



9-1981

Piper Aircraft v. Reyno

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

Recommended Citation

Piper Aircraft v. Reyno. Supreme Court Case Files Collection. Box 84. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Conflict with CA 2, and
case is important.

Reply brief:
nothing new.
you might
join 3.

Airplane accident happened
in Scotland. Repts., administrators
of estates of ~~the~~ victims, sued in
Calif. Suit was transferred to Pa,
& the DC determined on forum
non conveniens - holding that ~~the~~
~~a~~ case could best be tried where
accident occurred.

CA 3 reversed. It found that
Scottish courts may not apply "strict

PRELIMINARY MEMORANDUM

February 20, 1981, Conference
List 1, Sheet 3

No. 80-848

PIPER AIRCRAFT CO.

v.

REYNO, Adm'x

No. 80-883

HARTZELL PROPELLER,
INC.

v.

REYNO, Adm'x

liability; &
Then held that forum
non conveniens cannot
apply to transfer a case
Cert to CA 3 (Adams, Van Dusen,
Higginbotham)
to a juris. The law of
Federal/Civil Timely
which is less favorable
to plaintiff.
SAME

SAME

SAME

1. In these curved-lined cases, petrs challenge CA 3's
holding that forum non conveniens may not be invoked if the
alternate forum would apply law less favorable to the plaintiff.

An interesting question, and a conflict, but I doubt the need to resolve
the question is pressing. Inclined to deny. JPB

2. FACTS AND HOLDING BELOW. These cases arise out of an airplane crash in Scotland in 1976 in which six passengers and the pilot were killed. The aircraft involved was manufactured by Petr Piper Aircraft and its propellers had been made by Petr Hartzell Propeller. The aircraft had been owned by one Scottish company and serviced by another for seven years prior to the crash.

Resp, the American administratrix of the passengers' estates, filed this action against petrs¹ in Calif courts, asserting liability on the basis of strict liability and negligence. Petrs removed the action to USDC for CD Cal. Hartzell moved to dismiss for want of personal jurisdiction under Calif law, and Piper moved for a transfer to MD Pa. The DC granted the transfer and quashed service of process to Hartzell; Hartzell was reserved in Pa, where personal jurisdiction existed. Petrs then moved for dismissal on the basis of forum non conveniens. The DC agreed on the condition, which petrs accepted, that petrs would submit to service of process in Scotland and waive any statute-of-limitations claims in Scottish courts. The DC based its decision on the location of the accident and the remains of the wreckage; the familiarity of Scottish courts with the topography, should it be relevant; the familiarity of Scottish courts with Scottish law, which would apply to the claim against Hartzell; the difficulties and expense of compelling the appearance of Scottish witnesses, if any; the Scottish citizenship and residence of the real plaintiffs in interest; and the real plaintiffs'

¹The manufacturer of the engine also was named as a deft but was dismissed.

participation in an action against the operator and the servicer of the plane, then pending in Scottish courts.

On appeal by resp, CA 3 reversed.² It held that although DC decisions on forum non conveniens are reviewed only for abuse of the district judge's discretion, that discretion must be evaluated in light of the heavy burden a deft carries to overcome the pltf's tradition right to select the forum. After a lengthy discussion of choice-of-law doctrines in Pa and Calif, the CA determined that Pa law, which includes strict liability, would govern the action if it were to proceed in the USDC. Scottish law may provide only a negligence action and not strict liability, but Scotland surely has no interest in preventing its citizens from recovering under a higher standard applicable to the deft in its home jurisdiction. The CA remarked:

"a dismissal for forum non conveniences, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.' Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the use claim to which she is entitled here, would dismissal be justified." No. 80-848, Petn at 22a-23a (quoting De Mateos v. Texaco, Inc., 562 F.2d 895, 899 (CA3 1977), cert denied, 435 U.S. 904 (1978)) (footnote omitted).

Holding firms liable under the law of the jurisdiction where they regularly transact business is not unfair, no matter where the injury occurred. There was no evidence of difficulty in obtaining the appearance of any witness petrs were planning to call. There also was no indication that the topography around the accident scene was important or could not be proved by

²As a preliminary matter, CA 3 held that petrs had not waived their right to raise forum non conveniens by seeking the move to MD Pa.

testimonial evidence. Petrs would not be exposed to inconsistent judgments, for Scottish courts recognize res judicata.

3. CONTENTIONS. Petrs believe the CA has rendered a decision directly conflicting with cases from CA 2 and conflicting with the principles underlying prior decisions of this Court. In Fitzgerald v. Texaco, Inc., 521 F.2d 448 (CA2 1975), cert denied, 423 U.S. 1052 (1976), CA 2 held:

"A district court has discretion to dismiss an action under the doctrine of forum non conveniens, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. . . . A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, including the choice of law." Id., at 453.

CA 3, by contrast, has made the choice of law the dispositive factor, as suggested in the passage quoted above. This approach conflicts with Canada Malting Co. v. Paterson Steamships, Ltd., 285 U.S. 413, 419-420 (1932), where this Court declined to examine choice-of-law factors in approving a dismissal for forum non conveniens.

Allowing foreigners to sue American companies in American courts simply because American law improves their chances of success puts American firms at a severe disadvantage when competing with foreign firms in foreign markets. The CA's decision thus conflicts with this Court's recognition in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), that "[w]e cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." Id., at 9. Failure to correct CA 3's view will have serious consequences to American industry's overseas operations.

Finally, Hartzell challenges the CA's requirement a deft show what witnesses it would be hampered in calling. A forum non conveniens claim is presently early in litigation, before discovery reveals all the witnesses to be called. Detailed disclosure at this point is impossible, as CA 2 recognized in Fitzgerald, supra, at 451 n. 3.

Resp replies that petrs failed to meet the heavy burden a deft asserting forum non conveniens must carry. The CA evaluated relevant factors listed in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1974), and reached a correct decision. The controlling importance of choice of law derives from Van Dusen v. Barrack, 376 U.S. 612 (1964), which held that a transfer under 28 U.S.C. § 1404(a) is not permissible if it would change the applicable law. CA 3 has simply translated that decision into the comparable context of forum non conveniens. Moreover, the decision does not conflict with Fitzgerald, for there the American deft was a corporation owning the direct owner of a ship operated and managed by another company; the connection, therefore, was tenuous.

4. DISCUSSION. Petrs have cited a direct conflict between CAs 2 and 3. The CA 3 opinion indicates that it gives controlling weight to the law to applied and allows a case to continue despite inconvenience if the plaintiff would not fair so well in a foreign forum. As petrs point out, this effectively abolishes forum non conveniens, for a pltf would never select a forum where he would expect to fair worse than he would at home. Resp's distinction of Fitzgerald is specious. The deft there could have been--and was--subject to the jurisdiction of an American court with a more favorable rule of law; that ends the

case under the rule CA 3 has articulated.

The question now becomes whether this conflict merits resolution at this time by this Court. The parties do not indicate the frequency with which this problem arises, although Petr Hartzell noted that it had found fewer than 100 cases in researching the problem. The problem nonetheless is significant, particularly if foreign plts begin filing their American cases in CA 3 with more frequency to ensure application of the CA 3 rule.

There is a response.

01/18/81

Ale

Opinion in petn

Adams

PRELIMINARY MEMORANDUM

February 20, 1981
List 1, Sheet 3

Cert to CA 3
(Adams, Van Dusen,
Higginbotham)

No. 80-883

HARTZELL PROPELLER,
INC.

v.

REYNO, Adm'x

Federal/Civil

Timely

Please see Preliminary Memorandum in No. 80-848 -
Piper Aircraft Co. v. Reyno, Adm'x.

1/19/81

Ale

May 18, 1981

Dear Al:

As my former firm is still in this case, please mark me out of the following case which appeared on the May 14, 1981, Conference:

80-1592 Pain v. United Technologies Corp.,
List 3, Sheet 3

Sincerely,

Mr. Alexander L. Stevas

LFP/lab

cc: The Chief Justice
Mr. Justice Stevens

NOTE: At the Conference on May 14, 1981, the Conference voted - without my participation - to hold United Technologies Corp. for 80-848, Piper Aircraft Co., and 80-883, Hartzell Propeller, Inc.

