Title 28, U. S. Judicial Code, Section 1404-a—a few questions

On September 1, 1948, the new revision of the United States Judicial Code went into effect. Section 1404-a of title 28 of that code was but a very small part of that total revision. Its text is as follows:

“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.”

Taking the words in their ordinary meaning the section seems to say quite simply and clearly that, if plaintiff sues defendant in a federal district court which has jurisdiction over the parties and the subject matter, the court may, in the exercise of its discretion, transfer the case to another federal district court where the plaintiff might have brought suit in the first instance.

The section does not say when the court is to exercise this discretion, on whose motion, at what point in the proceedings; nor does it lay down any standards to guide the federal district court judge in the exercise of his discretion other than the phrases, “For the convenience of parties and witnesses . . .” and “. . . in the interest of justice . . . .” The section does not say what the effect of a transfer will be on a case transferred under its provisions—whether, for example, the federal district court to which the cause is transferred is to apply the “substantive” law of the state in which it sits, or of the state in which the transferring court sits. A further problem suggests itself as to what state laws will be classified as “substantive” or as “procedural” in order to carry out the purposes of 1404-a, admitting that a “procedural” law can take on a “substantive” character in the eyes of the classifying court in order to achieve a desired result in a given situation. (See the discussion of this point below in reference to “Erie”.) For example, if A sues B in the federal district court in state X (F1) we know that the statute of limitations of state X will govern the case and be applied. Now the case is transferred to a federal district court in state Y (F2) for the “convenience of parties and witnesses.” Is the statute of limitations in F2 (Y) now “substantive” as it was in F1, assuming that the case is a diversity case and Erie applies. A similar line of inquiry can be opened up as to the burden of proof in F1 and F2, inasmuch as the federal courts must apply with respect to the burden of proof the rule of the state in which they sit. (Schopp v. Muller Dairies (1938), 25 F. Supp. 50; Palmer v. Hoffman, 318 U. S. 109, 87 L. Ed. 645.)
The simple language of the section does not make it clear whether F1, feeling it is an inconvenient and therefore "unjust" forum, has to take jurisdiction or not. Can the court refuse the case and tell the plaintiff to bring his cause in the more appropriate forum to which the cause might be transferred?

Under what circumstances would an order transferring a cause be an abuse of discretion on the part of F1? Suppose the statute of limitations applicable to the plaintiff's cause in the convenient forum has run and the plaintiff is there barred? Does this mean that transfer is impossible because not "in the interest of justice" or does it mean that it is possible for F1 to be so inconvenient for parties and witnesses that justice may require a transfer to F2, even if the plaintiff is there barred? Or is there a third possibility even more consonant with the "interest of justice" and within the scope of the section?

This article will attempt to survey the problem of the proper place of trial in the federal courts and will consider section 1404-a as the latest step in the evolution of attempts, legislative and judicial, to solve the problems of venue and its effect on the proper hearing of the merits of a cause.

It is the purpose of this article to submit the argument that in view of the developments in the federal courts, and also in the state courts, in the field of "proper venue," section 1404-a must be construed as an attempt by Congress to create a flexible technique for the use of the federal courts—a technique intended for and adapted to, properly construed, an overall workable solution of most of the vexing problems and dilemmas presented by the "inconvenient forum" and its choice by a plaintiff as a place of trial.

Prior to 1404-a, there was a definite evolution in the field of the "inconvenient forum" in the federal courts but it was an evolution characterized by a sort of head-over-heels development: problem—solution, problem—solution, etc., with each solution being an ad hoc technique for dealing with the respective problem. It will be argued herein that a forthright and bold construction of section 1404-a, such as two federal courts recently suggested in perceptive dicta (see infra), will be best suited for dealing with the problems to be here considered. All of the ramifications which may flow from the proposed construction will not be considered—and, of course, cannot be considered.

The General Background of "Proper Place of Trial"

In the common law two concepts have developed which have provided endless hours of entertainment for those with a jurisprudential twist in their natures: the "transitory cause of action" and "jurisdiction over the person." Without considering any of the theoretical problems involved, working
lawyers commonly say that a plaintiff having a transitory cause of action can sue the defendant "wherever he can find him" or "in any court having personal jurisdiction over him." Let us use the language in its ordinary sense and assume that a plaintiff has a transitory cause of action for negligence. It is perfectly clear that as a matter of tactics it might be far more to the plaintiff's advantage to have the case tried in a forum far from the scene of the accident, in a court having "jurisdiction" over the defendant. Let us assume there is such a court and the plaintiff serves the defendant within its territorial jurisdiction. The defendant appears in order to avoid default and defends himself at great expense and under heavy handicaps. But the defendant may choose to settle rather than go to the expense of appearing in the inconvenient forum which is probably one of the reasons why the plaintiff chose the forum in the first instance.

Of course the plaintiffs early took advantage of these concepts of "transitory cause of action" and "jurisdiction over the person" and courts were required to develop rules and techniques to satisfy complaints of indignant defendants who pointed out that a case is not truly heard on the "merits" when heard in a forum where the plaintiff's proof is easy to present, local feeling is strong for plaintiff's right in this type of action, and the defendant's witnesses must be transported or records bundled up and transferred, or valuable time of the defendant or of his witnesses is lost in traveling and living away from home.

In England, with its unitary form of government, and in the separate states of the United States, arriving at methods with which to deal with plaintiffs who made these harassing choices of venue was relatively easy. Statutes were passed early in the development of our law which regulated choice of venue and provided for defenses of improper venue and for transfer of cases from one venue to another where it was clear the plaintiff's choice, though legally correct, was unfair to the defendant; and the device of conditional dismissal was developed whereby the defendant could ask the court to dismiss the plaintiff's suit on condition defendant would agree to service in the convenient forum or would waive the statute of limitations therein, etc.—making it clear that if the defendant did not cooperate in the "convenient county" the plaintiff could return and proceed to trial or judgment.

The "interstate" problem in a federal system, however, is necessarily much more complex. If A sues B in state X on a transitory cause of action and B pleads that he was only temporarily in state X and that the "fair" place of trial is state Y—several problems are immediately apparent:

1. State X cannot transfer the case to state Y—as county X can transfer to county Y.

2. If state X denies A access to its courts by refusing to take jurisdiction,
it may well be argued that A is being denied the privileges and immunities of citizens of the several states. (Restrictive legislation by the states denying jurisdiction to its courts over suits between nonresidents upon foreign causes of action has been held to be constitutional where the discrimination was based on “residence.”) (Douglas v. N. Y. N. H. and H. Ry. Co., 279 U. S. 377, 73 L. Ed. 747.) Many states, of course, feel they cannot refuse to take jurisdiction even if A and B are nonresidents and the cause of action is a “foreign” one, Minnesota being the outstanding example. (See Boright v. Ry. Co., 180 Minn. 52, 230 N. W. 457.) See, also, Bright v. Wheelock, 323 Mo. 840, 20 S. W. 2d 684, holding that there is no discretionary power to refuse to take jurisdiction of a transitory cause of action, in the absence of statute, where brought by nonresident.)

