4 HAPPIER HUNTING GROUNDS

When I was at home, I was in a better place.

—*SHAKESPEARE,* As You Like It

Ida Weitz of Victoria, Texas, had a son in the Marine Corps. She bought him a car to use at Camp Lejeune in North Carolina where he was stationed. One of his friends there borrowed the car and got into an accident with it, and the family of the accident victim decided to see a lawyer.

Injury lawyers spend a lot of time thinking about how to find new people to sue for old problems. In this case they could obviously sue the friend who drove the car and try to show he was negligent. Less obviously they could go after young Weitz, arguing that he should have known his friend was the sort of character who might get into an accident. The theory is called "negligent entrustment" and has made a lot of money for lawyers.

Trouble was, one young Marine was not likely to have much more money than another, and money, not blame, is often the real point of the exercise. Deeper pockets were needed. Why not Mrs. Weitz's? She had entrusted the car to her son knowing he might reentrust it to persons of unknown character. So she could be accused of negligence too. She had some insurance, and nothing says lawyers have to be content just with insurance either. In a 1989 case that provoked something of a public outcry, ninety-two-year-old Vermont widow Luella Wilson almost lost her house after lawyers got a $950,000 jury verdict against her; her offense, by coincidence also one of "negligent entrustment," had been to lend her great-nephew the money to buy a car that he later crashed.

Mrs. Weitz's lawyers hoped things would never reach that point, especially since they had what they thought was a very strong argument. It would be one thing to sue her in Texas where she lived, but these lawyers were trying to sue her in North Carolina. And she had never set foot in that state in her life. No matter, said a federal court of appeals in a landmark 1961 decision: she could properly be forced to come into North Carolina to stand trial under the state's "longarm" law.

Over the centuries no legal rules were framed as loftily or guarded as jealously as the rules on whether a court could exert rightful authority over you. The law of jurisdiction had the special solemnity of law that governs law, law meant to bind the courts themselves. A court can get the factual details of a case wrong and its errors may stand as permanent findings. It can mistake the law it is applying and its blunders will still obtain some deference from other courts. But if it oversteps its jurisdiction—so runs the older rule, at least—its verdict is void, a mere nullity, entitled to no respect from other courts; given to the winds. The law of jurisdiction sets the ultimate limit, if there is to be one, on who is to rule over whom.

In private lawsuits, for many centuries, the chief rule of jurisdiction was clear and straightforward. To sue someone you had to pay him a visit. You could not just denounce him to the first court that seemed convenient; you had to go to a court that was in some

sense his. The "most important principle of all municipal law of Anglo-Saxon origin," a Pennsylvania court sonorously declared in 1874, was "that a man shall only be liable to be called to answer for civil wrongs in the forum of his home, and tribunal of his vicinage." Actually the principle was ancient when the Anglo-Saxons came on the scene. The Roman law's pithy maxim was *actor forum rei sequitur*, "the plaintiff must pursue the defendant in his forum."

Why? Some thought it was a matter of consent. If you were nestling under a state's protective wing you could not complain about having to submit to its talons and beak. Others reduced the issue to one of raw physical power. Maryland courts took sole charge of suits against Maryland residents because their sheriffs were the ones who could compel them to stand trial. For much the same reasons they could hear a dispute over who owned a tract of land in Baltimore or a ship in its harbor, even if the owner were absent, because Maryland sheriffs could physically seize and dispose of the goods.

Framed thus in terms of the raw might of the sovereigns, the doctrine does not much sound like a bulwark of individual liberty. What was interesting was its corollary: by submitting to one sovereign, you could escape the whims of the others. By staying in Maryland you had nothing to worry about from the Virginia civil courts. Of course you might owe money in Virginia or have wronged someone there, and for that the Maryland courts and sheriffs would hold you to account. But first your Virginia opponents had to make proper application to the Maryland courts, lest Virginia entrench on the majesty of its sister state.

If the only courts that could try you were those of the place you *called* home, it would be too easy to frustrate your creditors by naming as your imaginary home some distant place. Instead a court's power over you was tied to your literal presence. The state you were physically in, even if just on a day trip, was the state where you could be sued at any moment. So a state line was something real and momentous. When you stepped across it the Indiana sheriffs lost their power over you and the Ohio sheriffs' power suddenly loomed large—however vexing that might be to you or your creditors.

