
January 1964

Law to be Applied Following Section 1404(a) Transfers

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Recommended Citation

James W. Curlee, Note, *Law to be Applied Following Section 1404(a) Transfers*, 18 Sw L.J. 742 (1964)
<https://scholar.smu.edu/smulr/vol18/iss4/8>

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one result of *Jackson* may be an expensive and troublesome burden for the affected states. Of course, if a decision is otherwise sound, the fact that it has an upsetting effect upon state criminal administration does not make it wrong; but here the total accomplishment of the majority opinion may not offset the problems it creates. If in the remedial proceedings and in subsequent trials a procedure no more "fair" than the New York practice is used, the effort expended by the Court in pursuit of constitutional objectives was futile indeed.

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Law To Be Applied Following Section 1404(a) Transfers

I. INTRODUCTION

In *Gulf Oil Corp. v. Gilbert*,¹ the Supreme Court held that the doctrine of forum non conveniens was available in federal court. This doctrine allows dismissal of a case if the forum chosen by the plaintiff is so inappropriate and inconvenient that it is better to begin anew in another court. In determining whether the doctrine of forum non conveniens should be applied, a court must consider the relative advantages and obstacles to a fair trial and the convenience of the parties and witnesses.² Mr. Justice Jackson stated in the *Gulf Oil* opinion, however, that although a plaintiff should not be permitted to choose an inconvenient forum merely to harass the defendant, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."³ Forum non conveniens is subject to careful limitation not only because the plaintiff is denied the generally accorded privilege of bringing an action in the forum of his choice (assuming that jurisdiction and venue are proper), but also because a meritorious cause of action could be im-

rights would be fulfilled by a special state hearing to determine the issue of voluntariness and that a new trial, though permissible, was not mandatory. The Court reasoned that if the confession is there found to have been voluntary the original trial will be exonerated. Of course, if a finding of involuntariness is made a new trial must ensue. *Jackson v. Denno*, 378 U.S. 368, 393-96 (1964). This means of satisfying petitioner's habeas corpus rights appears to be unique. It was criticized severely by the dissent. *Id.* at 427. Perhaps it represents an attempt by the Court to alleviate the administrative burdens which many of its recent decisions have thrust upon the states.

¹ 330 U.S. 501 (1947).

² *Koster v. Lumbermen's Mut. Cas. Co.*, 330 U.S. 518 (1947).

³ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

paired by application of the law of an alternative forum.⁴ Forum non conveniens is not a ground for dismissal unless the interest of justice requires the court to decline jurisdiction.⁵ Thus, even though the convenience factor might favor dismissal, it should be denied unless an alternative forum is open to the plaintiff. The general venue statutes,⁶ however, usually give plaintiffs a wide enough choice of courts that they are assured alternative forums in which to bring their causes of action.

The doctrine of forum non conveniens as applied in federal court was codified in section 1404(a) of the Judicial Code,⁷ which authorizes the transfer of a proper case to another district or division where it might have been brought. Section 1404(a) is a remedial statute which authorizes the judge, upon the motion of either party, to transfer a civil action to a more convenient forum.⁸ The burden of establishing that the action should be transferred is on the party moving to transfer.⁹ The exercise of the transfer power is committed to the sound discretion of the district court to be exercised in light of all the circumstances of the particular case relevant to the interest of justice and convenience of the parties and witnesses.¹⁰

Prior to the adoption of section 1404(a), if a forum was deemed improper under the doctrine of forum non conveniens, the suit was dismissed. The remedy under section 1404(a) is transfer; dismissal by the court is erroneous.¹¹ Thus, the statute supplants the doctrine of

⁴ *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) (limitation statutes of alternative jurisdiction would bar plaintiff's action).

⁵ *Felchlin v. American Smelting & Ref. Co.*, 136 F. Supp. 577 (S.D. Cal. 1955).

⁶ 28 U.S.C.A. §§ 1391, 1392 (1958).

⁷ 28 U.S.C.A. § 1404(a) (1958) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Hereinafter the statute will be cited in shortened form, § 1404(a).

⁸ *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).

⁹ *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950); *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360 (4th Cir. 1949).