3. If state X dismisses the case because it is “not fair” to the defendant in this venue, even though there is in personam jurisdiction, the plaintiff may be deprived of his only chance to recover. He may have found this “elusive defendant” after a long pursuit; the statute of limitations may have run in the “fair” forum, or he may be deprived of the benefit of his attachment liens secured in state X.

4. And it is perfectly clear that the courts of each state have no power to bind the courts of others on their decisions as to which forum is more convenient and which should hear the cause.

5. This is further complicated by the fact that if an inconvenient forum takes jurisdiction and the defendant is at such a disadvantage that he loses or cannot appear and defaults the judgment against him must be given full faith and credit in all other states. This fact gives plaintiff an added lever with which to exert pressure if he has a transitory cause of action and a defendant is susceptible to suit in states other than where the cause of action arose.

This last point of complication leads to consideration of what can properly be termed “the real problem.” When we talk about A and B in a federal system and visualize A pursuing B watchfully as B progresses through several states until he decides that B is in that forum which is sufficiently inconvenient, whereupon he pounces on B with personal service of process, we are talking of something that is no problem at all because A’s and B’s as individuals with that much mobility simply don’t exist or, at least, are pleasantly rare. There is, however, in modern society, nothing rare about B’s who are large corporations and who injure, or allegedly injure, people in one state while they are subject to suit in anywhere from two to 48 states. And there is nothing rare about A’s who, so injured or allegedly injured, find time and money enough (it is rumored that some law firms finance these A’s) to proceed to a state many miles from the scene of the accident where such corporations are frowned upon but “do business.” There, because the plaintiff has
a transitory cause of action and because defendant is a corporation doing business and therefore "present" in the state—the plaintiff can sue the defendant.

We do not have time or space to review various state policies as regards these "imported" causes of action. The purpose of this article is to discuss the problem as it developed in the federal courts, the state court situation being summarized for purposes of comparison with the problem in the federal courts—where in some very important ways it is more susceptible of solution, even though in others it seems more complex.

**The Doctrine of "Forum non Conveniens" in the Federal Courts**

Up to 1939 and the decision of *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165, the large corporation was not really open to the harassing suit in the federal courts to the extent that a serious situation was presented. Corporations were held not to be subject to suit in a federal district court other than the district court of its home, i. e., incorporation, because the Federal Judicial Code provided that in diversity cases a defendant was suable only in the district court of his residence unless he waived the rule which protected him (also in the home district of the plaintiff if jurisdiction could be obtained). Corporations were held not to be "present" in a district merely because they did business there. As noted above, they were "present" in states in which they did business and the battle of *forum non conveniens* was being fought in those state courts and not in federal courts. In 1933 the case of *Rogers v. Guaranty Trust Co. of N. Y.*, 288 U. S. 123, was decided by the Supreme Court. It helped to lay the basis for the problems raised by the Neirbo decision some six years later because it was the first case in the federal courts applying the doctrine of *forum non conveniens*. The way in which it arose illustrates the reason why there was really no serious problem in the federal courts until the Neirbo decision, *supra*, so radically increased the suability of corporations. In the Rogers case a corporate defendant had a case removed from a New York state court to the Federal District Court in New York (thus waiving any defense of improper venue) and there argued that the proper forum to adjudicate the suit was a New Jersey state court or a federal district court in New Jersey because it was a suit involving the internal affairs of a New Jersey corporation and any forum other than one in the state of incorporation would be so inconvenient to the defendant and to the court as to defeat justice and allow the plaintiff an undue advantage. Note that the defendant corporation first invoked the jurisdiction of the federal court on grounds of diversity of citizenship. The case arose before *Erie*, so the troublesome question as to whether a federal court is bound to follow the state rule on *forum non conveniens*, and dismiss on that ground
if it feels the courts of the state would, was not presented in the case. The
Supreme Court, applying the doctrine of forum non conveniens, recognized
that jurisdiction was proper in the district court but ordered the action dis-
missed and the plaintiff relegated to the more appropriate forum. The early
cases in the federal courts involving the doctrine after the Rogers case were
those involving internal affairs of corporations. Sometimes the doctrine was
applied and sometimes not (see 34 Va. Law Rev. 818 for a review of these
cases) but the cases were relatively rare and the question almost always
centered around the doctrine well established in state courts that courts
other than those in the state of incorporation should not determine disputes
involving the internal affairs of corporations. The cases were narrow in their
scope and understandably rare because, as noted, corporations were not
suable in federal district courts other than their “home” district court, in
the absence of waiver.

Then came the Neirbo decision, supra, in 1939; the holding was simply
that when a corporation qualifies to do business in a state where such quali-
ification includes submission to the jurisdiction of the courts of the state the
corporation has constructively waived its immunity from suits, where juris-
diction is based on diversity of citizenship, in the federal district courts of
that state. The effect of the decision was to make a corporation suable in
any federal district in which it did business. It was then “present” in federal
districts in the same sense it was “present” in the various states in which
it did business as outlined above.

The effect on the “suability” of a corporation doing business on a
nationwide scale is easy to see. The problem of the inconvenient forum had
truly arrived in the federal courts. And in 1937 the Erie case had said that
federal courts were to apply, in diversity cases, the substantive laws of the
state in which they sat. Whether or not this would include the doctrine of
forum non conveniens had not been decided by the Supreme Court when
section 1404-a became effective in September of 1948. And if the courts
of the federal judiciary continue to develop and construe the section along
the lines which they have followed to date, and which this writer will argue
is basically sound, the Supreme Court will never be called upon to decide
this issue. (See Weiss v. Routh, 149 F. 2d 193 (2d C. C. A., 1945) and Gulf
Oil Corp. v. Gilbert, 153 F. 2d 883 (2d C. C. A., 1946), where different
combinations of that circuit’s illustrious minds came to exactly opposite
conclusions on this problem, with the Supreme Court, in the Gulf case (see
citation infra) finding the question unnecessary to decide).

One thing had become certain by this time. The federal courts had
to decide whether or not a defendant corporation sued in a diversity case in
a district which it could prove was so inconvenient as to be “unjust” was
entitled to a dismissal on grounds of forum non conveniens.
One school held that there was no doctrine of \textit{forum non conveniens} of general application in the federal courts, (the recognized exception being internal-affairs-of-corporations cases). Others, of course, argued there was such a doctrine in the federal courts, applicable whenever it was clear that to allow the plaintiff to proceed with suit would be unjust to the harassed defendant.