The formality of these rights could (and sometimes still can) turn the "service of process" with which a lawsuit begins into a faintly ridiculous game of tag. Hard-pressed debtors retired to remote places, while syndicates of creditors kept agents at transit hubs who checked passenger lists and tagged unwary riders with process as they changed trains. (Long ago, when Sundays and holidays were off-limits for lawful tagging, much gadding about was done on those days.) A court upheld the tagging of a traveler at a Connecticut hotel although the whole point of choosing that place was to make the lawsuit hard for him to defend. Likewise held valid was the serving of a defendant with an Arkansas complaint while flying over the state in an airplane.

Fortunately, judges had ways of tempering the harshness of these rules for the innocent traveler. The judge in the place where you were tagged might let you go of his own accord, or your lawyers back home might get a judge there to order your hometown creditors to stop pestering you by use of distant actions. In either case, however, you got relief at the court's discretion, not by right, and one precondition would probably be your agreement to stand trial on the same charge at home.

Otherwise, a successful tag pretty much ended the jurisdictional game. If you skipped town after coming under a court's lawful dominion, it would enter a "default judgment" against you, and when your opponent tracked you down in another state you would have

no chance to reargue the merits: the U.S. Constitution requires states to give "full faith and credit" to each other's duly entered judgments.

For all their occasional gamesmanship, the old rules of jurisdiction had some definite advantages. They were easy to understand and follow: they basically let you know off the bat where you could sue or be sued. They also discouraged litigation. In disputes between persons at a distance from each other, the cost of travel and the little inertias of life cut against suing. Many lawsuits did not seem worth the trouble of taking to a distant forum, and were not filed at all.

It never seemed entirely fair that some people had to drop otherwise good cases because travel was such a bother. It seemed even less fair that they might have to drop good cases because they feared that the strange court they would visit would be biased against outsiders. Trouble is, these two sources of unfairness cannot be done away with; they can only be shifted. In a long-distance dispute, at least one side always has to travel and be an outsider upon arriving, like the bride coming to Yellow Sky. Earlier generations of Americans were more frightened of being summoned before an unfamiliar tribunal as an accused wrongdoer than of having to go there as an accuser. Maybe distant states could not always be relied on to lend a neighborly hand to the visiting complainant. But if so, could they be trusted not to plunder the visiting defendant? At least this way if you saw the courts of some state as corrupt or biased against people like you, you could stay out.

Of course lawyers searched for loopholes that would let them pull outsiders into local courts; and many state lawmakers and judges would have been glad to accommodate them. But through much of American history the Supreme Court steadfastly upheld the right not to be abducted to a distant court. It considered that right a crucial part of the due process of law guaranteed each American citizen by the Constitution. In a much-cited 1878 case called *Pennoyer* v. *Neff*, the Court declared that a judgment entered without proper jurisdiction could not be enforced even in the state where it had been issued, let alone anywhere else.

The right not to be sued except at home was, in short, a fullfledged constitutional right, one that has never been rolled back by any constitutional amendment. Had the courts been vigilant against its infringement we would enjoy it to this day.

The beginnings were modest and reasonable, more an evolution than an erosion. Almost from the start special rules had been applied to corporations, which can be in more than one place at a time. The worry was that a corporation might send salesmen into a state to peddle its bogus patent medicines or whatever, and then pull its cash receipts out before anyone got around to suing. Individuals or partnerships might get away with the same trick, of course, but what seemed new and unfair was that the same team could come in under the guise of a different corporate shell the next month. A state could pass a law requiring the out-of-state corporation that wanted to do business within its borders to appoint an ongoing local agent suitable for future tagging. If a corporation simply ignored that requirement, the offended state could sue in the corporation's home state for the violation of its laws; but in the meantime it could not throw open its own courts to suits against the wrongdoers.

The other major target of discontent under the old rules was the out-of-state driver who got into a local accident and escaped the state too fast to be tagged with process. The

problem as such was nothing new, having dated back to the days of the horse, but it seemed to be getting worse as the automobile made rapid interstate travel a pastime of the millions.

The first breaches were opened in the jurisdictional fortress by the creative use of ideas of tacit consent. Way back in 1856 the Court had ruled that if an unregistered corporation entered a state to do business, it could conveniently be *assumed* to have appointed a state official as local agent to be sued. And in 1927 it upheld a Massachusetts law providing that visiting motorists, like visiting corporations, tacitly consented to appoint local agents by the act of rolling across the state line.