May 18, 1981

Dear Al:

As my former firm is still in this case, please mark me out of the following case which appeared on the May 14, 1981, Conference:

80-1592 Pain v. United Technologies Corp.,
List 3, Sheet 3

Sincerely,

Mr. Alexander L. Stevas

LFP/lab

cc: The Chief Justice
Mr. Justice Stevens

NOTE: At the Conference on May 14, 1981, the Conference voted - without my participation - to hold United Technologies Corp. for 80-848, Piper Aircraft Co., and 80-883, Hartzell Propeller, Inc.

a Piper aircraft, with Hartzell propellers, crashed in Scotland, killing only residents of Scotland. The survivors (heirs) ~~are~~ are also Scottish residents.

This suit, orig. brought by Reiter (accepted personal representative by Calif Ct) in Calif. was removed to Pa (home district of Hartzell). & then Reiter moved to dismiss on forum non conveniens grounds.

BENCH MEMORANDUM

The DC dismissed but CA3 reversed.

To: Mr. Justice Powell

August 26, 1981

From: Mary Becker

No. 80-848, Piper Aircraft Co. v. Gaynell Reyno &

No. 80-883, Hartzell Propeller, Inc. v. Gaynell Reyno

Questions Presented

The major question is whether a court should refuse to dismiss a suit for forum non conveniens when the substantive law of the more convenient forum is less favorable to the pltf than the law of the inconvenient forum.

In order to address that issue in this diversity case, it may be appropriate to first determine whether forum non conveniens is a question of federal procedure or of state law.

The final issue is whether a non-resident alien pltf has as strong an interest in a chosen forum as a citizen or resident of the that forum.

See my summary of this first memo.

2.

TABLE OF CONTENTS

I.	<u>BACKGROUND</u>	3
A.	Histoical Origins of <u>Forum non Conveniens</u>	3
B.	§1404 Narrows the Scope of the Doctrine	7
C.	Facts and Decision Below	8
II.	<u>DISCUSSION</u>	10
A.	<u>Forum non Conveniens</u> : Federal Procedure or State Law? . .	10
1.	<u>Reaching the question</u>	10
2.	<u>The merits of the question</u>	13
B.	The Proper Scope of <u>Forum non Conveniens</u>	16
1.	<u>A change in substantive law</u>	17
(a)	Controlling weight	17
(i)	<u>Van-Dusen</u>	18
(ii)	<u>DeMateos</u>	19
(iii)	<u>The public interest</u>	20
(iv)	<u>Supreme Court precedent</u>	24
(b)	One factor	25
2.	<u>The deference due a non-resident alien</u>	27
III.	<u>CONCLUSION</u>	29

I. BACKGROUND

A. HISTORICAL ORIGINS

news to me
The doctrine of forum non conveniens originated in Scotland. It was originally termed "forum non competens" and was thought to be a question of a court's power or jurisdiction. By 1845, however, the question was seen as whether a court should decline to exercise its jurisdiction, and the English words "inconvenient forum" were used to point out the inaccuracy of the traditional Latin form. "Forum non conveniens" was used for the first time in the latter part of the nineteenth century as a neo-Latin translation of the English phrase familiar to Scottish judges. See Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908, 909 (1947).

In England, there was little need to plea forum non conveniens at early common law because English courts did not entertain international conflicts. A rule keeping "foreign causes" out of English courts was necessary because a jury familiar with a foreign controversy would not be available for trial of the action. When English traders began to extend their commercial activities over the seas during the fourteenth century, however, the Chancery Court of Admiralty extended its jurisdiction to their disputes. By the middle of the sixteenth century, that court was competent to try disputes involving only mercantile dealings abroad. See Cheshire's Private International Law at 33-34 (9th ed. 1974).

By the end of the sixteenth century, the common law courts were competing for this jurisdiction. Common law courts were able to try these cases because the jury now heard the testimony of

witnesses rather than relying solely on its own knowlege.

Initially, English courts only heard cases in which at least some of the operative facts had occurred in England, but eventually the courts tried cases connected solely with a foreign country provided there was no need for a jury from a foreign neighborhood. See id. at 34.

Despite the expansion of English jurisdiction, English courts did not adopt the doctrine of forum non conveniens. The Court of Chancery would, however, stay an action to prevent multiple suits. Originally, this remedy was available only when another action was pending. See Braucher, supra, at 910-11. During the present century, however, English courts began to stay actions in inconvenient forums in the absence of a pending action in the convenient forum, and there is little difference today between the operation of the two principles. See, e.g., The Atlantic Star, [1973] 2 W.L.R. 795 (H.L.(E.)); Logan v. Bank of Scotland, [1906] 1 K.B. 141.

The willingness of English courts to determine disputes with little in the way of an "English connection" seems to have parralleled the expansion, and subsequent contraction, of the empire. During the days of expansion, English courts extended their jurisdiction ever farther but would only apply a forum-non-conveniens-type doctrine when another action was actually pending; as the expansion ended and the empire contracted, English courts began to apply a doctrine equivalent to traditional forum non conveniens.

American state courts have always dismissed suits for

forum-non-conveniens reasons, but, prior to the publication of the classic American article on the subject in 1929, Blair, The Doctrine of Forum non Conveniens in Anglo-American law, 29 Col. L. Rev. 1 (1929), ^{state courts} they did not consciously apply either the term or the doctrine developed in Scotland.¹

Blair grouped the state-court cases dismissing for forum non conveniens in terms of their rationales: (1) availability of witnesses; (2) unfairness to a state's own citizens who should not have to support the resolution of disputes more properly resolved in another forum; (3) the "inextricable union" of right and remedy in a foreign forum; and (4) miscellaneous cases refusing to become embroiled in questions best resolved in the courts of the convenient forum, such as those dealing with the internal affairs of a foreign corporation (hereinafter "internal-affairs cases") or the validity of another state's revenue laws. See id. at 23-29.

Although the doctrine of forum non conveniens first appeared in the state courts, the decisions of this Court have ^{Supreme Court} ^{case have} ^{dominated} the area since at least 1932 when two important cases were handed down, Canada Malting Co. v. Paterson Steamships, 285 U.S. 413 ^{the} (1932) (applying forum non conveniens in an admiralty case) and Rogers v. Guaranty Trust Co., 288 U.S. 123 (1932) (upholding dismissal of diversity action under "internal-affairs" forum non conveniens where state courts would also have dismissed the action). ^{area}

¹ Blair was reminded "Moliere's M. Jourdain who found he had been speaking prose all his life without knowing it." Blair, supra at 21-22 referring to "Le Bourgeois Gentilhomme," Act II. Sc. vi.

The classic formulation of the doctrine, cited in every treatise and countless state-court decisions, appears in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). In Gilbert, a Virginia resident sued a Pennsylvania corporation in New York city to recover damages in tort for a fire which had destroyed the pltf's property in Virginia. According to the pltf, the Pa. corporation had negligently caused the fire when delivering gasoline to the pltf's Virginia warehouse. New York was chosen because the pltf thought a New York jury would be more generous than one in Lynchburg. The D.Ct. dismissed the suit and the the CA2 reversed. *Gilbert - lead case*

This Court reinstated the district court's dismissal, and listed the following factors as relevant to a forum-non-conveniens decision: (1) the private interest of the litigant in the chosen forum; (2) the ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of viewing the premises if relevant; and (5) "all other practical problems that make trial of a case easy, expeditious and inexpensive." Id. at 508. *The fine relevant factors*

The Court stated that unless the balance is strongly in favor of the deft, the pltf should remain in his chosen forum but concluded that, in the case before it, the balance favored the deft. In reaching this decision, the Court noted that everything relevant to the accident was in Virginia and rejected the pltf's assertion that jury generosity should be considered in weighing his interest in the chosen forum. *Balance remains in favor of TT's right to chose forum*

Although forum non conveniens is largely controlled by Supreme Court cases, the Court has explicitly avoided deciding

In Gilbert, this Court rejected the argument that juries in N.Y. were more generous than those in Lynchburg, Va.

whether federal or state forum-non-conveniens law controls in *decided whether fed or state law controls*
diversity cases. Gilbert and Rogers were both diversity cases
reviewing dismissals on forum-non-conveniens grounds by district
courts when local courts would also have dismissed on that basis.
Technically, the Court only held that, in such circumstances, a
federal court is not bound to extend its jurisdiction.²

B. §1404 Narrows the Scope of Forum non Conveniens

§ 1404

Shortly after Gilbert, Congress enacted §1404 of the
Judicial Code of 1948, which ended the applicability of forum non
conveniens to suits in federal court unless the alternative forum is
foreign. §1404(a) provides that "[f]or the convenience of the
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." 28 U.S.C. §1404(a).

