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## Federal Courts -- Venue -- Transfer of Actions Under §1404(a) of New Judicial Code

Don Evans

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rule was considered so objectionable in England that a statute was passed in 1833 which abolished the rule<sup>19</sup> and permitted the heirs of a living person to take as purchasers. This method of dealing with the rule has also been suggested by the American Law Institute.<sup>20</sup>

An addition to N. C. GEN. STAT. §41-6 permitting the heirs of a living person to take as purchasers where the grantor indicates that "heirs" does not mean "children" would allow the grantor's intention to be carried out and avoid the harshness of the common law rule.

THOMAS M. MOORE.

### Federal Courts—Venue—Transfer of Actions Under §1404(a) of New Judicial Code

Section 1404(a)<sup>1</sup> incorporates into the new Judicial Code<sup>2</sup> the doctrine of *forum non conveniens*,<sup>3</sup> but rather than requiring dismissal, permits transfer to a more convenient forum even though the venue of the original forum be proper.<sup>4</sup> The lower federal courts, however, have not agreed in construing and administering the new subsection, and all of the resulting conflicting views have not yet been resolved by the Supreme Court.<sup>5</sup>

(A). One question causing difficulty is whether a plaintiff, the party choosing the forum in the first instance, can invoke §1404(a) to transfer his action to a district where a defendant is not amenable to process. Of the four cases found in which the problem was considered, two federal district courts have denied plaintiffs the use of §1404(a),<sup>6</sup> while

APPOINTED TO ENQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 74 (1833), reprinted in LEACH, CASES ON FUTURE INTERESTS 3 (2d ed. 1940), *Therrell v. Clanton*, 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59 (1936).

<sup>19</sup> STAT. 3 & 4 WM. IV, c. 106 §3 (1833).

<sup>20</sup> UNIFORM PROPERTY ACT §15. "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent."

<sup>1</sup> "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."

<sup>2</sup> Title 28 U. S. C. (Supp. 1949). Effective September 1, 1948.

<sup>3</sup> For a discussion of this doctrine see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

<sup>4</sup> 28 U. S. C. §1404(a), Reviser's Notes at 802-03 (Supp. 1949). This subsection should not be confused with §1406(a) which, in a situation where the original venue is *improper*, gives the court the alternative of dismissing the action or transferring it to a proper venue.

<sup>5</sup> One question, whether §1404(a) applies to actions governed by special venue provisions, appears to have been settled in the affirmative. See Note, 28 N. C. L. REV. 100 (1949).

<sup>6</sup> *Bolten v. General Motors Corp.*, 81 F. Supp. 851 (N. D. Ill. 1949) (personal injury, diversity suit); *Barnhart v. J. B. Rogers Producing Co.*, 86 F. Supp. 595

two district courts have made the subsection available to plaintiffs,<sup>7</sup> one of the latter decisions being recently overturned by a court of appeals.<sup>8</sup>

The courts which permit plaintiff to invoke the subsection construe the "where it might have been brought" clause to mean *where the venue is proper*,<sup>9</sup> without regard to service of process requirements.<sup>10</sup> Support is found by these courts in the following reasoning: (1) the words of the general venue provision, §1391(a),<sup>11</sup> provide that diversity actions may "be brought . . . in the judicial district where all plaintiffs or all defendants reside"; (2) the language of the subsection does not distinguish between plaintiffs and defendants;<sup>12</sup> (3) there has long been a need for a device which would permit service of process outside the district of trial.<sup>13</sup> In denying to a plaintiff the use of §1404(a) the Court of Appeals for the Second Circuit,<sup>14</sup> speaking through Judge Learned Hand, reasoned that to construe §1404(a) as permitting a plaintiff to bring a defendant to trial in a district outside the state of the defendant's residence,<sup>15</sup> would be such a revolutionary departure

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(N. D. Ohio 1949) (personal injury, diversity suit), commented on in 63 HARV. L. REV. 708 (1950), 28 TEXAS L. REV. 872 (1950).

<sup>7</sup> Otto v. Hirl, 89 F. Supp. 72 (S. D. Iowa 1950) (personal injury, diversity suit); McCarley v. Foster-Milburn Co., 89 F. Supp. 643 (W. D. N. Y. 1950) (wrongful death, diversity suit, where California plaintiff, unable to effectuate service of process on defendants there, sued them in a federal court in New York where they resided and then moved for transfer under §1404(a) to a district court in California).