In 1943 and 1946 the cases of \textit{Meredith v. Winter Haven}, 64 S. Ct. 7, and \textit{Williams v. Green Bay and \textit{W}. Ry.}, 66 S. Ct. 284, respectively, raised some doubts about the doctrine's applicability but the issue was settled by the case of \textit{Gulf Oil Corp. v. Gilbert}, 67 S. Ct. 839. In this case the court held, by a 5-4 decision, that the doctrine of \textit{forum non conveniens} had general application in unusual situations in the federal courts, and the majority took the position that the doctrine was relatively well established. There was a strong dissent by Justice Black which brings out the basic defects of the doctrine of \textit{forum non conveniens} as an equitable doctrine. (See infra.)

As background development of our story here, there were two decisions prior to the Gilbert case which gave a more serious cast to the whole problem of proper place of trial in the federal courts and gave great impetus to the demand for a remedy.

The doctrine of \textit{forum non conveniens} when applied had protected defendant corporations in the federal courts from harassing suits as to transitory causes of action, made so deadly by the Neirbo decision, supra. But in the cases of \textit{Miles v. Ill. Central Ry.}, 315 U. S. 698, and \textit{Baltimore & Ohio Ry. v. Kepner}, 314 U. S. 44, it was held that the doctrine was inapplicable to cases arising under the Federal Employer's Liability Act because the intent of Congress was to give the plaintiff the choice of the venues therein provided and no element of inconvenience was to be used as a basis for a court's depriving him of that choice.

Also the case of \textit{United States v. National City Lines} (1949), 69 S. Ct. 955, held that the special venues created in the anti-trust acts in favor of the United States Government were not to be disturbed if selected by the Government, on the grounds of inconvenience to the defendant.

Regardless of how one feels about the social policy involved, it is to be admitted that at least one of the special venues of these acts could always be selected by a plaintiff for its inconvenience. This was especially true of the FELA. It was clearly less true of the anti-trust acts because it is not the usual tactics of the Government to seek unfair advantage in a suit for the sake of avoiding the merits. Individual plaintiffs have not shown, in FELA cases, any marked restraint.

This then was the situation in 1948 when section 1404-a became effective. Corporations were subject to suits on transitory causes of action in any
federal district in which they did business if the plaintiff was a citizen of a different state from that of the defendant’s incorporation. On causes of action created by federal statutes they were subject to suit in the special venues there provided, and if none, in accordance with the accepted standards of jurisdiction of the federal courts. The plea of forum non conveniens was available to a defendant corporation but not in cases arising under the “special venue” statutes, and these cases were numerous, most arising under FELA where the “harassing choice” of forum had become a real problem.

There is, however, one more aspect of the situation prior to 1404-a which needs emphasis—that is, the basic limitation of the doctrine of forum non conveniens as it operated in conjunction with our concepts of “transitory cause of action” and “personal jurisdiction” and “presence by doing business.” While the doctrine gave protection to a defendant being sued in an “inconvenient forum” the necessary effect of its application in the courts of one state, deciding that the court of another state was the proper place of trial, was to deprive the plaintiff of rights and advantages which were traditionally his: the right to sue on his transitory cause of action and the advantage of having found and served his defendant. This problem is particularly well expressed, for the inter-state situation by Professor Foster in his article on Proper Place of Trial, 44 Harv. L. Rev. 41, and for the federal court system by Justice Black in his dissent in the Gilbert case. In considering the words of Prof. Foster it is well to keep in mind that prior to 1404-a these same problems existed in the federal courts and were behind Black’s dissent to be considered following the excerpts from the Foster article:

“In the United States, the county of trial is largely regulated by statutes which are declaratory of the common law as to local actions, but more restrictive as to the plaintiff’s choice when he is suing on a transitory action. . . . In almost every state there is some check which would prevent the plaintiff from selecting a remote county merely to embarrass the defendant. . . . The result is that the rules of thumb have only prima facie effect and are subject to discretionary modification wherever there is a balance of convenience in favor of some other county.

“Such discretionary powers as are vested in the trial courts seem to be exercised satisfactorily. . . . The danger that a plaintiff who mistakes his county may fall afoul of the Statute of Limitations or lose the advantage of attachments or garnishments can be obviated by providing that the plaintiff’s suing in the wrong county shall only give the defendant the right to change the venue by timely motion and will not result in a dismissal.” (Emphasis supplied.)

Professor Foster, in the same article, adds:

“A more practical obstacle is that the issue as to the state of trial must be presented to individual states which can speak only for themselves and can not be certain that another state will follow what they believe to be the proper doctrine of international law. If a court in state A dismisses the action on
the ground that state B is the proper state for trial, can it be sure that courts in state B will not also refuse to entertain it? Will the plaintiff lose the advantage of attachment liens or of his having 'found' an elusive defendant, or will the Statute of Limitations be set up, in case he is forced to begin all over again in another state? The court in state A can not, as in the intra-state situation, simply order a transfer of the action to state B so that there will be a continuation of the same action.

"Assuming that the plaintiff has begun an action in a place which on the whole does not seem convenient, the question should be not whether he is to be penalized by a dismissal but whether the ends of justice might better be served by trial elsewhere, and on what terms. This will make it possible, as in the case of motions for change of venue, to ascertain just what is the issue and what testimony will be needed, before deciding whether or not the court should entertain the action. The dismissal may be conditional on the defendant's stipulation to admit service and waive all objections to proceeding in the state he contends is more appropriate, agreeing if necessary to waive the statute of limitations, and making such other stipulations as may be essential in order that the dismissal may operate for all practical purposes as a change of venue to the other state. . . . The amount of concessions required of the defendant should depend upon how reasonable the plaintiff was in beginning his action where he did. The exact form of the order should be left to the sound discretion of the trial judge in meeting the infinitely varying situations which will come before him."

These words of Professor Foster are still highly applicable to the interstate problem of *forum non conveniens*, but the main purpose in quoting them here is to show that because the federal courts are one system of courts the solution of the problems therein of proper place of trial will more likely be found in the intra-state procedure. In spite of the loose interpretation of the Erie doctrine that a federal court is "merely another court of the state in which it sits," a federal court is a part of a unified system of courts. Take this basic fact in conjunction with 1404-" and a solution of the problems of venue seems more possible (that is a solution which protects the plaintiff as well as the defendant).

Justice Black, in his Gilbert dissent (67 S. Ct. 893) quoted the case of *Davis v. The Dept. of Labor*, 63 S. Ct. 225:

"As penalty for error the individual may not only suffer serious financial loss thru the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he erroneously pursued it elsewhere."