In this relaxation--not codification--of traditional forum
non conveniens, the harshness of the traditional doctrine is *§1404 made it easier for a Δ to obtain a transfer.*
softened for both the pltf and the deft. See Norwood v.
Kirkpatrick, 349 U.S. 29 (1955). For the deft, it is easier to *Δ to obtain a transfer.*
obtain a §1404 transfer than it had been to obtain a forum-non-
conveniens dismissal. For the pltf, transfer, rather than *But "transfer" to the convenient forum, not "dismissal" is the remedy*
dismissal, is the appropriate remedy; although modern courts
typically require a deft to agree to waive statutes of limitations

² In Gilbert, which was decided after Erie v. Tomkins, 304
U.S. 64 (1938) (Rogers is pre-Erie), the Court explicitly stated
that it was not necessary to reach the issue because the state
and federal rules did not differ and "[i]t would not be
profitable, therefore, to pursue inquiry as to the source from
which our rule must flow." 330 U.S. at 509. *let time of Gilbert state + fed rule did not differ.*

and submit to service of process in the convenient forum, the remedy, in earlier times, was a simple dismissal. See id.

The major issue in the case at bar involves the weight to be given the fact that the substantive law of the convenient forum is less favorable to the pltf than the law of the inconvenient forum. Traditionally, courts have not given this factor any weight.³ As the discussion above suggests, forum non conveniens addresses the suitability of a forum for the trial of an action. It does not concern itself with whether the pltf would receive more relief in one forum or another. In recent times, however, some courts have held that the chances of the pltf's being able to recover under the applicable law of the alternative forum is one factor to be considered in deciding whether a case should be dismissed for forum non conveniens. See, e.g., Fitzgerald v. Texaco, Inc., 521 F. 2d 448 (CA2 1975), cert den., 423 U.S. 1052 (1976), discussed infra at 27.

The
major
issue
here

It } yes

C. The Facts and the Decision Below

In 1976 a Piper plane crashed in the Scottish highlands at Firthybrig Head near Moffat while flying from Blackpool to Perth. The pilot and all five passengers on the chartered aircraft were killed. The cause of the accident was either pilot error, a problem with the propeller manufactured by petr Hartzell, the way in which petr Piper designed the aircraft, petr Piper's failure to give

Facts
this
case

³ This is slightly overstated. A competing principle was also applied in traditional forum-non-conveniens analysis and served to limit the scope of the principle stated in text. See discussion at 26 infra.

proper instructions on maintaining and flying the plane, or a combination of the above. If the propeller, manufactured by in Ohio, did not operate properly, it was either because it was defective when it was placed in the plane at Piper's Pennsylvania plant in 1968 or because it was not maintained properly in Britain between 1968 and the crash in 1976. The aircraft was designed and manufactured in Pa. See Joint Appendix (JA) at All9 n.2 (CA3's description).

The decedents and their survivors are all Scottish citizens. Under the law of Scotland, a personal representative (rather than a survivor) cannot sue for wrongful death: only survivors can sue for damages attributable to loss of support and loss of society. See JA at 18-20 (affidavit of Scottish "Writer to the Signet" (lawyer) on relevant "Scots Law.")

In 1977, resp Gaynell Reyno, a legal secretary in California, brought this suit in California state court. Ms. Reyno is employed by the lawyers retained by the estates of the five passengers. She had been appointed administratrix of those estates by a California probate court thirteen days earlier. Petr Piper petitioned for removal of the action to federal court and it was transferred to the C.D. Calif. In that court, petr Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, for transfer of the action to the M.D. Pa. where Hartzell could be served. Piper also moved for the transfer. The C.D. Calif. quashed the service on Hartzell and transferred the case to the M.D. Pa. where Hartzell was served.

On what basis?

Propeller Co

Petr Hartzell and Piper then moved for dismissal for forum

non conveniens. The motion was granted (Herman, J.), but the CA3 ^{was assumed but} (Adams, Van Dusen, and Higgenbotham) reversed. The CA3 ^{CA3} noted that ^{reversed} the pltf might not be able to recover from the debts-petrs in Scotland because such recovery requires negligence; Scots Law does not impose strict liability on manufacturers. This would make little difference if the U.S. court applied Scots Law, but the CA3 concluded that, under the applicable choice-of-law laws, the M.D.Pa. would apply Pa. or Ohio law. The CA3 then reversed because a forum-non-conveniens dismissal should not result in a change in the applicable law. JA at A139-140. The CA3 did not reach the federal-question question. It merely noted that the forum-non-conveniens rules of Calif., Pa., and the U.S. were the same, and it therefore made no difference whose rule was applied.

II. DISCUSSION

A. Forum non Conveniens: Federal Procedure or State Law?

This issue is given cursory treatment by the parties, probably because this Court has given it such treatment in the past. I will first discuss why I think this Court might want to hold that forum non conveniens is a question of federal procedure rather than of state law before ruling on its precise contours, and I will then discuss why it is a question of federal procedure. ^{Many think it is Fed. Q}

1. Reaching the question. Initially it seemed clear to me that this Court should not, in a diversity case, state the substance of a doctrine without first determining whether the doctrine involves a question of state law or of federal procedure. In this case, the CA3 held that it did not matter whose rule it was since all the rules are the same. That is fine at the CA level, but this

Court does not say what the law is unless the question is federal-- and this Court does not usually use its resources to correct federal courts that have misapplied state law. If forum non conveniens in diversity cases is a state-law question, it would be more appropriate to so hold and then remand for a careful application of the relevant state law by the CA3. (State cases on point could be quickly cited, and the case remanded in light of them.)

There is another reason this Court might think it appropriate to state that the doctrine is a question of federal procedure before correcting the CA3's application of it. Both the states whose law might apply, Calif. and Pa., use the standard articulated in Gilbert and do so citing Gilbert. See, e.g., Calif. Code Civ. Proc. Annot. §410.30 (codification of forum non conveniens; first case cited by reporter is Gilbert); Archibald v. Cinerama Hotels, 15 Cal.3d 853, 860 (1976) (citing Gilbert); Rini v. New York 29 Pa. 235, 239 (1968) (same); Plum v. Tampax, Inc., 399 Pa. 553, 560 (1960) (same). Insofar as its ruling would be based on a correcting the CA3's application of state law, this Court would be stating that the CA3 wrongly interpreted Calif.'s and Pa.'s correct interpretation of a doctrine laid down (correctly?) in earlier Supreme Court cases. This is unnecessarily convoluted. Supreme Court cases control the area and, if the Court agrees that forum non conveniens is a question of federal procedure in diversity cases as discussed below, it would be simpler, and certainly more straightforward, to reach the issue in the case at bar.⁴

⁴ One reason federal cases dominate this area may be that a case with a forum-non-conveniens issue is not likely to be

On the other hand, there is a tradition of ruling on the substance of forum non conveniens without reaching the federal-procedure question. In Gilbert, for example, the Court did precisely that. Technically, the Gilbert Court only held that when a federal courts sits in diversity in a state that would dismiss for forum non conveniens, the federal court can also dismiss for forum non conveniens, and the CA therefore erred in reversing the D.Ct.'s dismissal. The CA had held, however, that state law did not control, and, if the Court disagreed with that holding, the traditional result would have been a remand to the CA to allow it to review the D.Ct.'s dismissal under the applicable state law. See, e.g., Meredith v. Winter Haven, 320 U.S. 228 (1943).