¹⁰ *Trust Co. of Chicago v. Pennsylvania R.R.*, 183 F.2d 640 (7th Cir. 1950); *Brown v. Woodring*, 174 F. Supp. 640 (M.D. Pa. 1959). It has been held that the judge has more discretion to transfer under § 1404(a) than under forum non conveniens; *i.e.*, transfer under § 1404(a) can be ordered on a lesser showing of inconvenience than would justify dismissal under forum non conveniens. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

¹¹ *Collins v. American Auto Ins. Co.*, 230 F.2d 416 (2d Cir. 1956), *cert. denied*, 352 U.S. 802 (1956). Under the doctrine of forum non conveniens dismissal is a final order and thus appealable. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). Under § 1404(a) an order granting or denying a requested transfer is interlocutory and not immediately appealable, *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir. 1950), *cert. denied*, 340 U.S. 851 (1950), but may be reviewed on appeal from a final judgment. *Chicago, R.I. & P.R.R. v. Hugh Breeding, Inc.*, 247 F.2d 217 (10th Cir. 1957), *cert. denied*, 355 U.S. 880 (1957). Review of an order granting or denying transfer, however, may be obtained by mandamus. *Paramount Pictures, Inc. v. Rodney*, 186 F.2d 111, (3d Cir. 1950), *cert. denied*, 340 U.S. 953 (1951). *Contra: Great Northern Ry. v. Hyde*, 245 F.2d 537 (8th Cir. 1957), *cert. denied*, 355 U.S. 872 (1957).

forum non conveniens in the federal court system. Nevertheless, the federal courts still can make use of the forum non conveniens doctrine in one situation; if a federal district court believes a foreign court is the more convenient forum, although it cannot transfer the case, it still may apply the traditional rules of forum non conveniens and dismiss the action.¹²

The Supreme Court first considered the implications of the limiting phrase in section 1404(a), "where it [the action] might have been brought," in *Hoffman v. Blaski*.¹³ In that case the district to which the defendant desired transfer lacked both venue and jurisdiction over the defendant. The Supreme Court held that regardless of the defendant's consent to venue and jurisdiction in the proposed transferee forum, a forum which had been improper for both venue and for service of process was not a forum where the action might have been brought.¹⁴ The court held that for a transfer to be granted, the plaintiff must have had an independent right to bring the action in the proposed transferee forum at the time of institution of the suit.

II. LAW APPLICABLE IN A TRANSFERRED CASE

There have been few cases that have considered the question of whether or not under a section 1404(a) transfer the law of the transferee or the transferor state will apply, *i.e.*, whether or not a transfer is accompanied by a change in the applicable state law. In *Headrick v. Atchison, T. & S.F. Ry.*,¹⁵ the plaintiff was a Missouri resident and the defendant railroad a Kansas Corporation. The cause of action arose in California, but that state's statute of limitations had run. The plaintiff instituted suit in a New Mexico state court where the defendant was amenable to process and suit was not barred by limitations. The defendant removed the case to a federal district court in New Mexico on the ground of diversity and then moved to have the case transferred to a federal district court in California. The Tenth Circuit concluded that if the case were transferred to California, the district court in the transferee state must apply the substantive law and policies of the transferor state. Thus, even if the case were transferred, the New Mexico statute of limitations still would apply.

This rule also was applied in *H. L. Green Co. v. MacMahon*,¹⁶ in

¹² *Gross v. Owen*, 221 F.2d 94 (D.C. Cir. 1955).

¹³ 363 U.S. 335 (1960).

¹⁴ *Id.* at 343.

¹⁵ 182 F.2d 305 (10th Cir. 1950).

