniens case, weigh the possibilities of delay when deciding whether the defendant's original motion for dismissal should be granted. Thus, the defendant would be tempted to use a conditional dismissal as a delaying tactic only where the court does not provide adequate remedies for noncompliance with the dismissal order.

2. In the *Hill* case the Minnesota court said that a conditional dismissal "in effect transfers an action to a separate court under a separate sovereignty. . . ." The court knew of "no authority" for such an interstate "transfer." The court was not accurate in calling a conditional dismissal a transfer, since the so-called "transferee forum" is under no binding obligation to accept the case. At any rate, a conditional dismissal or an "interstate transfer," if the

49. See text accompanying notes 32-33 supra.
50. 89 N.W.2d at 658.
51. Id. at 659.
52. State courts have discretion to refuse to exercise their jurisdiction, as long as they do not arbitrarily or discriminatorily refuse to do so. See Miles v. Illinois Central R.R., 315 U.S. 698, 704 (1942); Douglas v. New Haven R.R., 279 U.S. 377, 387 (1929); Barret, supra note 2, at 389-90; Blair, supra note 1, at 8-19.
However, a federal court may not refuse to accept a case transferred under 28 U.S.C. § 1404(a) (1952). See Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955). Section 1404(a) permits a federal district court, "for the convenience of parties and witnesses, in the interest of justice . . . [to] transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1952).
The reviser's notes to this section say "subsection (a) was drafted in accordance with the doctrine of forum non conveniens. . . ." But the Supreme Court held, in Norwood v. Kirkpatrick, supra, that forum non conveniens and § 1404(a) are not the same. The Court said the "harshest result" of forum non conveniens was tempered by § 1404(a) which permits transfers on a "lesser showing of inconvenience" than forum non conveniens which calls for dismissal. Id. at 32.
However, many of the same considerations apply to the situations where a state court must decide whether to apply forum non conveniens when the defendant is not amenable to involuntary process in the more appropriate forum, and where a federal court must decide whether it may transfer an action under § 1404(a) to a district where the action could not have been brought originally, but where it could now be brought because of the defendant's consent to appear there. Compare Paramount Pictures v. Rooney, 186 F.2d 111 (3d Cir. 1950) with Blaski v. Hoffman, 260 F.2d 317 (7th Cir. 1958), cert. granted, 27 U.S.L. Week 2336 (U.S. Feb. 24, 1959) (No. 597). A recent case note in 45 Va. L. Rev. 291 (1959) discusses the Blaski case and the relation between forum non conveniens and § 1404(a).
However, the author assumes that the doctrine of forum non conveniens is settled on the side of the Minnesota rule to the effect that an action may not be dismissed on grounds of forum non conveniens "unless the transferee [query, can even a conditional dismissal be said to be a "transfer"?] forum had jurisdiction of the person of the defendant, regardless of defendant's waiver [consent]." Id. at 292. (Emphasis added.) That the doctrine of forum non conveniens is not settled is evident since *Hill* and *Vargas* are directly opposed. Therefore, an analogy to forum non convenien-
court would call it such, should stand or fall on its merits, rather than being condemned merely because it is something new in the law.

3. Another argument against permitting a conditional dismissal when the defendant is not amenable to involuntary process in the more appropriate forum is that execution of a judgment for the plaintiff may be somewhat easier in a forum in which the defendant is amenable to involuntary process because of the greater likelihood that the defendant may own property located there. Although the plaintiff could sue on a foreign judgment in the state where the property is located, it would be more inconvenient and expensive to do so than to sue in the state in which the property is located and execute the judgment there.

This argument is not convincing. By a proper conditional dismissal the court can protect this interest of the plaintiff by simply requiring the defendant to post a bond in the second forum equal to the value of any property attached in the first forum. The plaintiff then would be able to execute a judgment gained in the second forum with as much ease as if he had gained it in the original forum.

Conclusion

The decision of the New Jersey court in the Vargas case was based on a proper and desirable interpretation of the doctrine of forum non conveniens. A conditional dismissal on grounds of forum non conveniens upon the defendant’s consent to appear in the more appropriate forum, even though he is not amenable to involuntary process there, comports fully with the reasons for applying the doctrine. The New Jersey rule leaves application of forum non conveniens to the sound discretion of the trial court.

The rule declared by the Minnesota court in the Hill case is unfortunate in that it engravts a double standard on the doctrine.

Some articles and notes which discuss various ramifications of § 1404(a) are, Black and Black, Injustices in the Federal Forum Non Conveniens Rule, 3 Utah L. Rev. 314 (1953); Keeffe, Venue and Removal Jokers in the New Federal Judicial Code, 38 Va. L. Rev. 569 (1952); Comment, 41 Calif. L. Rev. 507 (1953); Note, 51 Colum. L. Rev. 762 (1951); Note, 24 Geo. Wash. L. Rev. 208 (1955).

53. It is clear from the holding of the Hill case that the Minnesota court looks with a jaundiced eye on the doctrine of forum non conveniens. See 89 N.W.2d 654 (Minn. 1958). It seems likely that if another opportunity to further restrict the doctrine presents itself in a future case, the court will not pass it by. See 43 Minn. L. Rev. 160, 162 (1958).

It seems that the court regrets Johnson v. Chicago, B. & Q.R.R., 243 Minn. 58, 66 N.W.2d 763 (1954), which overruled Boright v. Chicago, R.I. & P. Ry., 180 Minn. 52, 230 N.W. 457 (1930), where the court had sanctioned importing of actions into Minnesota in these words: “it always has been our holding that our courts are open to those from other states for the trial of transitory causes of action whether
A Minnesota trial court must first look to see if the prerequisite of the defendant's amenability to involuntary process in the more appropriate forum is complied with; then, assuming this prerequisite is met and the court may apply the doctrine, the court can look at the equities of the case to determine whether it should apply forum non conveniens and dismiss. The effect of the Hill case is to say to the trial courts of Minnesota: "you may apply forum non conveniens only in cases where the prerequisite is met, regardless whether the case is one in which the doctrine should be applied."

Such a rule denies a trial court the power to administer justice in forum non conveniens cases unless an arbitrary and mechanical prerequisite is met. The Minnesota rule "is hardly one to commend itself for general acceptance."54

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54. Foster, supra note 53, at 60.