There was something breezy in saying that a genuine bit of constitutional due process could be waived without any explicit consent. But the Court had closely limited reasons for its rulings. Driving on public roads was a privilege, and corporations were artificial creations. Since a state could keep people from driving or running incorporated businesses entirely, it could exercise the lesser power of allowing them on conditions. The Court emphasized that the Constitution protected people's natural liberty to go in and out of states for almost any purpose but these two, without fear of having to return to face suit. A 1918 Court opinion by Oliver Wendell Holmes reaffirmed that the Kentucky courts could not use the tacit-consent fiction to corral an unincorporated Illinois partnership that had done some business in the Bluegrass State.

Lawmakers, however, find tacit consent to be heady stuff. Even in this noisy world most people are still silent most of the time. If silence is consent, it would seem that the commodity of submission is being proffered in boundless supply. And now the long arm of the state courts, as it flexed more often, was growing muscular. New laws reached out to nonresident boat and plane operators as well as drivers. And lawyers began pushing at the bounds of what it meant for a corporation to have been "present" in a state and thus subject to its courts. What counted as being present? Hiring a fulltime employee? Or would a part-timer do the trick? Keeping a regular place of business? Or would a single advertising brochure tacked to a bulletin board be enough? It was universally conceded that a company had not entered a state when it merely accepted orders from buyers there and shipped them the goods. But what if it sent in a troubleshooter to investigate a complaint that a shipment was spoiled?

In the early 1940s the International Shoe Company of St. Louis had (as it thought) carefully arranged its affairs to stay out of unfamiliar courts. It kept no offices or agents in the state of Washington. It paid commissions to traveling salesmen who visited the state, but took care not to let them collect money or enter contracts on its behalf. Instead it provided them with one sample shoe each of a pair in various styles. The salesmen would show the samples to the managers of local shoe stores, who then placed direct orders for shoes from the International Shoe factories in Missouri and elsewhere. The state of Washington claimed jurisdiction over the company anyway, and the case went up to the U.S. Supreme Court.

By now the Court had tired of the fiction-on-fiction game of widening chinks in the constitutional wall that protected defendants. In its 1945 *International Shoe* decision it simply took a bulldozer to the offending structure. It announced a new, all-purpose rule of jurisdiction that would apply to companies and just as momentously to individuals as well. From now on, any state court could haul you in so long as you had "certain minimum contacts" with its territory. What sort of contacts might those be? Those such

that letting the suit go forward did not offend "traditional notions of fair play and substantial justice."

No one knew at the time what this language meant. No one knows to this day. Of course courts are supposed to aim for fair play and substantial justice, but a court whose orders stop there is a court left to its own devices. In the decades that followed the state courts began grabbing one outsider and then another and then another, and the Court turned down all chances to stop them. The lone exception for many years was a 1958 case where a Florida court had tried to get its hands on a Delaware trust fund, but that decision was criticized in the academic commentary and in time virtually ignored. In essence the federal court resigned control over its whole fractious state brood, like the beleaguered parent who was reduced to shouting, "Do whatever the hell you want— now let's see you disobey *that*."

The sudden overthrow of the old limits on jurisdiction vastly multiplied the options for filing suits. It meant people and businesses could be sued not only in places where they had been active in the past but also in places they had never visited at all but with which they had unspecified "contacts" as they went about their affairs. The only question would be whether taking them there would offend the sense of fairness of the court that would be trying them.

The business world felt the first effects. Courts quickly seized jurisdiction over enterprises that had never entered a state but did ship goods regularly into it, purchase supplies from within it, or accept checks from customers who lived in it. The most profound impact was not on the really big companies, which with their sprawling nationwide presence were already used to being sued in many places, but on the typical small to mid-sized firm that serves a nationwide market from a single location. Suddenly these companies found themselves defending suits in Skowhegan and Winnemucca, Kissimmee and Juneau. It mattered not how tiny a share of overall business they had done in a state: an Illinois company was made to go to the U.S. Virgin Islands to be sued though only $1,800 of its $35 million in annual sales came from that territory. A magazine publisher might find itself sued not just where its editing or printing took place, but wherever it had subscribers or newsstand sales.