¹⁶ 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963).

which the plaintiff brought an action in the southern district of New York. The defendant moved to transfer the case to the southern district of Alabama. The court granted transfer and stated: "Although as a matter of federal policy a case may be transferred to a more convenient part of the system, whatever rights the parties have acquired under state law should be unaffected. The case should remain as it was in all respects but location."¹⁷

III. VAN DUSEN V. BARRACK

*Van Dusen v. Barrack*¹⁸ is a wrongful death case arising from the crash of a commercial airliner in the Boston harbor on October 4, 1960. As a result of the crash, over 150 actions for personal injury and death were filed against the airline, various manufacturers, the United States, and the Massachusetts Port Authority. Forty wrongful death actions were filed in the eastern district of Pennsylvania by personal representatives of the victims of the crash,¹⁹ the suits being based on the wrongful death statute of Massachusetts.²⁰ The defendants moved under section 1404(a) to transfer these Pennsylvania actions to a federal district court in Massachusetts where over one hundred actions already were pending and most of the witnesses resided. The district court granted the motion and held that the transfer was justified regardless of whether the transferred actions would be governed by the laws and choice-of-law rules of Pennsylvania or of Massachusetts,²¹ and that transfer was not precluded because of the plaintiffs failure to qualify to sue as personal representatives of the decedents under Massachusetts law.

By writ of mandamus in the court of appeals, the plaintiffs successfully contended that the district court erred and should vacate its order of transfer.²² The Third Circuit, relying on rule 17(b),²³

¹⁷ *Id.* at 652-53. The plaintiff erroneously assumed that the transferee state law would apply and was apprehensive that his statutory claim would be prejudiced by the transferee state's statute of limitations and that his common law claim, which he had moved to join with his statutory claim prior to the motion to transfer, would be disallowed on the same ground.

¹⁸ 376 U.S. 612 (1964).

¹⁹ Federal jurisdiction was based on diversity of citizenship. 28 U.S.C.A. § 1332 (1958).

²⁰ Mass. Gen. Laws Ann. ch. 229, § 2 (1955) states: "If the proprietor of a common carrier of passengers . . . causes the death of a passenger, he . . . shall be liable in dollars in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his . . . servants or agents. . . ." The statute was amended, Mass. Gen. Laws Ann. ch. 229, § 2 (Supp. 1962), to raise the maximum recovery allowed to thirty thousand dollars.

²¹ *Popkin v. Eastern Air Lines, Inc.*, 204 F. Supp. 426 (E.D. Penn. 1962).

²² *Barrack v. Van Dusen*, 309 F.2d 953 (3d Cir. 1963).

²³ Fed. R. Civ. P. 17(b): "Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined

held that a section 1404(a) transfer could be granted only if, at the time the suits were brought, the plaintiffs had qualified to sue in Massachusetts. In support of its holding the court cited *Hoffman v. Blaski*.²⁴ That case established the rule that "unless the plaintiff had an unqualified right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by section 1404(a)."²⁵ The Third Circuit, however, extended the *Hoffman* rule and increased the restrictions on transfers to convenient federal forums. In the *Hoffman* case the proposed transferee forum lacked both venue and jurisdiction; in the instant case both jurisdiction and venue are proper, but the plaintiff had not qualified to sue in the transferee district.

The Supreme Court granted certiorari and in its first consideration of the question stated that the *Headrick* and *H. L. Green Co.* cases properly reflect the underlying purposes of section 1404(a). Both the district court and the court of appeals erred in the assumption as to the state law to be applied in the transferee forum. The Supreme Court held that a section 1404(a) transfer authorizes only a change of courtrooms and not a change of applicable law; *i.e.*, the transferee court must apply the laws of the state of the transferor court. In addition, rule 17(b) was interpreted similarly so that the plaintiff's lack of capacity in the transferee forum will not prevent the defendant from transferring; *i.e.*, the capacity to sue will be governed by the laws of the transferor district court. Thus, if the instant cases are subsequently transferred to the district court in Massachusetts, they must remain Pennsylvania cases controlled by the law and policy of that state. Whatever rights the plaintiffs acquired upon the filing of their suits will be unaffected by the transfer.

In *Erie R.R. v. Tompkins*,²⁶ and in subsequent cases,²⁷ the Supreme Court established the principal of uniformity of outcome within a state by holding that a federal court enforcing a state-created right must apply any rule of the state law, statutory or decisional, which purports to have a substantial effect upon the outcome of the case.²⁸ The Supreme Court brought the instant case within the *Erie* doctrine

by the law of his domicile. . . . [A personal representative's] . . . capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . . " (Emphasis added.)

