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Federal Courts - Change of Venue Under section 1404(a) - Consideration of Applicable Substantive Law "In the Interest of Justice"

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court is satisfied that his discharge or release will be "without danger to others or to himself."³² If the court is not so satisfied it may hold a contradictory hearing on the matter.³³ This proposed legislation seems at least to furnish the committed person a better opportunity for discharge or release on probation, by allowing adequate cognizance to be taken of medical opinion. However, the suggested standard, "danger to others or to himself," may easily be open to the same criticism voiced against "menace to society," if it is construed to mean a mere potential danger. Whether this proposed legislation would be construed as a criminal rather than a civil matter remains to be seen.³⁴ It is submitted that additional legislation might be advisable to insure appellate review. In any event, it is hoped that if the result of the instant case is followed, the Supreme Court's supervisory powers will be construed more liberally to insure that such a committed person is afforded a fair opportunity to be heard and is not incarcerated for life because of a mere possibility that he will be a menace to society.

Paul H. Dué

FEDERAL COURTS — CHANGE OF VENUE UNDER SECTION 1404(a)
— CONSIDERATION OF APPLICABLE SUBSTANTIVE LAW
"IN THE INTEREST OF JUSTICE"

Section 1404(a) of the Judicial Code¹ authorizes a federal district court to transfer a civil action to any other district where it might have been brought² upon the showing that the

32. *Id.* art. 17.

33. *Ibid.*

34. Note that article 17 of the proposed revision on Insanity Proceedings, although based on section 4.08(3) of the ALI Model Penal Code, deleted the provision that "any such hearing shall be deemed a civil proceeding." See note 29 *supra*.

1. 28 U.S.C. § 1404(a) (1958): "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." See generally Kaufman, *Observations on Transfers under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595 (1950).

2. The Court in *Hoffman v. Blaski*, 363 U.S. 335 (1960) construed the words "where it might have been brought" to mean that the plaintiff must have had an unqualified right to bring the action in the proposed transferee court independent of the consent of the defendant. See generally 1 MOORE, FEDERAL PRACTICE ¶ 0.145[6] (2d ed. 1964). The Court seems to have retreated somewhat from this position. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964) noted 42 TEXAS L. REV. 1085, 1086 (1964).

transfer is desirable under the relevant criteria of convenience and fairness.³ The transfer for convenience in a diversity of citizenship case will often raise two interrelated issues of applicable state law as between the transferor and transferee district courts under the *Erie* doctrine.⁴ First, must the direction that federal district courts hearing diversity cases apply the law of the states "in which they sit"⁵ be interpreted literally by the transferee court after a change of venue under section 1404(a)? Second, must the federal district court, upon a motion to transfer, consider as among the factors "in the interest of justice," the effect of the requirement that the transferee court apply the law which would have been applied in the transferor court?

Section 1404(a), adopted in 1948, was based upon a modified doctrine of forum non conveniens,⁶ a concept by which a court can dismiss a suit, although it has personal and subject matter jurisdiction, if the convenience of another forum greatly outweighs that of the plaintiff's chosen venue.⁷ As a transfer under section 1404(a) means only a change of venue and the continuation of the instituted suit, the trial judge has a broader discretion to transfer than he has to dismiss under the doctrine of forum non conveniens;⁸ the latter disposition would necessitate the institution of a new suit in the more convenient forum. The section requires consideration of the following standards:

3. See *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

4. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

5. See *Griffin v. McCoach*, 313 U.S. 498 (1941). An administrator sued a life insurance company in the district court in Texas to collect under a policy. The company responded with a bill of interpleader, bringing in all other claimants under the policy, some of whom were assignees residing in New York. The New York claimants were successful in the lower court which applied the law of New York, the place where the contract was consummated. The Supreme Court reversed, holding that the Texas rule of insurable interest which precluded recovery by the assignees would apply, on the ground that a Texas state court would have applied that rule to the foreign contract. "The federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the state in which they sit." *Id.* at 503.

6. The Reviser's notes state that § 1404(a) was drafted "in accordance with the doctrine of a forum non conveniens." See *Ex parte Collett*, 337 U.S. 55, 58 (1949). Recognizing that this stated the intention of Congress too narrowly, the Court in *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1954), stated: "When Congress adopted § 1404(a), it intended to do more than just codify the existing law on *forum non conveniens*. . . . Congress, in writing § 1404(a), which was an entirely new section, was revising as well as codifying."