<sup>8</sup> Foster-Milburn Co. v. Knight, 181 F. 2d 949 (2d Cir. 1950).

<sup>9</sup> In a proper case the clause would also mean of course, where there is jurisdiction over the subject matter. See Tivoli Realty, Inc. v. Paramount Pictures, Inc., 89 F. Supp. 278, 281 (D. Del. 1950). For cases denying transfer to a district in which the action could not have been "brought" in the jurisdictional sense, cf. Lucas v. New York Cent. R. R., 88 F. Supp. 536 (S. D. N. Y. 1950) (no diversity in transferee district, the defendant multiple corporation being a citizen there as well as in the state of the transferring district); United States v. 23 Gross Jars of Enca Cream, 86 F. Supp. 824 (N. D. Ohio 1949) (where the subject matter of the libel action under the Federal Drug Act could not be found in the transferee district).

<sup>10</sup> The argument that the word "brought" is synonymous with the word "commenced" in FED. R. CIV. P. 3, which provides that an action is commenced by filing a complaint with the court, seems to prove too much. It would render the clause in question meaningless.

<sup>11</sup> 28 U. S. C. §1391(a) (Supp. 1949).

<sup>12</sup> Compare §1404(a) with the language of the removal statute, §1441(a), ". . . any civil action . . . may be removed by the defendant or defendants, to the district court of the United States. . . ."

<sup>13</sup> See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1, 22 (1945).

<sup>14</sup> Foster-Milburn Co. v. Knight, 181 F. 2d 949 (2d Cir. 1950). The reasoning of the two district courts denying the right to transfer, *viz.* that the plaintiff voluntarily selects his own forum and thereby waives his right to a transfer, is unrealistic, since in these cases the plaintiff has no real freedom of choice.

<sup>15</sup> See 28 U. S. C. §1693 (Supp. 1949) "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court." And see FED. R. CIV. P. 4(f), which provides that service may be had throughout a state, and beyond state boundaries, "when a statute of the United States so provides." These seem to require an express statutory provision for extending service beyond state boundaries.

from the existing practice that the court should demand that the Congress make plain its desire to effect such an innovation. Besides, it would not be in accord with the doctrine of *forum non conveniens* underlying §1404(a), which doctrine always presupposed at least two forums in which the defendant was amenable to process.<sup>16</sup> But it seems that the same reasons would not apply for requiring a sole *defendant* movant to be amenable to process in the transferee district, where venue was proper, since the defendant in moving to transfer could be said to waive his right to service.<sup>17</sup>

While good policy arguments support the result reached by the courts allowing plaintiffs to invoke §1404(a), nevertheless it is believed that wisdom lies with the Second Circuit in waiting for a clearer expression of intention from the Congress to modify existing procedural law, particularly since the motivating reason behind the enactment of §1404(a) was to afford relief to defendants by placing them on an equal footing with plaintiffs in the selection of a forum.<sup>18</sup>

(B). Another problem involving the interpretation of the "where it might have been brought" clause of the subsection arises when suit is brought against multiple defendants, who move for a transfer to a state in which not all defendants are residents in the venue sense. This problem *inter alia* serves to emphasize the importance of reading §1404(a) in connection with all venue provisions, both special and general.<sup>19</sup> If the action be one requiring that venue be laid in the district wherein the defendants reside, as is provided in many special venue statutes,<sup>20</sup> and in addition said clause has reference to venue, clearly there can be no transfer, in spite of the inconvenience of the original forum. Accordingly, one district court has held that in the case of

<sup>16</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 506 (1947).

<sup>17</sup> But cf. *Hampton Theatres, Inc. v. Paramount Film Distributing Corp.*, 90 F. Supp. 645 (D. D. C. 1950) (anti-trust suit, where the court intimated that fact defendant was not amenable to process in the transferee district was sufficient to preclude transfer under §1404(a), even though the venue there be proper); *Tivoli Realty, Inc. v. Paramount Pictures, Inc.*, 89 F. Supp. 278 (D. Del. 1950) *semble* (anti-trust suit). But it appears more doubtful that defendant could likewise waive improper venue in the transferee forum since this would impute to the "brought" clause absolutely no meaning.