²⁴ 363 U.S. 335 (1960).

²⁵ *Barrack v. Van Dusen*, 309 F.2d 953, 957 (3d Cir. 1963).

²⁶ 304 U.S. 64 (1938).

²⁷ *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *but see Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958).

²⁸ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

by holding that application of the law of the transferor state in the transferee forum does not violate the *Erie* principal because "the critical identity to be maintained is between the Federal District Court which decides the case and the courts of the state in which the action was filed."²⁹

The Supreme Court decision dispelled the plaintiff's contention that a change of venue would be accompanied by a change of law and hence that the transfer would not be in the interest of justice. The case was remanded to the district court, however, for reconsideration of the transfer order in light of the effect of this decision on the convenience of witnesses and justice to the parties. In its holding the Supreme Court stated that the damage rule to be applied in the suit is a prominent, although not a controlling, factor to be considered in determining which forum would best serve the interest of justice and be more convenient for parties and witnesses. Thus, the Pennsylvania district court must look to the Pennsylvania choice of law rules to determine whether the Pennsylvania or the Massachusetts damage rule applies.³⁰ Until recently it appeared unsettled whether, under Pennsylvania law, the Pennsylvania or the Massachusetts damage rule would be applicable.³¹ The Pennsylvania Supreme Court recently held that the Pennsylvania courts are to apply the Pennsylvania damage rule.³² In view of this holding, other factors being equal, the need in the instant case for testimony from Pennsylvania witnesses concerning loss of earnings and other factors relevant to compensatory damages may compel a refusal to transfer because of convenience of parties and witnesses. If, however, Pennsylvania law had dictated that the Massachusetts damage rule were to be applied, there would be no need for Pennsylvania witnesses because under the Massachusetts damage rule the amount of damages is determined solely by the defendant's culpability. In this case, section 1404(a) might allow transfer to Massachusetts.

IV. CONCLUSION

The *Van Dusen* holding preserves to the plaintiff all of the advantages which accrue to him by filing in a state favorable to his cause of action, including favorable limitation statutes³³ and choice

²⁹ 376 U.S. at 639.

³⁰ Under existing authority, a state may entertain an action based on another state's law and at the same time refuse to enforce the other state's law with regard to damages. *Kruger v. Wilson*, 242 U.S. 171 (1916).

³¹ Compare *Goranson v. Kloeb*, 308 F.2d 655 (6th Cir. 1962), with *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962).

³² *Griffith v. United Airlines, Inc.*, 203 A.2d 796 (Pa. 1964).

³³ See *Gomez v. The S.S. Dorothy*, 183 F. Supp. 499 (D.P.R. 1959).

of law rules.³⁴ In this firm holding the Supreme Court has laid down the doctrine that, if a case is transferred under section 1404 (a), the transferee district court will apply the law of the state of the transferor and, further, that the capacity to sue will be determined by the law of the transferor state. Generally, all defenses available in the transferor forum should be available in the transferee forum.

Had the Court held that the law of the transferee forum would apply, a transfer would make a plaintiff's choice of forum almost a nullity. In effect, the defendant could use section 1404 (a) as a means of transferring the case to a state in which the law would be most favorable to him. In addition, a holding that the law of the transferee forum applies, under some circumstances, would grant to a district court judge, when deciding whether to grant a section 1404 (a) transfer, the power to decide the case.³⁵ Thus, if the law of the transferee forum were applicable, it seems unlikely that the interest of justice ever would be served by a transfer to a forum whose law differed materially from that of the forum originally chosen by the plaintiff.

The Court's interpretation of rule 17 (b) prevents a plaintiff from blocking a transfer to a more convenient forum. If transfer were denied in cases in which a plaintiff admittedly could have qualified to sue in the transferee state but refrained from doing so, it would have the effect of denying the defendant the advantages intended by section 1404 (a); *i.e.*, by his lack of action plaintiff could "freeze" the location of the trial. When Congress enacted section 1404 (a), it intended to allow transfer "for the convenience of parties and witnesses" and obviously did not intend such a result.

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³⁴ See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

³⁵ *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).