Nor was there much hope of staying out of a state's courts by screening its citizens from one's customer list, because indirect contacts counted too. After a bus crash an English company that made component parts found itself compelled to stand trial in Hawaii even though it had no direct commercial connections with that island state. The court explained that a businessman should expect "to defend his product wherever he himself has placed it, either directly or through the normal distributive channels of trade." Everyone in the chain of commerce was vulnerable. Auto dealers and car rental companies began to be sued in distant states to which customers had driven their cars.

Surprising things were happening to individuals as well. Tennessee, Iowa, Washington, and California grabbed jurisdiction over out-of-state men who, it was alleged, had fathered children during time spent in the state. California passed a law providing that anyone who had sexual intercourse within its borders automatically submitted to later suit in its courts. Nor was it necessary, as Ida Weitz discovered, for an individual to visit a state physically to experience its justice. In 1984 the Supreme Court ruled that a Florida journalist, like the national magazine he wrote for, could be made to

go to trial in California, where his allegedly libelous articles had circulated. New York collared a California man who had put in telephone bids at a Manhattan auction, and lawyers warned that a single letter or phone call into a state might bring you into its courts as a defendant. Tacit consent, it seemed, could now be given in the privacy of one's own home.

State judges and state legislators took turns pushing out the frontiers of their jurisdiction. It became common for the judges simply to announce that they were assuming this or that new power over residents of other states. Where they hesitated, state legislators passed "long-arm" laws. In 1973 California invented a vacuum attachment that worked beautifully to pull in loose cases from around the country. The state's legislature simply declared that its courts were empowered with such jurisdiction as was consistent with due process—or, as a cynic might have put it, with as much as they could constitutionally get away with.

Of course judges could still turn away suits when they felt like it. An Oregon court said no when a Portland movie theater operator wanted to force Elizabeth Taylor to come to town to answer his charges that her off-the-set shenanigans had hurt the box office receipts of the film *Cleopatra*. Similarly, a federal court rebuffed a woman who had moved from South Dakota to Idaho, gotten her doctor to renew her prescription by telephone, and then decided she wanted to sue him in Idaho. The court said it thought it would be too bad if every doctor had to worry "where the patient may carry the consequences of his treatment and in what distant lands he may be called upon to defend it. The traveling public," it noted, "would be ill served were the treatment of local doctors confined to so much aspirin as would get the patient into the next state."

But this was a mercy rather than a solid right. Either court could easily have ruled the other way had it been so inclined. All the Oregon court would have had to assert, for example, was that Miss Taylor should have foreseen that her alleged misconduct would harm the business of theaters in Oregon, as for that matter in the rest of the Western world.

One rule of thumb that emerged was that a defendant with a "pervasive multi-state business" could be taken pretty much anywhere. For everyone else, the general pattern was that if a court wanted you it could probably have you, at least for those of your activities that were connected with the state; if it could find a few contacts more, it might assert "general" jurisdiction over your misdeeds wherever committed.

One of the chief assumptions behind long-arm jurisdiction was that many long-distance lawsuits are filed against big businesses, or, as in auto accidents, against individuals who are for the most part defended by insurance companies. It was hoped that these deep-pocketed entities could make travel just another cost of doing business, passing it on to their customers. Whatever the merits of this view, it was soon noticed that not all the defendants being shanghaied by the new system were big, nor by any means were all the plaintiffs little. In fact larger plaintiffs very often succeeded in forcing smaller defendants to travel. There was no real way around this. A few courts announced that they would base their jurisdiction in part on how wealthy a defendant was, but most hesitated to introduce an explicit wealth test for depriving litigants of what had so recently been their constitutional right.

As the old right to be sued at home sank over the horizon, a new orb was sighted in the legal firmament, the right to *sue* at home. No state could quite establish that right in so many words, but many made it clear that they approved of the general principle. One implication was noteworthy. If a state wanted to provide full service for its own local plaintiffs, it could not stop at merely handling those troubles they had encountered while they were on its own soil. It had to figure out a way to get jurisdiction over cases that arose while they were visiting other states.

The California Supreme Court found one creative approach in a 1976 case. The Cornelison family of California was on the highway in the state of Nevada when its vehicle collided with that of a Nebraska-based trucker named Roy Chaney. Mr. Cornelison was killed. His widow, who survived the crash, lived close by across the state line in California and could have traveled back to Nevada for trial without apparent hardship, but her lawyers apparently wished to sue in the balmier judicial climate of the Golden State.