<sup>18</sup> 28 U. S. C. §1404(a), Reviser's Notes at 802-03 (Supp. 1949).

<sup>19</sup> Special: 28 U. S. C. §§1394-1403 (Supp. 1949); 35 STAT. 66 (1908), as amended, 45 U. S. C. §56 (Supp. 1949) (FELA); 26 STAT. 209 (1890), as amended, 15 U. S. C. §§1, 2 (1946) (Sherman Anti-Trust Act); 38 STAT. 736 (1914), 15 U. S. C. §22 (1946) (Clayton Act). For a list of other special venue provisions see *United States v. National City Lines*, 337 U. S. 78, 85 (1949). General: 28 U. S. C. §1391 (Supp. 1949); particularly note §1391(c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U. S. C. §1406(a) (Supp. 1949), see note 4 *supra*.

<sup>20</sup> *E.g.*, 28 U. S. C. §1400 (Supp. 1949) (copyright and patent suits); 35 STAT. 66 (1908), as amended, 45 U. S. C. §56 (Supp. 1949) (FELA); 38 STAT. 736 (1914), 15 U. S. C. §22 (1946) (anti-trust suits).

multiple defendants, there can be no transfer of the action unless it could have been brought against all defendants, in the venue sense, in the transferee district.<sup>21</sup> Another district court reached a contrary result, holding that even though one corporate defendant was not a resident of (not doing business in) the transferee district and could not have been sued there originally, a transfer would be proper if the defendant consented to the transfer and venue was proper as to the other defendants in the transferee forum.<sup>22</sup>

The court denying its authority to transfer construed the "brought" clause literally and added that since the consent of a defendant who is sued alone would not avail him the right to transfer to a district where he was not a resident, then logically, neither should the consent of one of multiple defendants. The other court, however, construes the statute so as to be consistent with the only Supreme Court case bearing on the problem,<sup>23</sup> and concludes that it can find no practical reason requiring transferee forum to be a proper forum for *all* of several defendants. Although neither court is too clear as to whether the "brought" clause, in addition to proper venue, also requires all defendants to be amenable to process in the transferee jurisdiction, both courts seem to imply that the process obstacle can be hurdled by use of the consent device if venue is proper. The discussion of this problem thus far has been limited primarily to cases governed by special venue statutes. However, in other actions to which the general venue subsections 1391(a), (b)<sup>24</sup> apply, no added difficulty can be foreseen except in so far as courts might find the specific language, "*all* defendants," a deterrent to the use of the consent device.

The legislative history of the statute indicates that little if any thought was given to the problem of multiple defendants.<sup>25</sup> Until the matter is clarified by specific legislation or resolved by the Supreme Court, a district court faced with the problem might choose between (1) denying the transfer entirely and (2) utilizing the consent device. Where the defendant as to whom the transferee forum is improper does not consent, the court could either refuse the transfer, or perhaps require

<sup>21</sup> *Tivoli Realty, Inc. v. Paramount Pictures, Inc.*, 89 F. Supp. 278 (D. Del. 1950) (anti-trust suit, 5 of 14 defendants were neither doing business nor could be found in the state of the transferee district).

<sup>22</sup> *Glasfloss Corp. v. Owens-Corning Corp.*, 90 F. Supp. 967 (S. D. N. Y. 1950) (anti-trust suit); *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S. D. N. Y. 1950) (anti-trust suit), *appeal dismissed sub nom. Ford Motor Co. v. Ryan*, 182 F. 2d 329, 332 n. 7 (2d Cir. 1950) (court expressly by-passed a consideration of the validity of the consent device).

<sup>23</sup> *United States v. National City Lines*, 337 U. S. 78 (1949) (Supreme Court affirmed a transfer of a case factually similar to the *Ford Motor Co.* case, though not purporting to make a determination of the validity of the consent device).

<sup>24</sup> Title 28 U. S. C. (Supp. 1949).

<sup>25</sup> See *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45, 48 (S. D. N. Y. 1950).

the plaintiff to take a severance of his action.<sup>26</sup> Unless the consent device is employed, the beneficial effect of §1404(a) would appear to be materially lessened by suits involving multiple defendants.