7. See *Koster v. Lumbermen's Mut. Cas. Co.*, 330 U.S. 518 (1947); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 87 (Wright ed. 1960).

8. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). In a recent per curiam opinion in *Parsons v. Chesapeake & Ohio Ry.*, 375 U.S. 71, 72 (1963), the Court held that a § 1404(a) motion and a motion to dismiss for forum non conveniens require "evaluations of similar, but by no means identical, objective criteria."

the convenience of the parties,⁹ the convenience of witnesses,¹⁰ and the interest of justice.¹¹ There is often substantial overlap among these criteria and each has occasioned litigation, but the most carefully scrutinized standard has been that of the "interest of justice." Courts have decided that this standard may be tested by reference to: access to proof;¹² the possibility of a jury view of the premises;¹³ the distance over which the transfer is to be made;¹⁴ the congestion of court dockets;¹⁵ the facility with which a judgment may be enforced;¹⁶ and the avoidance of multiplicity of litigation through consolidation.¹⁷

The United States Supreme Court recently considered the criteria for transfer of a civil action in *Van Dusen v. Barrack*,¹⁸ and added to the list of considerations "in the interest of justice" a determination of the effect of the requirement that the transferee court apply the law of the state of the transferor court.¹⁹ In *Van Dusen* an action was commenced in the United States District Court for the Eastern District of Pennsylvania seeking damages for wrongful death as the result of the crash of a commercial airliner into Boston Harbor. More than 150 actions

9. The convenience of the parties may include: the residences of the parties, 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.4 (Wright ed. 1960); the availability and convenience of counsel, *ibid.*; and the cost of additional counsel if the action is transferred, *Hokanson v. Helene Curtis Indus.*, 177 F. Supp. 701 (S.D.N.Y. 1959).

10. The convenience of witnesses may include: the availability of compulsory process and the cost of obtaining attendance, *Chicago, R.I. & Pac. R.R. v. Hugh Breeding, Inc.*, 247 F.2d 217 (10th Cir. 1957), *cert. denied*, 355 U.S. 880; the possibility of obtaining live testimony, *Polaroid Corp. v. Casselman*, 213 F. Supp. 379 (S.D.N.Y. 1962); and the location of pertinent records of documents, *Ruskey v. Reed*, 225 F. Supp. 581 (S.D.N.Y. 1963).

11. See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.6 (Wright ed. 1960).

12. See 1 MOORE, FEDERAL PRACTICE ¶ 0.145[5] at 1780 (2d ed. 1964).

13. See *United Air Lines, Inc. v. United States*, 192 F. Supp. 796 (D. Del. 1961).

14. See discussion in *ibid.* See also *Deutsch v. Dunne*, 197 F. Supp. 907 (E.D.N.Y. 1961).

15. See, *e.g.*, *Chicago, R.I. & Pac. R.R. v. Igoe*, 220 F.2d 299 (7th Cir. 1955), *cert. denied*, 350 U.S. 822.

16. See 1 MOORE, FEDERAL PRACTICE ¶ 0.145[5] at 1781 (2d ed. 1964).

17. See *Continental Grain Co. v. The FBL*—585, 364 U.S. 19 (1960); *cf. United Air Lines, Inc. v. United States*, 192 F. Supp. 796 (D. Del. 1961).

18. 376 U.S. 612 (1964).

19. *Id.* at 644. The Court affirmed the doctrine first announced by the Tenth Circuit in *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950), that when the defendant seeks transfer, the transferee district court is obligated to apply the state law that would have been applied had there been no change of venue, *i.e.*, the law of the state of the transferor district court. When the law to be applied is unsettled, involves policy considerations peculiar to the state, or involves a complex conflict of laws rule, the difficulty of application in the transferee court is apparent. See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.6 (Wright ed. 1960).