Then Black pointed out that in the Gilbert case the court had before it a typical case in that they did not know, when they ordered dismissal on grounds of *forum non conveniens*, whether the plaintiff was barred in the forum which they had decided was more appropriate.

In the case of *Cinema Amusements v. Loews Inc.*, 85 F. S. 319 at page
322, the court said (in comparing section 1404-a and its transfer provision with the procedure of *forum non conveniens*):

"Under 1404-a a case is not dismissed but merely transferred to the more convenient forum; under *forum non conveniens* a case is dismissed and must be instituted anew in the more convenient forum, carrying with it the inherent and jeopardous hazard of being barred therein by the statute of limitations."

In the first *United States v. National City Lines* case, 334 U. S. 573, 68 S. Ct. 1169, at page 1179:

"Nor can the court within the limits of the doctrine specify the district in which the action is to be re instituted and tried. It can only terminate the pending proceedings as was done here without prejudice to the commence ment of a like suit 'in a more appropriate or convenient forum', with *whatever consequences may follow from having to begin all over again*." (Emphasis added.)

In addition to all the problems noted above involved in the inconvenient forum situation there was the fact that the only remedy available had the basic defect discussed above. Then came 1404-a.

**Judicial Treatment of 1404-a**

The cases which have considered section 1404-a to date have done so in the general context described above.

The first question of importance was naturally, "What did Congress intend section 1404-a to accomplish?" The only real clue on that score was the notes of the Revisers of the Judicial Code who drafted section 1404-a and which (the notes) were before the Congress when it adopted the Revision of the Code. (*Congressional Service*, "New U. S. Judicial Code, Title 28," West Pub. Co., p. 1853.) There it is briefly stated that the new section is enacted "in accordance with the doctrine of *forum non conveniens*" and that its basic purpose was to overcome the evil effects of the holdings of the Miles and Kepner cases, *supra*, that the doctrine of *forum non conveniens* was inapplicable by the courts to the "special venue" statutes and that where Congress had given only Congress could take away—and the plaintiff’s right to his venue in the statute existed regardless of how inconvenient or inequitable the venue he chose.

That much is clear. The Congress knew it was remedying a specific evil—and doing so by a provision "in accordance with the doctrine of *forum non conveniens*."

And yet it was necessary for the Supreme Court of the United States to hold that the section was applicable to a choice of forum by a plaintiff under a "special venue" statute. In the case of *Pascarella v. NYC Ry. Co.* (1948), 81 F. S. 95, the district court stated that the section was simply a
statutory codification of *forum non conveniens* and that as such the rule that *forum non conveniens* did not apply to cases arising under FELA still applied and therefore a court could not dismiss a suit brought under FELA and could no more transfer it and thus deprive the plaintiff of his choice of forum. This question, however, was settled in the Supreme Court in the cases of *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944, and *U. S. v. National City Lines*, 337 U. S. 78, 69 S. Ct. 955. In the two cases the issue was the same—applicability of the transfer section, 1404-a, to “special venue” statutes—except that the former case was concerned with FELA and the latter case with anti-trust acts and the venues therein laid.

The court held that section 6 of FELA was unaffected, that 1404-a was applicable and that transfer was permissible.

“Section 6 of FELA defines the proper forum; 1404-a of the Code deals with the right to transfer an action properly brought (italics added). . . . Section 1404-a does not limit or otherwise modify any right granted in Sect. 6 of the Liability Act or elsewhere to bring suit in a particular district. An action may still be brought in any court, state or federal, in which it might have been brought previously.”

Note that the effect of this holding is that 1404-a is something different from the doctrine of *forum non conveniens*—it does not affect rights to fora as they exist; it does allow a transfer in a case where the federal district court had no right to dismiss to force a plaintiff to bring suit in the very forum to which the district court may now order the case to be transferred. When we consider the effect of the transfer on the case in terms of the rights of the parties it will be well to recall that the court stated that 1404-a did not affect plaintiff’s rights to his venue under FELA. But if transfer is allowed to deprive him of any rights gained by his choice of forum, then transfer under 1404-a would be doing just what the Supreme Court said it was not to do. And if transfer is denied in order to prevent plaintiff’s rights in his forum from being affected, the court cannot effectively protect the defendant against the harassing forum under 1404-a. This is the basic problem inherent in 1404-a when we consider the “applicable-law-problem” before and after transfer, and whether considerations of the applicable law should be allowed to prevent a transfer or to encourage it. *It is submitted that in many of the cases it will be impossible to say whether or not it is “in the interests of justice” to order a transfer unless it is known by the transferring court which law will govern the decisive phases of the case.*

There are other indications, however, that 1404-a is not merely “*forum non conveniens* codified.” Under *forum non conveniens* a court could dismiss a suit properly brought. Under 1404-a it has been held consistently that the power to dismiss, to refuse jurisdiction, no longer exists in the federal district court.
“It will be seen therefore that the present procedure is not to dismiss a suit which has been brought in an inconvenient forum, but rather to transfer it to another more convenient forum in which it might have been brought originally . . . in the interests of justice. Schoen v. Mountain Producers, 170 F. 2d 707 at p. 714.”

In the case of Seven Oaks v. Fed. Housing Adm., 171 F. 2d 947, the plaintiff had chosen a proper venue to sue the FHA, who entered a plea of forum non conveniens. The court said (denying the motion to dismiss):


In the Burgess case, supra, the court made it clear that it felt 1404-a was a definite improvement over the doctrine of forum non conveniens:

“... but as enacted the legislation provides for a change of venue rather than dismissal of the suit, which is an improvement on the rule as applied without specific legislation.”

The Cinema Amusements case cited above holds likewise on the point of “dismissal” under 1404-a.

It is clear that the section is a substitute for forum non conveniens, and something more. It seems fairly well settled that, neither in diversity cases nor those arising under federal statutes, can the defendant any longer ask for a dismissal on grounds of inconvenience.

The next question is, what are the criteria for granting or denying a motion by a defendant for a transfer? What is the content of “for the convenience of parties and witnesses” and “in the interests of justice”? The Gilbert case, which set forth that the doctrine of forum non conveniens had general application in the federal courts, laid down what became the standard series of tests to be used as guides for determining when the doctrine was applicable. In the case of Brown v. Insurograph Corp., 85 F. S. 328, the district court said:

“... New transfer section is ... so akin to the former doctrine (forum non conveniens) that only a most unusual case would justify transfer unless ... a dismissal could be sustained under forum non conveniens. This would seem to be true except where the running of the statute of limitations might enter into the conclusions as to dismissal. The new transfer section, of course, allows of no question as to limitations.”