Gilbert is not the only case in which this Court has ruled on the substance of forum non conveniens in a diversity case without deciding whether it is a question of federal procedure and without more than cursory citation of state-law cases. See Koster v. Lumbermens Mutual Co., 330 U.S. 518 (1946); Williams v. Green Bay & W.R. Co., 326 U.S. 549 (1945).

Given this tradition, it might be appropriate to simply cite a few Pa. and Calif. cases to illustrate that state law does not differ from federal forum-non-conveniens law and duck the question again. The substance-procedure distinction is not the easiest doctrine to apply, and, since Calif. and Pa. rely primarily

between residents of the same state and will often end up in federal court. The state courts probably do not see many of these cases and are therefore likely to follow the rules adopted by other courts when the issue arises.

on the forum-non-conveniens rules developed by this Court, there may be little point in breaking with tradition to reach the issue.

2. The merits of the question. Under Erie, a federal court sitting in diversity is bound to follow the substantive law that would be followed in the local courts. On questions of procedure, however, federal law controls. In determining whether a question is one of substance or procedure, the Court no longer relies solely on the rather mechanical "outcome" test (the question is one of substance if it could change the outcome of the litigation) laid down in the early cases, e.g., Guaranty Trust Co. v. New York, 326 U.S. 99 (1945). Even if the outcome could be different under a federal rule, the federal rule will be used if it serves a strong federal interest and the state has little interest in the application of its rule in a federal court. See Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 525 (1958).

Erie rule applies only to substantive, not procedural Qs

There are two major interests served by application of forum non conveniens. The first is judicial economy and fairness to taxpayers who should not have to support resolution of a dispute in their forum when another forum can resolve the dispute with greater ease and efficiency. Some forum-non-conveniens dismissals serve an additional interest (besides economy) in having the dispute resolved in the forum whose law will control. In the internal-affairs cases, for example, state courts doubt their ability to control the internal affairs of foreign corporations. See Blair, supra, at 22 n.105. Similarly, courts use the doctrine to avoid ruling on the policies of a sister state--such as the validity of another state's

revenue laws. See id. at 29.

These interests are not involved when a federal court applies a rule of forum non conveniens different from the state's rule. The only possible conflict arises when a state would dismiss and the federal court nevertheless entertains the action.⁵ In such a situation, it is, however, the federal judicial system's resources that are used. And the federal system's relationship with, and ability to control, actions within another state should determine whether the court considers an internal-affairs- or revenue-type case. Commentators uniformly agree that federal law should control in diversity cases because the state in which the federal court sits has no real interest in whether the federal court will entertain a suit it would not. See, e.g., 1A, Moore's Federal Practice ¶10.317[3] at 3232-33 (2d ed. 1948); 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3828 at 181 & n.19 (1976); Note, Erie, Forum non Conveniens and Choice of Law in Diversity Cases, 53 Va. L. Rev. 380 (1967). Professor Moore notes that forum non conveniens is really a "venue question": where should a case be tried? He concludes that it is therefore appropriate to resolve it by reference to federal law in diversity cases just like any other venue question.⁶

⁵ If the state court would consider the action, no conflict is possible. The pltf is free to sue in state court after being dismissed from the federal court. In actions removed to the federal court from the state court, the federal court should remand if it does not want to consider the action. Cf. Cates v. Allen, 149 U.S. 451 (1893) (remand to state court with jurisdiction appropriate after removal to a federal court of equity without jurisdiction).

The only case I have seen applying state law to a forum-non-conveniens decision is Weiss v. Routh, 149 F. 2d 193 (CA2 1945). There, Learned Hand applied the outcome test, and I agree that under that test forum non conveniens appears to be a question of state law. But, as many comentators have noted, "almost every procedural rule may have a substantial effect on the outcome of a case." C. Wright, Handbook of the Law of the Federal Courts at 256 (3rd ed. 1976). If one looks at forum non conveniens in terms of both venue and the lack of state interest in application of a state forum-non-conveniens rules in federal courtrooms, the question appears to be one of procedure rather than substance.

Indeed, the CA2 itself did not follow Weiss in its initial consideration of Gilbert. See Gilbert v. Gulf Oil Corp., 153 F. 2d 883, 885 (CA2 1946) (Augustus Hand, Clark, & Frank) (Augustus Hand dissenting). In Gilbert the CA2 distinguished Weiss on the ground that it was an internal-affairs case and the reason for the forum-non-conveniens dismissal was therefore more substantive than the venue question presented in Gilbert, a tort case, see discussion at 6 supra. Id.⁷

At first I thought that a state might have an interest in

⁶ This point is insufficient in itself. If states had strong interests in whose forum-non-conveniens rules applied in federal courts, the fact that forum non conveniens is essentially a form of venue would not be determinative. §1404 is a form of venue, yet the Van-Dusen Court perceived Erie concerns in §1404 transfers. See discussion at 18 infra.

⁷ The CA2 also indicated some doubt as to whether Weiss was properly decided. Id.

protecting its manufacturers from liability to outsiders when the ^{controls} state's liability standard is stricter than that of the alternative forum. That interest is, however, more properly served by the state's choice-of-law law, and a federal court sitting in diversity does apply state choice of law.

In summary, since forum non conveniens is really a question of venue and since application of state forum-non-conveniens law in federal courts is of no interest to a state, forum non conveniens is properly regarded as a question of federal law in diversity cases.

B. The Proper Scope of Forum non Conveniens *What is its Scope?*

When there is a difference in the substantive laws of the chosen forum and the convenient forum, the CA3 held that the pltf is entitled to the more favorable rule of the chosen forum. I will first discuss whether that fact should be given controlling weight and will then discuss whether it should be regarded as one factor in a forum-non-conveniens decision. The CA3 also held that a non-resident alien pltf's choice of an American forum is entitled to the same weight as that accorded a resident or citizen. This holding is not firmly supported in the caselaw, and I will therefore discuss whether the CA3 also erred in this regard.⁸

CA3
went
all
way
with
TTS

^{you} ⁸ The Court granted cert on the single question presented by petr Piper in its petition and on the first question presented by petr Hartzell. These two questions could be read as only covering the weight to be given the change-in-substantive-law factor. Indeed, petr Hartzell's second question, explicitly excluded from the grant of cert, is whether a non-resident alien is entitled to the same deference accorded a citizen selecting a home forum. I have nevertheless discussed the deference issue because the parties do and because it could be considered implicit in the question on which cert was granted. In granting cert only on question 1, the Court's main concern may have been to avoid the incredibly involved conflict-of-laws analysis

But
grant of
cert was
limited

1. A change in the substantive law. (a) Controlling weight. The CA3 went through all the Gilbert factors and resp Reyno argues that the case need not be read as giving controlling weight to the difference in substantive law. I do not agree. If the CA3 had given any weight to the Gilbert factors, I do not see how it could possibly have reached the result it did.⁹ Moreover, the CA3 said the difference in substantive law was controlling:

"[a] dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.' Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the pltf the benefit of the claim to which she is entitled here, would dismissal be justified." JA at 140 (quoting De Mateos v. Texaco, Inc., 562 F. 2d 895, 899 (CA3 1977), cert. denied, 435 U.S. 904 (1978)) (footnote omitted).

To support this aspect of its decision, the CA3 relied on a Supreme Court case, Van Dusen v. Barrack, 376 U.S. 612 (1964), and an earlier CA2 decision, De-Mateos v. Texaco, Inc., 562 F. 2d 895 undertaken by the CA3.

⁹ The CA3 recognized that defts would not be able to subpoena the witnesses in Britain. Although there were no eyewitnesses to the accident, there were witnesses to the pilot's skill, the way in which the aircraft had been maintained, etc. It is seems unlikely that the pilot's employer or those responsible for the plane's maintainance would voluntarily come over to this country to help American manufacturers defend this suit. This factor had been weighed heavily by the D.Ct., and that court did not indicate any need for witness lists in a case as extreme as this one, but the CA3 discounted this factor because defts had not submitted such lists. JA at A133. The CA3 was, however, willing to give weight to the fact that an expert witness of the pltf lived in Calif. JA at A134.

Defts would also be able to implead the appropriate third-party defts (such as the maintainance co.) in an action in Britain, but not here. This factor also received only cursory treatment from the CA3. J.A. at A135-37.