(C). An important question in the administration of §1404(a) is whether an order of a district court directing (or refusing to direct) a transfer under the subsection is reviewable by appeal or by the prerogative writ of mandamus.<sup>27</sup> As to the right of appeal, the cases are in accord that an order transferring or refusing to transfer is interlocutory and not appealable.<sup>28</sup> On the question of whether mandamus will lie to review the interlocutory order the authorities are less certain.<sup>29</sup> As the cases now stand, if a district court *denies* a motion to transfer, then the very nature of this order is such as to call for an extraordinary remedy and mandamus might lie from the court of appeals if the district court erred.<sup>30</sup> On the other hand, if the court *grants* a transfer, the court of appeals of the circuit *a quo* will not entertain a petition for mandamus but will leave the question for the court of appeals of the circuit into which the action was transferred,<sup>31</sup> unless perhaps the impropriety of the transfer order is sufficiently glaring. If the transfer by the district court was clearly unauthorized under §1404(a),<sup>32</sup> mandamus will lie as in the denial situation above.<sup>33</sup>

The rationale of this difference in results between the denial and the granting situations seems to be that where transfer is denied, if defendant movant finally loses on the merits below, any error in the interlocutory order would probably not be correctible on appeal;<sup>34</sup>

<sup>26</sup> FED. R. CIV. P. 21; 3 MOORE, FEDERAL PRACTICE 2911 (2d ed. 1948).

<sup>27</sup> MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE ¶0.03(28)5 (1949); Note, 58 YALE L. J. 1186 (1949).

<sup>28</sup> Ford Motor Co. v. Ryan, 182 F. 2d 329 (2d Cir. 1950) (order denying transfer); Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866 (2d Cir. 1950) (order transferring); Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F. 2d 360 (4th Cir. 1949) (order transferring); MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 210 (1949); Braucher, *supra* note 3, at 938. *But see* Magnetic Engineering Co. v. Dings Manufacturing Co., *supra* at 869, 870 n. 1 (appeal treated as petition for mandamus).

<sup>29</sup> See R. R. v. Wiswall, 23 Wall. 507, 508 (U. S. 1874) (order remanding a removed action could be reviewed by mandamus even though interlocutory); Larsen v. Nordbye, 181 F. 2d 765 (8th Cir. 1950) (mandamus did not lie to review order denying plaintiff's motion to dismiss under FED. R. CIV. P. 41(a)(2)); Notes, 58 YALE L. J. 1186, 1188 (1949), 33 MINN. L. REV. 738, 746 (1949).

<sup>30</sup> Ford Motor Co. v. Ryan, 182 F. 2d 329 (2d Cir. 1950) (Judge Swan dissenting).

<sup>31</sup> Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866 (2d Cir. 1950) (Judge Frank dissenting).

<sup>32</sup> Foster-Milburn v. Knight, 181 F. 2d 949 (2d Cir. 1950) (court did not have power to order transfer on plaintiff's motion when defendant not amenable to process in transferee district).

<sup>33</sup> While the Supreme Court has not yet passed upon the appropriateness of this prerogative writ procedure, the question has been before the Court in one case. *Ex parte Collett*, 337 U. S. 55 (1949) (petition for writ of mandamus and prohibition).

<sup>34</sup> The reasoning is that if petitioner loses he could not show that a different result would have ensued if the case had been transferred.

whereas if he won below he would be unable to recover his added expense resulting from the court's refusal to transfer. Hence the need for an extraordinary remedy. On the other hand, where the court directs a transfer, the court of appeals of the circuit *ad quem* would be in a better position to decide the question of whether mandamus will lie, since it can best determine whether, in that court, any other remedy is available to the plaintiff.<sup>35</sup>

It would appear that the same reasons for granting a petition for mandamus should apply both where motions to transfer are granted and where denied. However, to permit the use of mandamus to review every disposition by a trial court of a motion to transfer, would seemingly result in unnecessary delay.<sup>36</sup> Perhaps the petition for this exceptional writ should be granted only to correct extreme inequities or a clear abuse of the trial court's discretion.<sup>37</sup>

(D). Another problem in the administration of the new venue statute arises where state courts have been given jurisdiction concurrent with federal courts, *e.g.*, suits under Federal Employers Liability Act.<sup>38</sup> To what extent may a plaintiff in such an action, while defendant's motion to transfer to a more convenient forum is pending, avoid a transfer by dismissing his action<sup>39</sup> and bringing it in an equally inconvenient state court where §1404(a) is not available? The problem really materializes if the action is one which by statute cannot be removed to a federal court.<sup>40</sup> In the only case found which was directly concerned with this problem<sup>41</sup> the court of appeals affirmed an order of the trial court granting plaintiff's motion to dismiss his action. The court held dismissal was not prejudicial error even though it left the plaintiff free to bring his suit in any state court where he could get service of process

<sup>35</sup> *But see* Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866, 870 (2d Cir. 1950) (dissenting opinion).