The opinion does not indicate too clearly exactly what the court means as to “no question as to limitations” but it seems to be saying that under 1404-a the statute of limitations of the first district court (i. e., of the state in which it sits—see Guaranty Trust Co. of N. Y. v. York, infra) will always apply. This is not a settled question. It is a part of “The Question.” It is
clear, however, that the court states that judges are to look to Gilbert for the criteria for "to transfer or not to transfer." Certainly there is no right to a transfer in all cases merely because there is another forum. It is a matter of discretion. The limits of the exercise of that discretion have yet to be determined. A quite different point of view from the Brown case was expressed in the case of Jiffy Lubricating Co. v. Stewart Warner Corp. (1949), 177 F. 2d 360. Here the 4th C.C.A. made the statement that different considerations governed the application of "transfer" than governed the application of forum non conveniens. The court stated that the notion 1404-a codified forum non conveniens was erroneous and that transfer is not controlled by whether there would be dismissal under the prior rule:

"Transfer is a less drastic matter than dismissal for it involves no loss of . . . time . . . or costs."

This court, in refusing to dismiss an action brought under 1404-a, pointed out that unlike forum non conveniens and its dismissal rule, the transfer does not end the suit but preserves it "as against the running of the statute of limitations and for all other purposes." Once again it seems clear that the courts do feel the statute of limitations of the original forum governs a case after transfer—and distinguishes this from the situation in the forum non conveniens situation. The point of view expressed in the Jiffy case as to the criteria seems more sensible than an adoption of those listed in the Gilbert case as applicable for forum non conveniens. Judicial decisions over a period of time on 1404-a will have to set down the limits of the discretion. For example, it has been held that where a defendant waits until one week before trial in F1, where the issue is joined, the defendant's motion for transfer will not be granted regardless of how inconvenient he can prove F1 to be. The court stated that "the interests of justice" would not be served by transfer at that time because the plaintiff would be unfairly delayed. The defendant had not made his motion seasonably. (Brainard v. A. T. & S. F. (1948), 81 F. S. 211.)

It has also been held, defeating a very ingenious plaintiff, that 1404-a could not be used for the convenience of plaintiff. In this case, the plaintiff could not get jurisdiction over the defendant in the "convenient forum" where the cause arose and the witnesses were, etc.; so the plaintiff sued defendant on his transitory cause of action in another district and then moved for transfer, saying his convenience was included in the phrase, "For the convenience of parties." The court held that the words "To district where it might have been brought" in the section meant where the defendant was amenable to suit and that 1404-a was not designed to add to a plaintiff's then existing rights in fora. (Barnhart v. John B. Rogers Co., 86 F. S. 595.) Also a plaintiff who was barred by the statute of limitations in the forum he
chose could not move for a transfer, said the court in Bolten v. Gen. Motors Corp. (1949), 81 F. S. 851. Here the plaintiff was seeking to use 1404-a to escape the statute of limitations in the inconvenient forum, having carelessly sued there without ascertaining the length of the statute there applicable. This is a far different case from the cases discussed below where the defendant moves for transfer for his convenience and the action is barred in the district to which he asks it to be transferred. In this type of case there is a real danger the plaintiff will be deprived of one of his existing fora.

It is interesting to note that a motion to transfer is not considered as an "answer" by a defendant who so moves in order to prevent the plaintiff from dropping suit without prejudice and then later suing in the forum to which the defendant had asked that the cause be transferred. Under the Federal Rules of Procedure, if a defendant answers the plaintiff cannot then get a dismissal without prejudice on his own motion. He can, if the defendant moves for a transfer and it is denied, and also, presumably, if it is granted. (White v. Thompson (1948), 80 F. S. 411.)

In Boyd v. Grand Trunk West. Ry. (1949), 70 S. Ct. 26, the court very definitely points out (in holding a contract restricting the employee's choice of venue under FELA as void) that 1404-a is not designed to restrict the plaintiff's choice of venue or any of his rights in those fora there declared to be proper places of suit. It can be well argued that (as noted above) if the transfer is held to affect any of the substantive rights of the parties to the suit that the transfer will not be "in the interests of justice." This is very clear when we talk of the "special venue" statutes and the plaintiff's right to venues there declared. Of course one way to insure that a transfer will not affect any substantive rights of the parties is to hold that the transfer will not be allowed to affect those rights as fixed when the plaintiff sued the defendant in Fl. Another way, of course, is to deny a motion for transfer if it can be shown that those rights will be affected by the transfer. But, and this cannot be emphasized too strongly, to approach the statute in this fashion, is to limit its usefulness as regards the phrase, "For the convenience of parties," its very raison d'être, because the times when transfer will be possible will be greatly cut down if it is held that transfer changes the applicable law.

As a small example of what might be argued to be a substantive right in Fl, in the second case of U. S. v. National City Lines, 80 F. S. 734 (before it reached the Supreme Court, see supra) the Federal Government, plaintiff in the anti-trust suit, argued that if the District Court of California transferred to the District Court of Illinois the plaintiff's case would be seriously delayed because the court docket in the District Court in Illinois was overcrowded and the plaintiff would be put at the end of the docket. The plaintiff was
arguing that the speed with which a remedy can be had is a “substantive”
right in F1 and, therefore, it would not be in the “interests of justice” to so
delay him by a transfer. The argument was one of “speed of trial” against
“convenience.” The court took note of the argument and pointed out that
there was no doubt that the District Court of Illinois would protect the plain-
tiff’s priority if the delay was called to its attention after the transfer. It is
submitted that this concern for plaintiff’s rights is an enlightened point of
view as to the application of 1404-a.

**Effect of a Transfer Under 1404-a on a Case Brought in an
Inconvenient Forum**

In order to decide what effect the transfer of a case under 1404-a will
have on that case in terms of the applicable law, we must decide on the
meaning of 1404-a as an expression of legislative intent as the courts have
seen it to date. The cases discussed above all indicate that 1404-a has replaced
the doctrine of *forum non conveniens*—that it has general application in the
federal court system and is a new and comprehensive rule of procedure
designed to secure that all cases in the federal courts will be heard in the
forum which, considering all factors of justice and convenience, is the
proper place of trial. It is a rule that is designed to assure that the plaintiff
and the defendant can have their cause heard on the merits in a forum which
will give the plaintiff all the rights in varied choices of *fora* he had before
the section—in diversity cases and in cases arising under federal law—and
yet which will give the defendant his convenient forum.

It is submitted that 1404-a is a general venue statute with a purpose
similar to that which is so commonly expressed in the various state statutes
controlling changes of venue within the state court systems, as described by
Professor Foster, *supra*. (See Calif. Code of Civ. Proc., sec. 397, for an
effect.)