(CA3 1977). In addition, at least implicitly, the CA3 relied on the "public interest" in imposing strict liability on American manufacturers. After analyzing these factors, I will discuss relevant Supreme Court precedent ignored by the CA3.

(i) Van-Dusen. In Van-Dusen, the Court construed §1404, which provides for transfers between districts when appropriate for the convenience of parties and witnesses and in the interest of justice. As discussed above, see 7-8 supra, this is not a codification, but a relaxation, of the common law doctrine of forum non conveniens. The question before the Court in Van-Dusen was whether a §1404 transfer should change the choice-of-law law applied by the district court in diversity cases from the choice-of-law law of the transferor state to the choice-of-law law of the transferee state. The Court concluded that a §1404 transfer should not result in a change in the applicable law and held that after a §1404 transfer, the transferee court should begin with the choice-of-law law of the transferor state. The Court explicitly stated that it was not addressing whether a forum-non-conveniens dismissal would or should be governed by similar concerns. 376 U.S. at 640.

The Court analyzed the question before it in terms of Erie and noted that §1404 would become a forum-shopping instrument if transfers under it changed the applicable law. Erie analysis indicated that the fact that the suit was transferred should not change the applicable state law.¹⁰

¹⁰ Because §1404 transfers can be obtained with greater ease than forum-non-conveniens dismissals, the state interests served by application of state law to cases transferred under §1404 are not as limited as the interests served by application

The instant case began with a forum-non-conveniens dismissal, not a §1404 transfer. Scotland is, of course, free to begin its choice-of-law analysis with the law of the "dismissing" forum. The question before this Court is whether the courts of this country, rather than those of Scotland, will dictate whose choice-of-law law will be the starting point in resolving this controversy.

The policies considered by the Court in Van-Dusen do not support the CA3's application of Van-Dusen to the case at bar. Erie is of no relevance when the convenient forum is Scotland since constitutional limits and Erie policies do not extend that far. The danger of forum shopping actually cuts the other way: the CA3's decision will encourage foreign pltf's to bring suits to this country whenever one of our fifty forums offers an advantage over the convenient forum.¹¹

(11) DeMateos. The CA3 also relied on the so-called "holding" of the CA3 in an earlier decision, DeMateos v. Texaco, Inc., 562 F. 2d 895 (3rd Cir. 1977), cert den., 435 U.S. 904 (1978). In DeMateos, the court noted that the principle of Van-Dusen should

of state forum-non-conveniens law in federal courts. See discussion of interest served by application of state forum-non-conveniens law in federal courts at 13-14 supra.

¹¹ In a forum-non-conveniens dispute, any resolution is going to encourage some forum shopping by someone since what is being determined is which forum will be used. On balance, the rule of the CA3 will encourage more forum shopping than would a contrary rule. On a forum-non-conveniens motion, the deft bears a heavy burden in overcoming the pltf's right to his chosen forum. Given this burden and current long-arm statutes, a rule favoring forum-shopping by pltf's will cause more shopping than one encouraging forum-non-conveniens motions by defts.

apply to forum-non-conveniens decisions. The CA3 concluded that the dismissal in the case before it would not, however, change the applicable law and therefore affirmed it. The CA3 did not give any serious consideration to whether Van-Dusen should apply in dismissals for forum non conveniens.

(iii) The public interest. The CA3 held that a forum-non-conveniens dismissal should not result in a change in the applicable law. It was therefore necessary to analyze the case before it to determine whether a dismissal would result in such a change. This conflict-of-law analysis is not included in the grant of cert, and, thoretically, the CA3 would have reached the same decision regardless of the strength of Scotland's interest in this matter. At least implicitly, however, the CA3's decision rests the relative strenghts and weaknesses of the interests of the various forums in the law to be applied. On a policy basis, it is this portion of the CA3's opinion that is most relevant to determining what the law should be.

Let me begin with a brief discussion of the conflict-of-laws analysis. The major conflict¹² in applicable law is the standard of liability: strict in this coutry versus a negligence standard in Scotland. This difference would not, of course, matter

¹² There is another difference in the applicable laws, but it does not present any real issue. The law of Scotland allows survivors, but not personal representatives, to sue for loss of support and companionship due to wrongful death. As the CA3 noted in its decision, however, if Scots Law should control on this question, the D.Ct. need only allow for the substitution of parties under Fed. R. Civ. Proc. 17(a). See JA at A150.

Discussion of
The major conflict is between "strict" liability in U.S. & "negligence" standard in Scotland

if the American forum applied Scots Law, but the CA3 found that Pa. choice of law would apply to petr Hartzell and that Pa. would choose either Pa. or Ohio law on liability.¹³ The CA3 found that Calif. choice of law would apply to petr Piper and that Calif. would choose Pa. law on liability.¹⁴ The bottom line, as percieved by the CA3, was that Scotland could not possibly object to a recovery by its citizens and that American jurisdictions have a strong interest in applying strict liability to their manufacturers to ensure maximum safety.

The problems with this analysis are numerous. As petr Hartzell points out, this appears to be the first case ever to hold

¹³ Pa. choice-of-law applies to petr Hartzell because the action against Hartzell began in Pa., not Calif. See discussion of procedural background at 9 supra.

The CA3's conclusion that Pa. would not choose Scots Law seems wrong. See, e.g., Schomajcz v. Hummel Chemical Co., 524 F. 2d 19 (3rd Cir. 1975); Armstrong Cork Co. v. Drott Manuf. Co., 533 F. Supp. 477 (W.D. Pa. 1974). (These cases applying Pa. choice-of-law tend to be in federal courts because in such cases the parties are not usually both from Pa.)

The CA3 purported to follow Pa.'s choice of law but determined it largely on the basis of intuition. See JA at A153-54. The D.Ct. concluded that Pa. would apply Scots Law. See JA at A82-84.

¹⁴ The suit against Piper began in Calif. and was transfered to Pa. in a §1404 transfer. Under Van-Dusen, discussed supra at 9, the M.D.Pa. therefore began with the choice-of-law law of Calif., the transferor state.

I doubt that Calif. would apply Pa. law, rather than Scots Law--especially if Petr Hartzell is right in saying this is the first case ever to hold that a manufacturer's state's interest outweighs the interest of the place of injury and of the victim's domicile, see discussion in text at 21-22 infra. Petr Piper has not addressed the Calif. choice-of-law question (cert was not granted on it), however, and I have not looked up any Calif. cases on this point. The D.Ct. concluded that Calif. would apply Scots Law. See JA at A83-84.

that the interest of the manufacturer's forum outweighs the interest of either the place of the accident or of the victim's residence. See Brief of Petr Hartzell (on merits) at 40 (one of the most trustworthy briefs I have ever seen). One could argue that other cases may not have involved situations in which the manufacturer's forum is more generous in allowing recovery than the forum of the accident or of the victim, but that would mean adoption of a rule always favoring the pltf: if any forum with any connection with the accident imposes liability on these particular facts, the pltf wins. In the past, conflicts analysis has worked in a more even-handed way.

Moreover, the CA3 misses the major purpose of strict liability. Safety is maximized by negligence liability; strict liability sacrifices some safety incentive (contributory negligence is no defense, so users have less than the appropriate incentive to use a product safely) to achieve another goal: compensation of victims, thus spreading of the cost of the accident among consumers of the good. In this connection, petr Hartzell cites several Ohio decisions stating that the purpose of Ohio products liability is protection of Ohio consumers. See Brief of Petr Hartzell (on merits) at 42.

Moreover, the CA3 ignored Scotland's interest in imposing a negligence standard within its borders. As discussed above, a negligence standard maximizes safety incentives for pilots, mechanics, air traffic controllers, and all others involved in maintaining and operating an aircraft in Scottish airspace. Aside from safety considerations, Scotland also has a right to control who

} yes

bears the costs of accidents. When strict liability applies, the price of an article includes the cost of projected accidents caused by the negligence of other consumers. If Scotland wants planes available in the market without this cost element, it should be able to so provide regardless of where the planes are manufactured.