When the case reached the high court in Sacramento Justice Stanley Mosk, speaking for the court majority, conceded that the crash had not literally taken place in California. But, he pointed out, it had certain important connections with California. The victims lived in the state. Chaney, the Nebraskan, often visited the state on business. In fact, he was on his way there when the crash took place and only a short time later would actually have arrived. So the state had every right to make him stand trial within its borders.

Justice William Clark, later to serve in the Cabinet under President Reagan, dissented in a tone that betrayed a certain what-next exasperation. The only adequate excuse for grabbing an outsider, Clark observed, would be the outsider's California-related activities. And yet the "only conceivable connection" between those activities and this crash was that Chaney "was rolling toward (and plaintiff away from) its border." If being only a short drive away from the Golden State was enough to be sucked in by the gravitational field of its courts, how far away did people have to keep to know they were out of the orbit of jeopardy? Three hours' distance? Twenty-four? "Our busy courts," Clark said, "should have little interest in assuring each resident who leaves the state that he may return to litigate every wrong incurred in his travels."

These pshaws and faughs notwithstanding, many law school commentators saw the direction the *Cornelison* case had pointed out, and approved wholeheartedly. Why not make an alleged wrongdoer stand trial wherever the consequences of his actions might be felt? And where more were they felt than where his victims went back to live after a mishap?

The states' newfound yen to hear out-of-state controversies when their own citizens were the ones filing the suits required a fairly stunning U-turn in the arguments that had been used to propel the jurisdictional juggernaut this far. It had been plausibly urged that local mishaps should be brought to local courts because that was where the witnesses, highway patrol, and hospital reports were to be found. Now that these arguments suddenly cut against the extension of jurisdiction, they were discarded without a second thought. The California high court allowed as how the police records of the *Cornelison* accident were located in Nevada, where Chaney preferred to be sued; but after all, Mrs. Cornelison "was also a witness to the accident and she is a California resident."

New York soon came up with an irresistible method of conscripting defendants that other states rushed to emulate. In 1966 its highest court asserted jurisdiction in a suit

against a Quebec driver who had injured a New Yorker in a Vermont crash. Its reasoning was that the suit was really against the Quebec man's insurance policy, that the policy could be found wherever the company that issued it could be found, and that this company did business in New York. Before long New York was hearing cases against drivers across North America who had never allowed their cars to set tire in the Empire State. Driving along near your home in Moline or Little Rock or Spokane and grazing the fender of a passing car, you might find yourself the defendant before a Bronx jury. The cheerful assumption was that the suit should be of no concern to you personally, only to your insurance company—a notion of scant comfort when you found yourself summoned as a witness, or found your rates going up after a big payout was made in your name.

Had the new rule simply been that a case would always be tried in the complainant's back yard and never in the respondent's, the impetus for litigation would have been strong enough. But the emerging order was actually much more favorable to plaintiffs and their lawyers than that. They kept gaining new options; seldom if ever did they have to give up any old ones. Mrs. Cornelison's lawyers won the right to sue in California, but they could still have taken her suit to Nevada or Nebraska if that had been more to their liking.

What happened was inevitable. Lawyers headed in droves for the courts with the highest verdicts, the least demanding rules of evidence, the most lopsidedly pro-plaintiff procedural rules, the laxest scrutiny of attorneys' fees. They searched out the judges and juries most sympathetic to their kind of client or hostile to their kind of opponent. Some things were not supposed to vary from court to court: Chaney's driving was supposed to be judged under Nevada highway rules no matter where he faced trial. But everything else did vary, and any lawyer knew that the intangibles of personnel and procedure could tip the balance in many a case.

The value of getting into the right court is quite tangible. Some years ago an experienced injury lawyer was quoted as saying that injury cases with identical facts could bring expected damage awards ranging from $10,000 to $2,000,000 depending on the jurisdiction in which they were filed. A study for the New York City government found that the reputation of Bronx juries for handing out high verdicts was not mistaken: the average award in cases against the city there was nearly twice as high as in Brooklyn and Queens and two and a half times that in conservative Staten Island. Often an otherwise valueless claim acquires settlement value if it can be brought in a dangerous court district. In a 1975 New York case, the plaintiff's lawyer confessed with disarming candor that he had made a tactical error by suing in one court and asked permission to refile in a court with higher verdicts.