Of course the individual states, in applying their change of venue
statutes, are not faced with problems of applicable law stemming from a
dual system of courts complicated by a difference of laws from county to
county. In the inter-state picture we have federal courts sitting in different
states, each with different rules of law, and causes of action arising in one
state, being sued on in another, removed to federal courts, and now trans-
ferred to another federal court sitting in still another state. Complicate this
by the rule that a federal court is to apply the “substantive” law of the state
in which it sits, *including* its conflicts of law rules, and it makes one dizzy to
contemplate how complex one case could become. It is submitted that a
proper construction of 1404-a will at least prevent the further complication
of a picture that is already fairly jumbled.
The proper construction seems to be that 1404-a was enacted to remedy the very clear shortcomings of the doctrine of *forum non conveniens* and yet preserve its equally clear advantages. In order to effect this purpose it seems that the law governing the plaintiff’s case must always be that of the forum of his original choice—and it must be held that transfer on the motion of the defendant to another forum must be, and can only be, in “the interests of justice” if it is transferred only for *purposes of trial*. In other words, the plaintiff will bring his suit, under the traditional notions of “transitory cause of action” and “personal jurisdiction,” wherever he can find the defendant or wherever the federal statute creating his right allows him to sue. That act will fix the applicable law. Erie requires that the federal court in F1 apply the “substantive law” of the state in which it sits. It is submitted that the rule of Erie, in effect, will apply after transfer only in the sense that F2 will apply the same rules of law as if it were F1 sitting in this more convenient place of trial—and that the law of the state in which the federal court, F2, is sitting has no bearing even though it is a forum in which the plaintiff might, in the first instance, have brought the suit.

For the purposes of considering this construction let us consider a case involving the statute of limitation. It has been held that a state’s statute of limitations, under the Erie doctrine, is “substantive” and therefore applicable in federal courts in that state because the policy of Erie requires uniformity of decision between the courts of a state and the federal courts therein. The statute of limitations, in our law traditionally called “procedural,” is, under the rule of *Guaranty Trust of New York v. York*, 326 U. S. 99, 65 S. Ct. 1464, called “substantive” in order to carry out Erie doctrine because it is a matter that “intimately affects recovery or non-recovery.” Therefore, if defendant hurts plaintiff in State X, the law of State X will govern the tort in matters of substance, under the basic conflicts rule. The procedural laws and rules of State X will naturally apply in State X in any attempt to enforce the right created there, but will have no effect outside of State X. Let us assume diversity of citizenship. The plaintiff sues the defendant in a federal court, F1, sitting in State Y. In F1 the substantive law of State Y is to be applied (i. e., “matters intimately affecting recovery or non-recovery”). If this suit were brought in a court of State Y having jurisdiction because of the defendant’s presence and because the cause of action is transitory, it would apply its own statute of limitations. (It could be argued that the statute of limitations is substantive *always* and therefore the statute of State X should always apply, but this question is too well settled to be re-opened.) Under Erie F1 must apply the statute of Y also. Now suppose the statute of X is longer. If the defendant feels that the convenience of matters requires the case to be heard in F2, a federal court sitting in State X, and yet feels also that on trial he will be able to prove that
the plaintiff is barred by the statute of limitations of State Y—what should the defendant do? As stated above, he must move for the transfer under 1404-a seasonably. He is aware that the statute of limitations of State X is longer than that of State Y. The plaintiff does not believe that he is barred under either statute; but if it is transferred and the issue is raised he will certainly argue powerfully that F2 must apply the statute of limitations of the state in which it sits, and all of its law affecting recovery.

On the other hand, suppose the plaintiff is barred by the statute of limitations in State X, even though the defendant is “present” there, and that is the reason he sued in State Y. If defendant moves for transfer, what will the federal judge in F1 do? He is faced with the rules of Erie and Guaranty Trust, supra, and a statute of limitations in F2 barring the plaintiff; and his court is extremely inconvenient to the defendant. Further there is no definite construction of 1404-a to assist him.

**A Proposed Construction of Section 1404-a in View of Recent Decisions**

In the case supposed, and in all similar cases presenting this basic dilemma, the proper construction would allow the transfer upon a consideration of the “convenience of parties and witnesses” and also “in the interest of justice” and to preserve the rights of the parties as they were in the state in which the action was originally brought. By such transfer only the place of trial has been changed because of the residence of witnesses, etc. The rights of the parties remain as they were before such transfer. All matters affecting the recovery or non-recovery should be tried in the forum of transfer in accordance with the law of the original forum. Such interpretation would accomplish the purposes of the statute and not prejudice the rights of the parties. This construction would have the great advantage of allowing the proper place of trial to be determined without reference to matters affecting recovery or non-recovery. Plaintiff’s traditional right to bring his action in a forum that is favorable to him would be maintained and defendant’s desire to have the case tried in a more convenient forum would be satisfied. Defendant could, under the construction contended for, make his motion for a transfer because of the inconvenience of the forum without being concerned about the possible loss of any defenses he might have under the law of the state in which the action is brought, for such rights would not be affected by an order granting the transfer. The fact that plaintiff’s cause of action may turn out to be barred by the statute of limitations of the original forum should not preclude the defendant from having the case transferred to a more convenient forum, and if it is so transferred he ought to be able to set up the statute of limitations of the original forum at the trial. The plain-
tiff cannot complain of the application of the statute of limitations of the forum of his choice.

If the construction contended for is not adopted, it is clear that a transfer under 1404-a where the statutes of limitation of the two forums are different will often give to or take from a defendant a decisive right or defense. If the statute of the forum chosen by the plaintiff is shorter, as in the first case supposed above, the defendant would—if he moved for transfer in order to have the trial in a convenient forum—lose his defense. On the other hand, if the statute of the convenient forum were longer, he would gain a right which he did not have in the original forum, plus his convenience. The question, however, of whether a defendant has the defense of the statute of limitations is often in doubt until the trial of the facts. The defendant must make his motion for transfer a reasonable time before the day of the trial. (Brainard v. A. T. & S. F. Ry. Co., supra.) It is obvious, therefore, that in many cases a defendant will be forced to make a motion for transfer knowing that he desires a convenient forum but not knowing whether or not the effect of his motion will be to give him or take from him a crucial defense. This introduces a matter of chance which is clearly not within the intent of the section and which will be avoided by the construction contended for.

Conclusion—What Support Is There in the Judicial Decisions for the Position Taken Above?

The Supreme Court of the United States has not as yet passed upon the particular matter under consideration. So far as the lower courts have had occasion to touch upon it, they are in accord with the spirit and tenor of the construction contended for. In the case of Cinema Amusements v. Loews, supra, the court pointed out that the section laid out a new procedure that was different from the old doctrine of forum non conveniens and, in at least one respect, a possible improvement. That quotation bears repeating here:

"... Under 1404-a a case is not dismissed but merely transferred to the more convenient forum; under forum non conveniens a case is dismissed and must be instituted anew in the more convenient forum, carrying with it the inherent and jeopardous hazard of being barred therein by the statute of limitations..."