As this Court noted in The Breman v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971), in the context of honoring a forum-selection clause in a contract, "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved in our courts. ... We cannot have trade and commerce in world markets ... exclusively on our terms, governed by our laws, and resolved in our courts."

The CA3's decision should, therefore, be rejected on a policy basis. The CA3 relied on non-existent Ohio and Pa. interests and ignored the strong interests of a foreign nation.¹⁵

¹⁵ Petr Hartzell notes additional policy considerations ignored by the CA3. See Brief of Petr Hartzell (on merits) at 44-48. I will only give a brief summary of the more important points. Foreign pltf's will be able to shop for, not just an American, but the perfect American forum. There are fifty to choose from, and major corporations conducting any substantial international trade are likely to be subject to service of process in most, if not all, of them under modern long-arm statutes. Indeed, the increased scope of these statutes suggests that courts should be more, not less, amenable to forum-non-conveniens motions.

Our jury system is widely perceived as less than the ideal way in which to determine damages. We should, perhaps, hesitate before extending its reach. It should also be noted that the American jury adds much to the attraction our system has for foreign pltf's.

Our contingency-fee system is an additional attraction to foreign pltf's whose local forums do not provide a cost-free gamble at a personal-injury award.

*Policy
considerations
do not
support
CA3*

(iv) Supreme Court precedent. Moreover, the CA3 ignored earlier decisions of this Court inconsistent with its holding. Canada Malting, the early admiralty case, Gilbert, and Koster v. Lumbermens Mutual Co., 330 U.S. 518 (1946) (a companion case to Gilbert, all suggest that a change in substantive law should be given little, if any, weight in deciding a forum-non-conveniens motion). CA3 ignored

In Canada Malting, the Canadian owner of one vessel brought a libel action against another Canadian vessel with which the first vessel had collided. The vessels were unintentionally and fortuitously in the U.S. waters of Lake Superior at the time of the collision. The pltf brought the action in an American court to take advantage of a more favorable substantive rule. The Court did not consider this relevant: "We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the D.Ct. to decline to assume jurisdiction over the controversy." 285 U.S. at 419-20 (Brandeis, J.).

In Gilbert, the Court noted that one reason for the doctrine of forum non conveniens is that it allows cases to be tried by a court more likely to be familiar with the applicable law and eliminates the need for choice-of-law analysis in an inconvenient forum. 330 U.S. at 509. In Koster, a companion case to Gilbert, the Court noted that "[t]he ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." 330 U.S. at 527.

Canada Malting is, I think, the most persuasive of these

decisions; unlike Gilbert and Koster, the relevant portion of the case cannot be described as dicta.

In Canada Malting, the Court considered irrelevant the fact that a more favorable substantive rule applied in American courts than in the convenient forum. I do not think it can be distinguished from the instant case on the ground that the vessels were only in U.S. waters fortuitously whereas the Piper aircraft was manufactured in this country in a more deliberate manner. The United States has a strong interest in ensuring maximum safety on its waters and this can best be accomplished if those responsible for accidents therein are amenable to suit here. Such a rule would maximize awareness of where one's vessel is, a necessary prerequisite to maximizing safety incentives within our waters. If anything, this interest seems stronger than those found by the CA3 in the instant case.

The only other way to distinguish Canada Malting is on the ground that it was an admiralty case between foreigners. The point just made about maximizing safety in U.S. waters would still obtain, however, and the CA3 held that a foreign pltf's forum selection is entitled to the same deference accorded an American pltf's. The propriety of this aspect of the CA3's decision is discussed at 27-29 infra.

(b) One factor. In one recent case, the CA2 held that a change in substantive law is one factor to be considered in balancing the various forum-non-conveniens interests. See Fitzgerald v. Texaco, 521 F. 2d 448, 453 (CA2 1975), cert denied, 423 U.S. 1052 (1976). Although the Canada Malting Court gave no weight

CA2

to this factor in the case before it¹⁶, I am not sure such an approach is possible in every case.

The problem with according no weight, ever, to a change in substantive law is that traditional forum non conveniens is premised on the existence of an alternative forum. If there were no other forum in which the pltf could sue, dismissal for forum non conveniens was never appropriate.¹⁷ There is a tension between this aspect of the doctrine and the principle that the substantive law of the other forum is not relevant to a forum-non-conveniens decision. If the pltf cannot sue on the facts alleged in another forum, one can say that there is no other available forum, though the reason the pltf cannot recover might be a difference in substantive law, e.g., strict liability in the chosen forum versus a negligence standard in the convenient forum. Although I think that there is a difference between these two principles and that neither should be abandoned, it may be difficult to formulate a bright-line test identifying cases as being properly controlled by one rather than the other.

¹⁶ Canadian Malting did not explicitly hold that no weight should ever, in any circumstances, be accorded this factor; rather, it held that on the facts before it, the D. Ct. had not abused its discretion regardless of the applicable Canadian law. See portion of opinion quoted at 24 supra.

¹⁷ I am not at all sure what the limits of this aspect of the doctrine were. Traditionally, the fact that the statute of limitations had run did not make the other forum "unavailable." I have the impression that the other forum must have been willing, at some point, to entertain this cause of action when described in fairly general terms (so that slight differences in substantive law would not result in refusal to grant the dismissal).

In the Fitzgerald case, cited above, the CA2 considered differences in law one factor to be considered in determining a forum-non-conveniens motion. In that case, the pltf was less likely to recover under the maritime law of England than under the U.S. rule because, under the English rule, a vessel's owner is not liable after he notifies a governmental agency of the wrecking of his vessel and requests that the government, or its agency, take action to locate and mark the wreck. 521 F. 2d at 452. (Under U.S. law, he is liable unless he has taken all reasonable precautions to prevent injury to another.) The CA2 recognized this difference as a relevant consideration, but held that the fact of that the pltf's chances were better in the inconvenient forum did not mean that the D.Ct. had abused its discretion in dismissing the case. The court noted that "[a] contrary ruling would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover."

The approach taken by the CA2 in Fitzgerald may be the best. One of the factors listed in Gilbert is the pltf's interest in the chosen forum, and this could be accorded more weight when there are major differences in substantive law at roughly the cause-of-action level. When, however, as in Canada Malting and the case at bar, the basic cause of action is recognized in the convenient forum, the precise substance of that forum's law should be of little relevance.

2. The deference due a non-resident alien. In the decision below, the CA3 held that pltfs who are non-resident aliens should be accorded the same weight as that accorded citizens or

residents of a forum. In so doing, the CA3 cited, see JA at A128-30, recent cases holding that an American citizen is entitled to no extra deference. As petr Hartzell quite properly points out, however, the recent trend is to reduce the deference given the forum citizen--that is, place no additional burden on the deft in proving the forum inconvenient when the pltf is American. Brief of Petr Hartzell at 16-17. See also, e.g., Note, Forum non Conveniens and American Plaintiffs in the Federal Courts, 47 U. Chi. L. Rev. 373 (1980). The CA3 did not follow that trend in the decision below. Instead, it accorded a non-resident alien the deference usually reserved for those who reside in the forum and placed the heavier burden on the deft in all cases.

In prior decisions, pre-dating the recent trend, this Court has accorded citizens and residents more deference in their selection of their home forum than that accorded others choosing it. See, e.g., Swift & Co. Packers v. Compania Columbiana del Caribe, 339 U.S. 684, 697 (1950) (A "suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."); Koster v. Lumbermen's Mutual Casualty Co., 330 U.S. 518, 524 (1947) ("In balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.") (emphasis added).

Whether or not one thinks citizens and residents are entitled to special deference may be essentially a judgment call. I think a strong argument can, however, be made for the old rule according such deference. The doctrine of forum non conveniens is

based on conservation of judicial resources and fairness to those whose money supports the forum. It is an exception to the usual rule that a court exercises its non-discretionary jurisdiction. There is, however, less need for this exception when the pltf is a member of the group supporting the forum. The courts of the chosen forum should, therefore, be more willing to entertain an action brought by a citizen or resident despite some inconvenience.¹⁸ / *yes*

III. CONCLUSION

As a threshold matter, the Court must decide whether to reach the question of which law, state or federal, determines a forum-non-conveniens decision in a diversity case. It would be analytically cleaner and more straightforward to reach this question before defining the substance of forum non conveniens, but this Court has traditionally ducked the issue in cases such as the one at bar.