<sup>36</sup> See Note, 58 YALE L. J. 482, 488 (1949).

<sup>37</sup> MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 197 (1949).

<sup>38</sup> Other examples of statutes conferring concurrent jurisdiction are the Jones Act, the Fair Labor Standards Act, certain portions of the Bankruptcy Act, and the Securities Act. See MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 398 (1949).

<sup>39</sup> FED. R. CIV. P. 41(a)(1) (voluntary dismissal by the plaintiff as a matter of right where notice of dismissal filed before answer or motion for summary judgment). Rule 41(a)(2) (where plaintiff's motion made after answer, etc., no dismissal save upon order of the court and upon such terms and conditions as the court deems proper).

<sup>40</sup> 28 U. S. C. §1445(a) (Supp. 1949) (FELA suits); 28 U. S. C. §1445(b) (Supp. 1949) (suits against trustees of common carriers for damaged shipments); see MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 262 (1949) for other non-removable actions.

<sup>41</sup> New York C. & St. L. R. R. v. Vardaman, 181 F. 2d 769 (8th Cir. 1950) (FELA suit, the trial court denying plaintiff's motion to dismiss made after the court's order transferring the action but within the period of stay); *cf.* White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948) (where plaintiff dismissed as a matter of right).

on the defendant, and notwithstanding such subsequent suit in a state court would not be subject to transfer under §1404(a).

This anomaly, whereby concurrent jurisdiction and non-removability of certain actions can be used to circumvent<sup>42</sup> the purposes for which the subsection was enacted, would largely disappear if state courts were authorized to use the *forum non conveniens* doctrine to decline jurisdiction of these actions clearly inconvenient in that forum. But even if federal law is no bar to such a use of the doctrine, it is still not absolutely clear that a state court has this discretionary power in the absence of statutory authority.<sup>43</sup> Hence legislation by states empowering their courts to use the doctrine would seem necessary to cure the situation. There is some authority to the effect that the district court under Federal Rule of Civil Procedure 41(a)(2) has discretion to deny plaintiff a voluntary dismissal,<sup>43a</sup> but the weight of the decisions does not support this construction of the Rule. If this view were adopted, however, and defendant files his answer before moving for transfer, plaintiff's subsequent motion to dismiss could be denied where it appeared he was seeking to evade §1404(a).<sup>43b</sup> However, where the plaintiff sues initially in an inconvenient state court, and that court is powerless to utilize the doctrine, he may clearly thwart §1404(a) and its underlying purposes.<sup>44</sup>

<sup>42</sup> See *Hayes v. Chicago, R. I. & P. Ry.*, 79 F. Supp. 821, 826 (D. Minn. 1948) (where plaintiff threatened to dismiss if defendant's motion to transfer granted).

<sup>43</sup> *Mooney v. Denver & R. G. W. R. R.*, 221 P. 2d 628 (Utah 1950) (under Utah statute the court can decline jurisdiction of FELA suit under doctrine of *forum non conveniens*); *Accord*, *Herb v. Pitcairn*, 324 U. S. 117 (1945); *Douglas v. New York, N. H. & H. R. R.*, 279 U. S. 377 (1929); *cf.* *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142, 148 (1907) (subject to restrictions of Federal Constitution, state may determine limits of the jurisdiction of its courts). *But cf.* *State v. Mayfield*, 359 Mo. 827, 224 S. W. 2d 105 (1949) (without such a statute a Missouri court refused to exercise its judicial discretion to decline jurisdiction of a FELA suit on the sole ground of *forum non conveniens*). See Note, 44 ILL. L. REV. 80 (1949) (if a state legislature has power to determine the jurisdiction of its own courts, why cannot a state court by its own declaration of rule employ *forum non conveniens* without interference, even in FELA cases?).