The court's words clearly show that it felt that upon a transfer under the new procedure the statute of limitations of the forum to which it was transferred would not be permitted to be the hazard it was under the doctrine of forum non conveniens.

The Circuit Court of Appeals in Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 178 F. 2d 866, stated:

"... when an action (under 1404-a) is transferred it remains what it was. All further proceedings in it are merely referred to another tribunal leaving untouched whatever has already been done."
Also, in the case of *Richer v. R. I. & P. Ry. Co.*, 80 F. S. 971, the district court pointed out that upon ordering a transfer under 1404-a the defendant’s pending motion for a more definite statement was to be ruled upon after transfer by the court receiving the case. This, along with the Magnetic case, *supra*, indicates that the courts do look upon the section as a new procedure for transfer for purposes of trial only—*with the trial merely continuing after transfer*.

One of the leading cases to date supporting this conclusion is *Greve v. Gibraltar Enterprises*, 85 F. S. 410, decided in August 1949 where the court said (at page 414):

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a *change of venue affects the place of trial only*. It could be held under section 1404-a that a transfer to another district is for the purpose of trial alone. It was not contemplated that a change under this section could or should deprive a plaintiff of a valid legal right existing in the forum in which he rightfully brought his action. The views thus expressed appear to be in keeping with the purpose of the new procedure. In such respect, the proceedings differ from the *forum non conveniens* rule which often dismissed the action in the original court and compelled the institution of a new suit in another district where plaintiff might meet and be subjected to hazards such as the running of the statute of limitations. It is believed that construing section 1404-a as authorizing a change for the purpose of trial and leaving the legal rights of the parties fixed as they were in the court of original choice will avoid such hazards and greatly add to the beneficial results of this section."

This case was an anti-trust case, conspiracy to restrain trade, and the plaintiff’s forum was set by federal statute, as in the Collett case, and *U. S. v. National City Lines, supra*.

In the above case, however, the court added that it would have hesitated to base its order for transfer solely upon its construction of 1404-a, being unwilling to subject the plaintiff to the risk of a possible misconstruction of the section in proceedings subsequent to transfer which would bar the plaintiff’s action by the application of the local statute of limitations in the new forum. Rather, the court found that it was not necessary to make a definitive construction of the section because the defendant had agreed in open court not to invoke the statute of limitations of the forum to which it asked the cause to be transferred. It is submitted, however, that in view of the soundness of its construction of the section its caution in refusing to make that construction the basis of its decision was unnecessary.

The latest construction of the section, by the Tenth Circuit Court of Appeals, in the case of *Headrick v. A. T. & S. F. Ry. Co.*, 182 F. 2d 305, decided in May of 1950, was a case where the federal jurisdiction depended solely on diversity of citizenship and is, therefore, of particular interest as
forestalling arguments that 1404-a, construed as argued for, would apply only to cases where special venues were laid by federal statutes. In this case plaintiff sued defendant in the state court of New Mexico for personal injuries suffered by the plaintiff in California. On defendant’s motion the case was removed to the federal district court on grounds of diversity of citizenship, where defendant filed motion to dismiss on grounds of *forum non conveniens* or, in the alternative, to transfer the cause to a California district court under 1404-a. The district court dismissed the action on the defendant’s plea of *forum non conveniens*. The plaintiff appealed and the Circuit Court of Appeals reversed the New Mexico district court. The defendant had the possible defense of the statute of limitations in California and it appears from the opinion of the circuit court that the district court felt that it could not transfer under 1404-a to a district where the statute of limitations had run on the plaintiff’s cause of action. Yet the district court did dismiss plaintiff’s action on grounds of *forum non conveniens*, thus certainly subjecting the plaintiff to that California statute of limitations. The language quoted below of the circuit court indicates clearly the considerations it feels are to govern the district court in ruling on the defendant’s motion to transfer or to dismiss the plaintiff’s suit because of inconvenience of forum. Certainly it was error to dismiss the plaintiff’s suit, and plaintiff’s appeal on that basis was sustained. (See the cases above on this point.) The court also ruled that there was no basis for the district court to order a transfer to the California court because there was not a showing that the balance of convenience weighed heavily enough in the defendant’s favor to disturb the plaintiff’s choice of forum. The court admitted that under 1404-a district courts should probably not require as strong a showing of inconvenience to justify transfer as was required under *forum non conveniens* to justify dismissal (see Jiffy and Brown cases, supra) but the court felt that defendant had not shown even the reduced amount of inconvenience and that for the district court to order a transfer would be abuse of discretion. Of major interest to us, however, is the court’s construction of 1404-a as to the effect on the rights of the parties if a case is transferred under its provisions. The court expressed its views and then reversed and remanded to the lower court for further proceedings on the defendant’s motion to transfer in accordance with those views. The court said, on pages 309 and 310:

“Then, too, we think the court was in error in assuming that upon transfer from the District of New Mexico to the District of California under the provisions of 1404-a the California statute of limitations would be applicable. The plaintiff’s action was transitory in its nature. He had a legal right to select any forum where the defendant was amenable to process and no contention is made here that the case was not properly brought in the New Mexico state court. It is conceded that the action is not barred by the New Mexico statute. Had the case been tried in the New Mexico state court, the
procedural laws of New Mexico including the statute of limitations would be applicable. It is well (settled) that in removal cases the Federal Court must apply the state law and the state policy. . . . Neither can a Federal Court in a diversity case take away that which a state has given. Upon removal to the Federal Court in New Mexico, the case would remain a New Mexico case controlled by the law and policy of that state, and if 1404-a is applicable and a transfer is ordered for the convenience of the parties and witnesses and in the interests of justice, there is no logical reason why it should not remain a New Mexico case still controlled by the law and policy of that state. U. S. v. Council of Keokuk (73 U. S. 514), Magnetic Engineering and Mfg. Co. v. Dings Mfg. Co. (178 F. 2d 866). In the latter case Judge Hand said, 'However, when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal. . . .'

(Emphasis added.)

The court's adoption of the construction contended for seems unequivocal. But the court does not stop with the element of "convenience to parties and witnesses" but also discusses the proposed construction in view of the further phase of this problem of the convenient forum—protection of the established rights of plaintiffs to sue where jurisdiction is properly laid. The question as to which law governs the action after transfer cannot be properly answered without attention to both sides of the problem. On page 310 the court quoted with approval Professor Moore's Commentary on the Judicial Code, page 203:

"A sensible treatment was to refrain from narrowing the choice of venue or from attempting to restrict the developed principles as to when a defendant is amenable to service of process, but to give the district court the power to exercise a broad discretion in light of all relevant factors and, where these warranted, to transfer, not dismiss, to a proper forum. Subsection (a) of Section 1404 has done this." (Emphasis added.)