If the Court does decides to reach the question, it will then be necessary to determine whether a federal court sitting in diversity should apply state or federal forum-non-conveniens law. Because the doctrine of forum non conveniens deals essentially with venue and because states have little, if any, interest in whether

¹⁸ It could be argued that this is an over-broad (and therefore unreasonable) restriction on access to a judicial system--citizens and residents get preferential treatment regardless of how much they support the system. All citizens and residents pay the tax required under the forum's tax code, however, and I see no difference between, on the one hand, making the forum especially available to all those subject to the forum's revenue laws and, on the other hand, providing social services for the poor within the forum but not for others--rich or poor--in another forum.

federal courts apply their forum-non-conveniens law, the question appears to be one of federal procedure rather than state law. *Yes*

Finally, the Court will address whether the CA3 erred in concluding that the dismissal for forum non conveniens was inappropriate in the instant case. The CA3 broke with all precedent in holding that a pltf is entitled to his chosen forum whenever a forum-non-conveniens dismissal would result in application of less favorable substantive rule. This approach would, to say the least, seriously erode the doctrine since pltf's--especially foreign pltf's--are unlikely to sue in an inconvenient American forum unless the American forum offers them an advantage. In addition, this rule ignores the strong interests foreign forums have in resolving disputes with which they have the dominant ties.

*CA3
ignores
forum-
non-
conveniens.*

The CA3 also broke with all precedent in according a non-resident alien the deference in forum selection accorded a citizen or resident suing in his home forum. Despite a recent trend in the lower courts to accord no special deference to either group, I think the old rule is the right one. Forum non conveniens is grounded on judicial efficiency and fairness to those supporting the forum. It is an exception to the usual principle that a court exercises its non-discretionary jurisdiction. There is simply less need for this exception when a member of the supporting group is using the forum.

lfp/ss 9/21/81

80-848 Piper Aircraft v. Reyno
80-883 Hartzell Propeller, Inc. v. Reyno

*Give head
Buck - of course.*

This is a brief and incomplete summary of Mary's excellent bench memo. A Piper aircraft, with Hartzell propellers, crashed in Scotland. The pilot and all five passengers were killed. The decedents and their survivors are all Scotch citizens. The plane was owned and maintained by a Scotch concern, and was based in Scotland.

In Scotland negligence principles would be applied to determine liability. In the United States, strict liability applies. Because of this, Reyno - the respondent - a California legal secretary unrelated to the deceased - was appointed personal representative. She brought this suit in California; it was removed to a federal district court in Pennsylvania, where Hartzell is domiciled. A motion to dismiss for forum non conveniens was granted by the DC. CA3 reversed in a rather remarkable decision.

The leading Supreme Court decisions on this doctrine [Canada Malting, 285 U.S. 413; Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (involving suit by a Lynchburg resident brought in New York because it was thought that a New York jury would be more generous than one in Lynchburg); and Koster v. Lumbermen's Mutual, 330 U.S. 518], all indicated - in varying degrees that differences in substantive law (e.g., in this case the difference between

strict liability and negligence) is not a factor to be given weight - certainly not controlling weight - in applying the doctrine. Indeed, Gilbert, the leading case that identified five factors to be considered, expressly said that the favorable substantive law should not be a relevant factor.

CA3, nevertheless - though purporting to apply Gilbert's 'factors' - expressly said that the difference between Scottish and American law was "controlling". (See Mary's memo p. 17)

We granted cert, by the terms of our grant, limited to the single question presented by Piper and the first question presented by Hartzell. Both of these can be read as covering only the weight to be given the "difference in substantive law". But subsidiary questions must be understood, and perhaps decided.

*Q of
our
grant*

First, Mary suggests the desirability of deciding expressly that "federal law should control" in a diversity case raising forum non conveniens issues. This Court's decisions have found it unnecessary, to this date, to decide this question. A good deal can be said for holding that federal law controls. Actually, forum non conveniens presents a question of venue. This is procedural, not substantive law, and therefore under Erie federal law controls.

*Actually,
a quest.
of venue*

Another question debated in the briefs, that implicitly is included in our grant, is whether in applying

the doctrine, federal courts as a matter of policy should treat foreign plaintiffs in the same way as U.S. plaintiffs. This is an important question because the cases establish that normally substantial weight is given to the right of a plaintiff to choose the forum. This can be rebutted by the Gilbert factors, but the burden is on the defendant. CA3 held that a foreign plaintiff is entitled to the same deference as a U.S. plaintiff with respect to choice of the forum. Again, CA3 ignores most of the existing authority.

Should foreign TTs be accorded same deference as U.S. TTs?

CA3 erred

On "policy grounds", strong arguments can be made contrary to CA3's position. Absent substantial reasons, we should not encourage foreign citizens to sue in American courts that are already overburdened. As this case illustrates, the degree of "convenience" often is far greater in the foreign country where witnesses and the parties are available. Assuring the appearance in an American court of witnesses abroad is impossible. Finally, foreign countries have an interest in applying their own law to accidents that occur within their borders. It should also be noted, contrary to CA3's view, that the negligence doctrine of Scotland is more conducive to the exercise of due care by airplane pilots, manufacturers, and maintenance crews than a doctrine of strict liability.

Why should we encourage foreign TTs to sue in U.S.

More ~~convenient~~ in Scotland

Can't subpoena Scottish witnesses

Scotish substantive law is more conducive to encouraging

Although I have not done credit to Mary's unusually helpful memo, I agree with her views that CA3 committed egregious error and should be reversed.

~~Scotish~~

October 9, 1981 Conference
Third Supplemental List

No. 80-883

HARTZELL PROPELLER, INC.

v.

REYNO, GAYNELL, ETC., et al.

See Memorandum No. 80-848.

10/8/81

Schlueter

PJC

Suggestion of Petitioner in
No. 80-883 of change in
Ownership

Court
Argued, 19...
Submitted, 19...

Voted on , 19 . . .
Assigned , 19 . . .
Announced , 19 . . .

No. 80-883

HARTZELL PROPELLER, INC.

VB.

REYNO

Grant
Mobur

[illegible]

No Action Needed
Schubert

Discum

October 9, 1981 Conference
Third Supplemental List

No. 80-848

PIPER AIRCRAFT CO.

v.

REYNO, GAYNELL, ETC., et al.

Suggestion of Petitioner
in No. 80-883 of Change
in Ownership

No. 80-883

HARTZELL PROPELLER, INC.

v.

REYNO, GAYNELL, ETC., et al.

(Same)

SUMMARY: Petr (defendant below) advises ^{1/} the Court that on July 7, 1981, it was acquired, through merger, by TRW, Inc. It is now conducting business as the Hartzell Propeller Division of TRW and claims that this corporate change will not in any way affect the legal issues before this Court or the rights and remedies of the

^{1/}Apparently petr has adopted in part the terminology of Rule 40.1 of this Court which permits one party to "suggest" the death of the other party.

The purchase of petr Piper by TRW has no effect on the issues before this Court. The Court's rules do not provide for a change in names in this precise situation. The Court could ⁽¹⁾ leave the names on the docket unchanged; ⁽²⁾ treat this filing as a motion ^{over}

parties.^{2/} Petr advances three alternatives for disposing of this matter: (1) Ignore the matter and defer the change in name of the party defendant to the court in which trial goes forward; (2) Treat it as a substitution of officials, Rule 40.3, and the change will take place automatically; or (3) Treat it as a substitution of parties under Rule 40.1 (death of party).

DISCUSSION: The petr's first option seems to be the most appropriate. Because the change will apparently not affect the outcome before this Court, there seems to be no need to actually substitute any party. If formal substitution is deemed appropriate, this Court should treat petr's suggestion as a motion to substitute and then grant it.

There is no response.