Disarming candor, however, is the exception rather than the rule. In one of the leading lawsuits over tank-car spills, the lawyers for aggrieved neighbors originally filed suit where the accident took place, in Boone County, Missouri, but after a survey of potential jurors showed resistance to high damage awards they moved the suit across the Mississippi River to the county surrounding East St. Louis, Illinois, one of the most depressed cities in America. It was a good choice: after a four-year trial the jury allowed as how the neighbors had suffered no damage from the spill but tried to award them $16.2 million in punitive damages anyway.

American lawyers have long known how to take a defendant with statewide operations to the right county and city; thus do rural complaints against Illinois railroads get filed in Chicago to avoid the stingy juries often found downstate. Long-arm

jurisdiction helped turn this largely local pastime into a big-league national affair. As in any sport, different teams attract different kinds of fans. Litigators with lame, speculative cases love the unpredictable courts where anything can happen; those with solid cases try to avoid the very same courts. Courts with long backlogs repel lawyers who want fast resolution, but attract lawyers whose strategy is to bleed their opponents into submission.

Some states attract shoppers by offering to apply a long statute of limitations to out-of-state transactions. Earl Cowan was hurt in a 1975 highway accident in Texas. Six years later lawyers for his widow had the idea of suing Ford Motor Company for the injury. The time limit for suing had long since expired in Texas, so they sued in Mississippi, a state with no connection whatsoever to the accident but with a longer statute of limitations. Ford was ordered to face the suit.

When Kathy Keeton, an executive with *Penthouse* magazine and wife of its publisher Bob Guccione, decided to sue the rival sex magazine *Hustler* for some scurrilous items it had published about her years before, her lawyers found that the statute of limitations had run out in every state but New Hampshire, so that was where they went. The Supreme Court ruled in 1984 that this was perfectly okay: if *Hustler* had not wanted to be sued in the Granite State, it should not have shipped magazines there. Although Ms. Keeton had no known link to New Hampshire herself, Justice William Rehnquist explained, the state was perfectly free to discipline magazines for libels whether they involved its own citizens or not.

One of the most important consequences of the long-arm revolution in fueling litigation could easily have been predicted. In very many disputes, especially in the business world, both sides have some conceivable grounds to sue. A company orders supplies, claims to find their quality unsatisfactory, and refuses delivery on further shipments; it can sue for a refund of its deposit, or the supplier can sue to enforce the contract. If the two are at a distance, they both have reason to race to the courthouse to get the home-court advantage. Worse, the cycle of suspicion can be self-fulfilling: fear of being struck first can provide reason enough to strike the first blow in a case that should not have led to a lawsuit at all.

Fracases between insurance companies and their bigger corporate customers, a fast-growing category of litigation, have become a virtual Supermarket Sweep of two-way nationwide forum-shopping, with the insurers racing for straightlaced Illinois and the corporate policyholders for loosey-goosey New Jersey. Lawyer Timothy Russell of Drinker. Biddle and Reath says he advises insurance companies to be aggressive: "If forum selection is considered so important, it is probably wise to sue first and talk second."

When Eastern Airlines filed for bankruptcy it was said to have picked the federal court in Manhattan rather than the one near its Miami headquarters at least in part because the late chief judge of the Miami court was known as tough on foot-dragging by debtors and tightfisted with fee awards for their lawyers. The *National Law Journal* reported that "attorneys for ailing companies have routinely filed Chapter 11 petitions in other jurisdictions solely to avoid the judge's reach." Other laws provide more or less openly for forum-shopping. Antitrust suits can be filed in any federal court district where a defendant sells goods, which can mean practically anyplace in the country.

Thus do local lawyering cultures wield national influence. California is popular for air-crash cases and many other kinds of litigation. Philadelphia is a favorite filing site for

class actions (although Melvin Belli is reported to have proposed Miami because of the weather). The Texas Gulf Coast, from Beaumont through Houston to Matagorda County, is known for populist juries of oil rig workers and their relatives with a low flash point of anger at deep-pocket defendants. In the *Forbes* list of the nation's richest plaintiff's lawyers, six of the top ten are based in the coastal section of the Lone Star State.

Like other kinds of commerce, forum-shopping has become more international in flavor. Some American courts now listen to cases from around the world filed by litigants who may never have met an American until the tort lawyer flew in to their home town with papers to sign and tales of the high awards to be had across the ocean. If their lawyers can find some defendant vulnerable to suit in an American court, Europeans who get hurt when a helicopter crashes in the North Sea can obtain "mid-Atlantic settlements" much higher than their countrymen can get in similar mishaps where only Europeans can be blamed.