The court added:

"Generally, the courts which have had occasion to consider the matter have adhered to the view expressed by Professor Moore."

In support of this point of view the court then pointed out that this was the rationale of the Collett case, supra, in dealing with a plaintiff's rights to a forum under the "special venue" statutes:

"The inference is that if a party suing under the Federal Employers' Liability Act had the right to bring a suit in any district mentioned in that act and the same was transferred to a more convenient forum (under 1404-a) that no rights acquired in the forum selected by the plaintiff would be lost on transfer. To hold otherwise would be to say that upon transfer the litigants would be in the same position as though the action had been originally brought there. Substantially the same situation would then exist as before the passage of the section and the venue code would be mutilated. As Moore says the purpose of the section was not to narrow the choice of venue or to restrict the application of established principles of law." (Italics supplied.)
In the Greve case, supra, another issue of some importance was raised. The plaintiff opposed the defendant's motion for transfer on the grounds that the transfer would not be to a forum where the cause of action "might have been brought" in the first instance because at the time suit was brought in the allegedly inconvenient forum the plaintiff was barred by the statute of limitations of the forum to which, for reasons of convenience, the defendant now seeks to have the cause transferred. The court held that the statute of limitations was not a bar to bringing an action but was merely a defense available to a defendant, which might not be proven or might be waived, etc., and that section 1404-a referred to jurisdiction when it referred to a forum "where the action might have been brought."

Some Further Considerations


It remains to be seen how, if applied as the cases just discussed recommend, 1404-a will affect the problem of "applicable law" in the federal courts in all its phases. For example, assume plaintiff sues defendant in F1 (jurisdiction based on diversity of citizenship) sitting in State Y. It is a transitory cause of action. The conflicts rules of State Y say that the law of State X is controlling as to substantive law. Suppose, further, that the rules on burden of proof and statute of limitations are different in States X and Y—or assume that there are presumptions and inferences available in State X not available in State Y or vice versa.

Suppose that under the conflicts rules of State Y some of these are held "procedural" and some "substantive"—for example in Levy v. Steiger, 233 Mass. 60, 124 N. E. 477, the Massachusetts court held that a statute of Massachusetts putting the burden of proof of contributory negligence on the defendant was a procedural rule and the rule of law of the place of tort that plaintiff must prove himself free from contributory negligence did not apply. In such a case, it has been held that a federal court in Y, F1, would apply Y's rule with respect to the burden of proof. (Palmer v. Hoffman (1943), 318 U. S. 109.)

And under the rule of Klaxon v. Stentor Co., 313 U. S. 487, and Griffin v. McCoach, 313 U. S. 498, the federal court must apply the conflicts rules of the state in which it sits. Thus if Y's conflicts law referred F1 to the "substantive" law of X it seems clear that what Y calls the "substantive law" of X should control F1. F1 is not to arrive at a different result from the state court of Y. Therefore, its rule calling a rule of another state "procedural" and therefore not applicable in a case is in itself a rule of "substance" in Y as far as F1 is concerned. The purpose is uniformity of decision.

If the case is transferred to F2 in State X the purpose is to protect the
plaintiff's choice of forum and give the defendant his convenience. In line with this purpose, none of the laws of State X have application to this case. F2 will apply the law of State Y, just as F1 would have—and this includes its rules of conflicts of law.

Thus, if X is the state whose “substantive” law is held as governing by the conflicts rule of State Y, F2 will apply that law of X which State Y would call “substantive” in its conflicts law—and not that part of the law of State X which F2 would call “substantive” in order to carry out the purposes of Erie. For example, if Y called the burden of proof rule of X (looking to X for the “governing law”) a matter of procedure and not applicable, the fact that this rule is held “substantive” in order to carry out Erie (Palmer case, supra) has no effect on F2 in the transfer situation. In order to carry out the manifest purpose of 1404-a, F2 will apply the substantive law of Y, classified as “substantive law of Y” in order to carry out Erie, so that F1 and F2 will reach the same result as a court of Y—and this “substantive law” includes Y’s conflicts rules.

It will be no more difficult for F2 to apply the conflicts rules of Y than for F1 (if there is no transfer) to apply—under Y’s conflicts rules—the law of another state. In any case, the ultimate task is always to determine the law of another state, conflicts law or internal law.


The case in State X in the federal court, F2, is being tried as if F2 were in State Y. This also raises the problem of res judicata. It would seem that if F2 finds the plaintiff is barred by the statute of limitations of Y, applicable in F1 and therefore in F2, the plaintiff’s case is not res judicata if he chooses then to sue in F2 and the statute of limitations of X has not yet run. The cases of M'EElmoyle v. Cohen, 13 Pet 312, and Warner v. Buffalo Dry Dock Co., 67 F. 2d 540, hold that a judgment based on the defense of the statute of limitations of one state does not preclude the bringing of the action in another state where the cause is not barred. Thus the case would never have been heard by F2 with respect to the statute of limitations of X which would govern a suit originally brought in F2 as a proper forum. It is not clear how the case of Angel v. Bullington (1946), 330 U. S. 183, has changed the rule, or if it has, on res judicata. It does suggest that “matters affecting recovery or non recovery” once litigated make the cause res judicata. This might one day be held to have changed the rule on the statute of limitations. It is a consideration to remember.

Conclusion

In the light of all the foregoing it is clear that there is a need for a definitive construction of 1404-a. Certainly such a construction should not
be a narrow one. The Supreme Court has already laid a foundation for a broad construction in holding that 1404-a permits transfer of cases arising under the "special venue" statutes. There is, however, no reason to assume that this is the farthest boundary, in view of the many benefits to be achieved by a broad construction such as the one contended for.

Throughout this article, the point of view has been twofold: namely, the desirability of protecting the traditional right of a plaintiff to sue wherever the jurisdictional requirements are satisfied and the necessity of preserving the defendant's equitable right to a convenient forum. These are both basic considerations. One should not be achieved at the expense of the other.

The construction of the new procedure contended for will result in two significant accomplishments.

1. It will preserve and extend all the gains made in recent years by the application of the doctrine of *forum non conveniens* in the federal courts.

2. It will eliminate many of the uncertainties and hazards to which plaintiffs seeking a just determination of their causes were subjected when—under the doctrine of *forum non conveniens* their suits were dismissed.

If this construction is adopted, the plaintiff's right and the defendant's convenience can both be served without affecting the result. The plaintiff has his forum and its law—which he chose; the defendant has his convenient forum which 1404-a gives him. It is submitted that this is in "the interests of justice."