<sup>43a</sup> *Henjes v. Aetna Ins. Co.*, 39 F. Supp. 418 (E. D. N. Y. 1941) (plaintiff's motion to dismiss for purpose of re-entering state court and thereby defeating court's removal order denied); *Colonial Oil Co. v. American Oil Co.*, 3 F. R. D. 29 (E. D. S. C. 1943). *Contra*: *Bolten v. General Motors Corp.*, 180 F. 2d 379 (7th Cir.), *cert. denied*, 71 Sup. Ct. 41 (1950) (plaintiff has absolute right to dismiss, restricted only by the requirement that it be done "upon such terms and conditions . . .").

<sup>43b</sup> It is arguable that the court could order the plaintiff not to bring the same suit in a state court as one of the "terms and conditions" of dismissal. *But see*, *McCann v. Bentley Stores Corp.*, 34 F. Supp. 234, 235 (W. D. Mo. 1940) (compensating defendant for costs and expenses are the only "terms and conditions" conceivable).

<sup>44</sup> Since the preparation of this note the Supreme Court has decided that a state court is not prevented by federal law from utilizing the doctrine of *forum non conveniens* to dismiss FELA actions, provided such court adopts the doctrine for all causes of action and does not discriminate against citizens of sister states. *Missouri v. Mayfield*, 71 Sup. Ct. 1 (1950), *reversing* 359 Mo. 827, 224 S. W. 2d 105 (1949). Most states rejecting the doctrine, the need for state legislation remains.

(E). The final question to be considered concerns the effect of state law under the *Erie* doctrine on the administration of the subsection. Suppose the plaintiff sues in a district court where the law of the state in which it sits requires, on the alleged facts, a judgment for the plaintiff under the *Erie* rule; and the defendant moves for a transfer under §1404(a) to a district court in a state whose law is such that the defendant would win. Assuming transfer is granted, what law should the transferee forum apply? There are at least three cases<sup>45</sup> to the effect that the law of the transferring district applies, and that a change of venue affects the place of trial only. Or, in the terse language of the Court of Appeals for the 10th Circuit, when a removed case<sup>46</sup> is transferred from a New Mexico district court to a California district court under §1404(a), "there is no logical reason why it should not remain a New Mexico case, still controlled by the law and policy of that state."

Although this result places upon a transferee district court the additional burden of deciding each transferred case under a foreign law, this is an easier task than that which would be forced upon the court having to decide the question of transfer if the law of the transferee district were held to control. In this latter situation, if the motion was to transfer to a district in a state having a public policy opposed to that of the state of the instant district, the trial judge would have the unhappy duty of determining the propriety of defeating one state's policy and applying another.<sup>47</sup> Finally, if the law of the transferee district were to control, this would undoubtedly encourage a defendant to "shop around" the states of proper venue for the best state law available before moving for a transfer on the grounds of inconvenience. This, of course, runs counter to one of the reasons for which the *Erie* rule was adopted. Wisdom clearly lies with the existing law.

DON EVANS.

### Federal Jurisdiction—Interpleader—Cross-Claims

Plaintiff insurance company (a disinterested stakeholder) brought an interpleader action to determine the proper recipient of an escrow fund placed in its possession by one of the defendant-claimants. The suit was instituted in the United States District Court for Southern

<sup>45</sup> *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950); *Magnetic Engineering Co. v. Dings Manufacturing Co.*, 178 F. 2d 866 (2d Cir. 1950); *Greve v. Gibraltar Enterprises, Inc.*, 85 F. Supp. 410 (D. N. M. 1949).

<sup>46</sup> The removal of an action by a defendant to the federal court is no waiver of his right to move for transfer under §1404(a). *White v. Thompson*, 80 F. Supp. 411 (N. D. Ill. 1948); *Stewart v. Atchison T. & S. F. Ry.*, 92 F. Supp. 172 (E. D. Mo. 1949); *Chaffin v. Chesapeake & O. Ry.*, 80 F. Supp. 957 (E. D. N. Y. 1948).

<sup>47</sup> See *Griffin v. McCoach*, 313 U. S. 498 (1941) (fact situation where disregard of policy of transferring state would be clearly substantive).