for personal injury and wrongful death had been instituted against the airline and others, some 45 of these actions being filed in the Eastern District of Pennsylvania. Upon defendant's motion under section 1404(a) for transfer to the District of Massachusetts where some actions were pending, the trial court granted the request, holding that the transfer was justified regardless of whether the transferred actions would be governed by the law of Pennsylvania or of Massachusetts.²⁰ On certiorari to the United States Supreme Court, it was held that when the defendants seek transfer, the transferee district court is obligated to apply the state law that would have been applied if there had been no change of venue—that a change of venue under section 1404(a) generally should be, with respect to state law, but a change of courtrooms.²¹ The Court added that in considering the motion for change of venue under the relevant criteria of convenience and fairness, the district court must include a determination of the uncertainty which may exist in the law and policy of the state of the transferor court and the relative difficulty which may be encountered in applying that law and policy in the transferee court.²² Thus the district court sitting in Pennsylvania was directed to consider not only what law a Pennsylvania state court would find applicable if hearing the cause, but also the clarity of the law and other problems the Massachusetts district court would have in applying the proper law.

The recent decision in *Pearson v. Northwest Airlines, Inc.*,²³

20. *Popkin v. Eastern Airlines*, 204 F. Supp. 426 (E.D. Pa. 1962). Plaintiff sought mandamus in the court of appeals to vacate the transfer order. In *Barrack v. Van Dusen*, 309 F.2d 953 (3d Cir. 1962), the court of appeals reversed, holding that a transfer could be granted only if the plaintiff had an unqualified right to bring suit in the transferee district. Relying upon the construction of the words "where it might have been brought" as set forth in *Hoffman v. Blaski*, 363 U.S. 335 (1960), the court found that the transfer was improper as the plaintiff [administrator] was qualified only under Pennsylvania law and not under Massachusetts law. In *Van Dusen v. Barrack*, 376 U.S. 612, 627 (1964), the Supreme Court reversed, distinguishing *Hoffman* on the ground that there the defendants were seeking a transfer to a forum where statutory venue did not exist. The Court held that upon transfer, the federal district court sitting in Massachusetts would merely be hearing a Pennsylvania action as if it were a federal district court sitting in Pennsylvania. See Note, 42 TEXAS L. REV. 1085 (1964).

21. *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964).

22. *Id.* at 644.

23. 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). The court relied heavily upon the recent decision of the New York Court of Appeals in *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1963). For an incisive discussion of these cases as regards conflicts of law, see Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

is illustrative of the difficult problem which a motion to transfer may pose for a district court after *Van Dusen*. In a factual setting much like *Van Dusen*, plaintiff, a New York domiciliary, brought an action for the wrongful death of her husband, also a New York domiciliary, against a Massachusetts corporation. Venue was laid in a federal district court in New York, plaintiff asserting a cause of action under the Massachusetts wrongful death statute, which measures damages by the culpability of the defendant, the maximum amount recoverable being \$15,000.²⁴ The plaintiff was permitted recovery under the Massachusetts law, but the court refused to limit judgment to \$15,000, holding that the statute required application of a standard of culpability, contrary to New York law which applied a standard of pecuniary loss with no maximum limitation, and thus the Massachusetts standard was unenforceable against a New York resident.²⁵ Faced with such an expression of the law and policy of the state of the transferor court, the dilemma

24. MASS. GEN. LAWS ch. 229, § 2 (1949 and Supp. 1961). The statute has been amended to raise the upper limit on recovery to \$20,000.

25. See *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1963). See also *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), there was avoided any speculation whether Pennsylvania would impose its damage policy upon the Massachusetts death statute. This issue has been resolved by the Pennsylvania courts in *Griffith v. United Airlines, Inc.*, 203 A.2d 796 (Pa. 1964), where on facts similar to *Van Dusen, Pearson*, and *Kilberg*, it was held that Pennsylvania could impose its death policy upon the Colorado death statute, where Pennsylvania had the "most significant relationship with the occurrence and the parties." *Id.* at 802.