It seems like free money, but of course it is not. For one thing, American companies suffer a distinct disadvantage in bidding for overseas work. In 1985 McDonnell Douglas, trying to sell aircraft to the mainland Chinese, felt obliged to build into its bid a cost factor to cover its inability to avoid being sued in American courts after any crashes that may take place in remote stretches of the Sinkiang desert. (The Chinese reportedly reacted with incredulity at this bit of "American flim-flam.") Perhaps in hopes of correcting the competitive imbalance, some American courts have begun entertaining suits against *foreign* companies for foreign sins against foreign residents when the defendant—in one case, Rolls-Royce—carries on some American operations. The result is to shift the competitive advantage to foreign companies that conduct absolutely no U.S. operations. American trial lawyers like to boast about how they are carrying the valuable goal of deterrence into the world marketplace. Others might say they have pioneered a new form of international commerce, the export of disservices.

Courts can still turn away, on grounds of unfairness or impracticality, disputes that should be heard in other states or countries. (The doctrine is called *forum non conveniens*.) That is what has happened to date with the lawsuits against Union Carbide over the 1984 gas leak at Bhopal, India. But judges don't use that power as often as they might. First, needless to say, they do not turn down cases on the grounds that they are so sympathetic to the kind of suit being put forward that it would be unfair to let them hear it. Second, the defendant who objects to the forum has to shoulder a high burden of proof; if there are doubts, the case stays put.

And convenience is often not what is at stake anyway. The squabbling on this issue can take on a surreal quality: one set of lawyers, living out of suitcases after traveling halfway around the world to find the court with the most favorable verdicts, will insist it is perfectly convenient, while their opponents, so used to being sued in this court that they keep lawyers nearby on permanent payroll, swear it would be vastly easier for them to defend the case in some remote corner of the globe.

Even more to the point, the courts that frown on forum-shopping tend to be the ones where no one wants to shop, because they protect defendants' rights in other ways too. The courts most apt to favor plaintiffs are likewise the ones inclined to open their doors to all comers. Some, like the fabled New Orleans saloons that never close, have practically taken those doors off the hinges.

As states leapfrogged each other with ever wilder, can-you-top-this claims of power, the political environment that shaped the state courts was wholly transformed. No longer did the more ambitious courts have to content themselves with regulating the small share of the nation's grievances that happened to be lodged against their own citizens. They could now boldly project their power to persons, events, and bank accounts around the country and even the world. There was clearly much potential for doing good in this reach-out-and-put-the-touch-on-someone power, especially if one believed that juries and legal cultures in other states were regrettably tolerant of misbehavior or hesitant to hand down big enough verdicts.

Beneath these sweet violin strains of idealism could be heard an insistent drumbeat of old-fashioned political self-interest. State judges are mostly elected or appointed for renewable terms by election-minded governors. Jurisdiction over outsiders gave them a thousand new chances to redistribute money from people who lived in other states to their own constituents. In the days when most defendants were local, both judge and jury might hesitate to approve a crippling judgment against a local employer, magazine, or car dealer; it might hurt real, identifiable neighbors. Now the immediate harm at least would fall on distant and anonymous investors, employees, consumers and taxpayers. Small wonder so many courts were soon observed to dish out "home cooking" to local litigants.

No one ever seriously doubted that shifting the burdens of travel and bias to cut in favor of lawsuit filing, instead of against it, would raise the amount of litigation. Greatly expanding plaintiffs' court options, instead of just replacing one definite court with another, was bound to do the same thing: a smorgasbord calls forth a heartier appetite than a one-dish commissary, especially when "home cooking" is one of the options. But litigation boosters were excited by the promise of making it easier to press meritorious suits, and preferred not to think very much about the costs of making it harder to press meritorious resistances.

The long-established constitutional right not to be sued except at home passed unmourned and unwept by most legal commentators. Like other rights that disappear, it was no longer spoken of as a right at all: first it became a matter of conveniences to weigh and equities to balance, and then it was forgotten entirely. And only later did we learn it had a point after all.

CHAPTER 4

Home a better place: As You Like It, Act II, scene iv.
Ida Weitz case: Davis v. St. Paul-Mercury Indemnity Co., 294 F.2d 641 (4th Cir. 1961).
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