10/8/81

Schlueter

PJC

80-848 Piper a/c case 10/11
(See my memo of 9/21)

1. The DC granted Δs' motion to dismiss for forum non conveniens. CA3 reversed.
2. CA3 attributed controlling significance to fact that U.S. law (strict liability) is more favorable to TTs than ~~the~~ Scottish (negligence).
3. CA3 view in this respect is contrary to this Court's decisions, esp. in Canada Maloney. Also, Gulf Oil v Gilbert & Roster.
4. CA3 also erred in holding that same deference must be accorded choice of a foreign TT as that of U.S. TT.
5. We should hold that Fed law applies. Under Erie, Fed law applies to procedure. True is venue

80-848 PIPER AIRCRAFT v. REYNO
80-883 HARTZELL PROPELLER v. REYNO .

Argued 10/14/81

Fitzsimmons (Petr. Piper)

Same TTs have brought suit in Scotland vs Petr.

Relies heavily on DC's decision of dismissal.

Aircraft was mfg in Pa - Piper's principal place of business.

Relies on Gilbert

Gardner

Can't try case w/o witnesses from Scotland - + no way to compel attendance.

CA3 said Scottish Cts would apply Scotch law. See Op. p. 137, 139, 147.

Cathcart (Reser)

CA3 decided case on abuse of discretion - not on Scotch law.

Case involves a procedural rule.

Gardner (Reply)

Canada Malta controls. CA3
never mentioned this case.

Critical sentence

CA5 did not consider all of
five factors.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 15, 1981

80-848 Piper Aircraft v. Reyno
80-883 Hartzell Propeller v. Reyno

Dear Chief:

It came to my attention today that I may have a
recusal problem in the above cases.

Some weeks after we granted these cases, we held
for them a cert petition in 80-1592 Pain, et al v. United
Technologies Corp., a case in which CADC affirmed dismissal
for forum non conveniens of a suit involving a helicopter
crash in the North Sea (our Conference May 14, 1981). My
former law firm is counsel for the respondent in the case we
are now holding.

I enclose a memorandum, prepared by one of my
clerks, that addresses the question whether our decision in
Piper/Hartzell - however it may go - could affect Pain v.
United Technologies Corp. I think it is reasonably clear
that the cases are sufficiently different so that whether we
affirm or reverse Piper/Hartzell, our judgment will have no
effect on United Technologies Corp. The facts that
liability has been conceded in the latter case, and that the
witnesses on damages presumably live overseas, distinguish
the cases. I suppose the possibility remains, however, that
something written in Piper/Hartzell may be thought relevant
to United Technologies Corp.

I would like the judgment of the Conference as to
whether I should disqualify. I regret posing this question
late in the afternoon before Conference, especially since I
had put a reminder memorandum in my file last May when we
agreed to hold United Technologies Corp. I simply
overlooked my memo.

Sincerely,

Lewis

The Chief Justice
lfp/ss

cc: The Conference

meh 10/15/81

To: Mr. Justice Powell

From: Mary

In Re: No. 80-848, Piper Aircraft Co. v. Gaynell Reyno &
No. 80-883, Hartzell Propeller, Inc. v. Gaynell Reyno &
No. 80-1592, Jacqueline de Villoutreys Pain, et al. v.
United Technologies Corp.

It seems unlikely that the disposition of the Piper and Reyno cases will affect the outcome of the United Technologies case. In Piper and Reyno the CA3 overruled the grant of a forum-non-conueniens motion and held that the DC should have given more weight to a difference in substantive law (regarding liability) between the two forums.

In United Technologies, the deft manufacturer's helicopter crashed in the North Sea near Norway. The decedents were a French citizen and resident, a Nowegian citizen and resident, a British citizen and resident, an American residing in Norway, and a Norwegian resident with dual Norwegian-Canadian citizenship. In that case, the CADC upheld a conditional dismissal for forum non conueniens, but the circumstances were quite different from those presented in Piper. There, the deft American manufacturer stipulated to its liability and agreed to be bound by that

stipulation in the foreign forum. The only remaining issues were damages in wrongful death actions. Determination of these issues would turn on the decedents' health prior to the accident and likely future earnings; the CADC found that these issues would presumably turn on evidence presented by witnesses amenable to compulsory process in the countries where decedents had resided. The only reason the United Technologies petrs continue to fight for an American forum is that they would like an American jury.

There are two important distinctions between United Technologies and Piper. First, in Piper, the CA3 found that the lower court erred because it did not give sufficient weight to the petr's interest in the substantive law of the chosen forum. There is no such difference in United Technologies. In that decision, the CADC held that jury generosity should not change the outcome of a forum-non-conveniens motion, and in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 510 (1947), this Court also held that jury generosity is not relevant to a forum-non-conveniens decision.

The other difference is that in Piper, the evidence of any defect in manufacturing was in Pa. and Ohio. In United Technologies, liability for a defective product has been stipulated, and only determinations of actual damages will be heard in the foreign forum where the relevant information is presumably available.

Thus, neither of the interests the CA3 emphasized in reaching its decision--the pltf's interest in the substantive law of the chosen forum and the location in this country of evidence

relevant to establishing a design defect--is present in United Technologies.

There is one way in which Piper might affect United Technologies. In United Technologies, one of the pltfs was an American (the mother of the American who had been residing in Norway). In their petn for cert, petrs argue that the courts below erred in dismissing a suit brought by an American pltf. In Piper, there is some argument about the weight to be accorded a foreign pltf's selection of an American forum. There appears to be some uncertainty as to whether cert was granted on this issue. In any event, it might be addressed in the Court's decision. If it were, something might be said that would be relevant to the weight to be accorded an American pltf's selection of his home forum.

November 5, 1981

80-848 Piper Aircraft Company v. Reyno

Dear Thurgood:

Please show at the end of the next draft of your opinion that I took no part in the decision of this case.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



November 5, 1981

No. 80-848 Piper Aircraft Co. v. Reyno
No. 80-883 Hartzell Propeller v. Reyno

Dear Thurgood,

Please show at the end of the next draft of
your opinion that I took no part in the decision of this
case.

Sincerely,

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

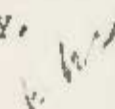
November 6, 1981 ✓

Re: No. 80-848 Piper Aircraft Co. v. Reyno
No. 80-883 Hartzell Propeller, Inc. v. Reyno

Dear Thurgood:

On the whole, I agree with your analysis of the forum non conveniens issue in these cases. I am troubled, however, by the last paragraph of Section II. In my mind, the paragraph gives too much latitude for the domestic forum to evaluate the legal system of the alternate forum. As written, a district court here could examine the sufficiency of the causes of action permitted by the alternate forum. This paragraph thus undercuts the point that a district court should have to engage in "complex exercises in comparative law." We should not permit a plaintiff to defeat a forum non conveniens motion by arguing that the foreign forum's substantive law is "unsatisfactory" by American standards. Rather, the district court's analysis of the law to be applied by the foreign forum should be limited to determining whether that forum would permit litigation on the subject matter in dispute. In addition, by focusing on whether the remedies provided by the alternative forum is inadequate or unsatisfactory, the paragraph implies that a plaintiff could defeat a motion by demonstrating that the statute of limitations has run in the alternate forum. Because it would have no remedy at all in the alternate forum, the plaintiff could argue that the district court may not dismiss the action on forum non conveniens grounds.

I am not wedded to any particular language in this regard, but I do think the language of that paragraph undercuts much of the excellent analysis that precedes it.

Sincerely, 

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 13, 1981



RE: Nos. 80-848 and 883 Piper Aircraft & Hartzell
Propeller v. Reyno

Dear John:

Please join me.

Sincerely,

Bill

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

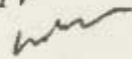
November 24, 1981

Re: No. 80-848 Piper Aircraft Co. v. Reyno
No. 80-883 Hartzell Propeller, Inc. v. Reyno

Dear Thurgood:

Subject to the minor revisions in footnote 21 which we have discussed being made, I now join your opinion.

Sincerely,



Justice Marshall

Copies to the Conference

December 2, 1981

80-848 Piper Aircraft v. Reyno

Dear Thurgood:

I note, on page 24 of your opinion in the above case that you state I "took no part in the consideration of this case".

As stated in my letter to you of November 5, this should read:

"Justice Powell took no part in the decision of this case."

I would appreciate you making this change.

Sincerely,

Justice Marshall

lfp/ss

506

[illegible]