Situations which justify refusal of a state to apply a law of another state which the forum state finds in violation of its public policy probably have their limitations. The rationale seems to be that the interest of the state must be very great to justify the imposition of a different damage policy upon the death statute of the state in which the action arose. See, e.g., *Skahill v. Capital Airlines, Inc.*, 234 F. Supp. (S.D.N.Y. 1964), where a plaintiff who was a citizen of Rhode Island sued the defendant on a cause of action arising out of an accident in Virginia, the suit being filed in a federal court in New York. Defendant moved to limit recovery to the \$30,000 maximum allowable under the Virginia statute. Plaintiff relied on *Kilberg* and *Pearson*, contending that such a limitation is against the public policy of New York. In holding for the defendant, the court emphasized that the plaintiff was not a resident of New York, and that the contracts in the state or the interests of the state must be great to justify the imposition of the New York damage policy on the Virginia statute. *Accord, Gore v. Northeast Airlines, Inc.*, 222 F. Supp. 50 (S.D.N.Y. 1963) (plaintiff had been a resident of New York, but had moved to Maryland since the action arose; *held*, the State of New York did not have a sufficient interest in the action to justify a superimposition of its damage policy upon the Massachusetts death statute, as had been done in *Kilberg* and *Pearson*); *Thompson v. Capital Airlines, Inc.*, 220 F. Supp. 140, 143 (S.D.N.Y. 1963) ("the public policy considerations which motivated *Kilberg* [will not] be extended to non-residents").

in which a transferee court sitting in Massachusetts would find itself is apparent. *Van Dusen* directs the transferor court to consider this dilemma upon the motion to transfer, "in the interest of justice."²⁶ Thus if the transferor court finds that the law and policy which, under *Erie*, it would be bound to apply would be "difficult or unclear and might not defer" to the laws of the state of the transferee court, it should weigh that factor heavily against granting of the motion to transfer. Moreover, since the laws and policy of the state of the transferor court would govern the transferred action, the feasibility of consolidation with suits pending in the transferee court may be substantially curtailed.²⁷ Consideration of the law to be applied is not without precedent, for "it has long been recognized that: 'There is an appropriateness * * * in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.' Gulf Oil Corp. v. Gilbert."²⁸

It is interesting to speculate whether, after *Van Dusen*, a federal doctrine of forum non conveniens yet lives.²⁹ Presented with an action commenced in an extremely inconvenient forum, a court may nevertheless be reluctant to transfer because of uncertainty of the law to be applied or difficulty in its application. For example, should the transfer place the transferee court in the uncomfortable position of having to superimpose the damage policy of the state of the transferor court upon the law of the state in which it sits, the court where the action was commenced may be tempted to dismiss the action, thus forcing it to be brought again in the place where it may be most expedi-

26. *Van Dusen v. Barrack*, 376 U.S. 612, 626 (1964). See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.6 (Wright ed. 1960).

27. *Van Dusen v. Barrack*, 376 U.S. 612, 644 (1964).

28. *Id.* at 645.

29. An extensive discussion of the doctrine as applied in federal courts may be found in Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); cf. *Rodrigues v. Pan American Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962).

A collateral but nonetheless intriguing question is raised concerning the possible application of a state's doctrine of forum non conveniens in the federal court under *Erie R.R. v. Tompkins*. Must the federal court dismiss where the state court would have done so, or may it transfer under § 1404(a)? The Supreme Court in *Van Dusen* expressly avoided answering this question. 376 U.S. 612, 640 (1964). Compare *Currie, Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955); with *Currie, Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960). For a general discussion of the doctrine of forum non conveniens in state courts, see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

tiously tried.³⁰ This result would seem to put a penalty upon the plaintiff's choice of the extremely inconvenient forum, a result section 1404(a) was designed to prevent. Moreover, it may be argued that a revival of the rule of *Gulf Oil Corp. v. Gilbert*,³¹ even in the extreme case suggested, is an unwarranted judicial narrowing of the rules of venue, so liberally circumscribed by Congress in section 1404(a).³²

An alternative solution which found favor after the introduction of section 1404(a) but before the law-to-be-applied problem had been settled by *Van Dusen*, may facilitate the transfer to the convenient forum, yet at the same time minimize the problems raised by the requirement which obligates the transferee court to apply the law of the state of the transferor court. A transfer may be conditioned upon a stipulation of the moving party that he will not assert the local statute which may be detrimental to the cause of the adverse party.³³ Further, the transferor court could preliminarily decide what law would be applied in the transferor court and so indicate in the order granting transfer to the moving party.³⁴ Thus the transferee

30. In the following cases the court found dismissal proper rather than transfer: *LeClair v. Shell Oil Co.*, 183 F. Supp. 255 (S.D. Ill. 1960) (federal question jurisdiction; motion to transfer to Delaware denied and action dismissed; most convenient forum was Pennsylvania, a state to which transfer was not possible); *McGee v. Southern Pac. Co.*, 151 F. Supp. 338 (S.D.N.Y. 1957) (diversity action on cause arising in California where California statute of limitations had run; motion to transfer to New Jersey denied and action dismissed); *Hammett v. Warner Bros., Inc.*, 176 F.2d 145 (2d Cir. 1949) (transfer denied and action dismissed where issue could be more conveniently tried in another suit pending in another court between different parties).

31. 330 U.S. 501 (1947).

32. See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 71 (Wright ed. 1960).

33. Transfer was conditionally granted in the following cases: *Humble Oil & Ref. Co. v. The Patsy H.*, 198 F. Supp. 423 (D. Del. 1961) (stipulation that moving party would not rely on statute of limitations of state of transferee court to found a plea of laches); *Hokanson v. Helene Curtis Indus., Inc.*, 177 F. Supp. 701 (S.D.N.Y. 1959) (stipulations that defendant would not rely on statute of limitations of state of transferee court, and defendant would reimburse plaintiff for additional attorney's fees); *May v. The Steel Navigator*, 152 F. Supp. 254 (S.D.N.Y. 1957) (stipulation of waiver of statute of limitations as foundation of a plea of laches); *Crawford v. The S.S. Shirley Lykes*, 148 F. Supp. 958 (S.D.N.Y. 1957) (same); *Curry v. States Marine Corp.*, 118 F. Supp. 234 (S.D.N.Y. 1954) (same); *Frechoux v. Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D.N.Y. 1953) (same).

34. See *Jozwiak v. Dayton Oil Co.*, 200 F. Supp. 300 (S.D.N.Y. 1961) (the court determined the effect of the applicable law for the benefit of the transferee court, in the event of transfer, although it subsequently denied the motion to transfer); *Hokanson v. Helene Curtis Indus.*, 177 F. Supp. 254 (S.D.N.Y. 1957); *Curry v. States Marine Corp.*, 118 F. Supp. 234 (S.D.N.Y. 1954); cf. *Chenoweth v. Atchison, T. & S.F. R.R.*, 229 F. Supp. 540 (D. Colo. 1964) (re-transfer to Kansas for the original transferor court to determine the law to be applied to the parties).

court will have notice of the law which would be applied in the transferor court on an important issue, thereby minimizing the difficulties inherent in the former's determination and application of the law and policy of the state of the transferor court.³⁵

This discussion of considerations involved in a transfer under section 1404(a) is particularly important in Louisiana because of its civil law tradition. It is not difficult to suppose a case in which interpretation or construction of civilian institutions would be crucial to parties litigating here. There is little likelihood that judges sitting in federal courts in common law jurisdictions will have the same expertise as a Louisiana judge in civil law generally, or Louisiana civil law in particular. This is a factor that may militate against transfer to a district court sitting in a common law jurisdiction. If transfer is ultimately granted, it may be advisable for the federal district court sitting in Louisiana to insure the clarity of the applicable law by either a transfer conditioned upon stipulation of the parties, or a pronouncement on the applicable law of Louisiana.

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LEASES — SALE OF LEASE DISTINGUISHED FROM SALE OF RIGHT OF OCCUPANCY

Plaintiff and defendant entered a lease agreement containing an acceleration clause. Upon nonpayment of rent by defendant, plaintiff obtained judgment for rent past due and rent for the unexpired term of the lease. The judgment recognized plaintiff lessor's privilege on defendant's movables situated on the leased premises. National Cash Register intervened, asserting a vendor's privilege and chattel mortgage on several cash registers which had been placed on the leased premises prior to recordation of the chattel mortgage. By virtue of a writ of fieri facias, both the right of occupancy and defendant's movables,

35. The feasibility of such a pronouncement will depend upon the stage of the proceedings in the transferor court. If the proceeding is in the preliminary pleading stage, it may be difficult or impossible for the court to isolate issues of law which may be determinative of the case. This dilemma would appear to be a factor which militates against transfer. See *Chenoweth v. Atchison, T. & S.F. R.R.*, 229 F. Supp. 540 (D. Colo. 1964), where the transferee court transferred the action back to the transferor court, as the original transfer was premature in view of the complex issues of law which could most expeditiously be isolated and decided by the transferor court at a later stage in proceedings there.