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CHANGE OF VENUE AND THE CONFLICT OF LAWS

BRAINERD CURRIE†

I. THE PROBLEM

PRIOR TO SEPTEMBER 1, 1948, the suggestion that a change of venue might give rise to problems in the conflict of laws would have been an almost complete absurdity. Provisions for changing the place of trial within a state have long been familiar;¹ but since a single law is in force throughout the state, a transfer from one county to another can hardly raise questions as to jurisdiction² or as to the applicable law. In the federal courts, on the other hand, we have—emphatically, since the decision of *Erie Railroad Co. v. Tompkins*³ in 1938—a single judicial system administering, in addition to a body of national law, the laws of all our several states. Until 1948, however, there was almost no occasion for associating conflict-of-laws problems with changes in the place of trial, because, generally speaking, change of venue was a phenomenon unknown to federal civil procedure.⁴ The

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¹ See Foster, Place of Trial—Interstate Application of Intrastate Methods of Adjustment, 44 Harv. L. Rev. 41, 62 (1930).

² The problem in *Herb v. Pitcairn*, 324 U.S. 117 (1945), 325 U.S. 77 (1945), though arising out of a statute in terms providing for “change of venue,” in fact involved more, since the statute authorized transfer from a court having no jurisdiction of the subject matter to a competent court. See generally Farlow, Change of Venue and Effect of Transfer in City Courts in Illinois, 41 Ill. L. Rev. 105 (1946).

³ 304 U.S. 64 (1938).

⁴ *Brown v. Heinen*, 61 F. Supp. 563 (D. Minn., 1945); *Spies v. Chicago & E. I. R. Co.*, 32 Fed. 713 (S.D. N.Y., 1887); *Billings Utility Co. v. Federal Reserve Bank*, 40 F. Supp. 309 (D. Mont., 1941).

When the District of Columbia consisted of two counties, there was provision for the “removal” of cases from one to the other. Act of June 24, 1812, § 8, 2 Stat. 755, 757.

The Act of March 3, 1821, 3 Stat. 643, and the Act of February 28, 1839, 5 Stat. 322 [both repealed, 36 Stat. 1168 (1911)], provided for change of venue in the event of disqualification of district and circuit court judges, respectively. Both acts dealt expressly with the effect of transfer. The earlier one specified that the transferee court should take cognizance of the case “in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed, as were cognisable in the district court from which the same was removed.” The language of the later act was substantially the same, except that it omitted the final reference to the

place of trial of civil actions was governed by statute. If the venue was improperly laid, the consequence was dismissal upon timely and sufficient objection.⁵ If it was properly laid, the action proceeded to trial and judgment in the court in which it was filed without further reference to the appropriateness of the forum, except in rare instances in which considerations more or less related to the place of trial restrained the exercise of jurisdiction.⁶ Under the doctrine of *forum non conveniens*, which burst into full bloom shortly before the revision of the Judicial Code was enacted in 1948, the class of cases in which a district court might decline to exercise its jurisdiction was greatly enlarged;⁷ but still no problems were presented of the sort suggested here, because that doctrine led to the dismissal of the action, not to its transfer.

jurisdiction of the transferee court, substituting a provision for process for the execution of the judgment.

Since 1887 there has been provision for transfer, with the consent of the parties, from one division to another in the same district. 24 Stat. 425 (1887); 34 Stat. 206 (1906), 36 Stat. 1103 (1911), 39 Stat. 851 (1916), 62 Stat. 937 (1948), 28 U.S.C.A. § 1404(b) (1950). Prior to 1948, in the absence of consent, there could be no transfer even to another division within the district. *Lavietes v. Ferro Stamping & Mfg. Co.*, 19 F. Supp. 561 (E.D. Mich., 1937); *Williamson v. E. R. Squibb & Sons*, 30 F. Supp. 629 (E.D. S.C., 1939); *Duval v. Bathrick*, 31 F. Supp. 510 (D. Minn., 1940). Contra: *Sanders v. Royal Indemnity Co.*, 33 F. 2d 512 (W.D. La., 1929).

Section 304 of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1044 (1938), as amended, 21 U.S.C.A. § 334 (Supp., 1953), provides for transfer to another district of certain libels for condemnation, and specifies that "the court to which such case was removed shall have the powers . . . which the court from which removal was made would have had . . . if such case had not been removed." 21 U.S.C.A. § 334 (f) (2) (Supp., 1953).

A provision for the transfer of corporate reorganization proceedings [52 Stat. 885, as amended, 11 U.S.C.A. § 518 (1946)] was superseded in 1952 by comprehensive provisions for transfer of bankruptcy cases. 66 Stat. 424, 430, 11 U.S.C.A. § 55 (1952). Consult *In re Lustron Corp.*, 184 F. 2d 789 (C.A. 2d, 1950); *In re Marine Aircraft Corp.*, 118 F. Supp. 844 (S.D. N.Y., 1954).

Admiralty Rule 54 [28 U.S.C.A. following § 2073 (1952)] provides for change of venue in limited liability proceedings, and there are similar provisions in the Suits in Admiralty Act [41 Stat. 525 (1920), 46 U.S.C.A. § 742 (1944)] and the Public Vessels Act [43 Stat. 1112 (1925), 46 U.S.C.A. § 782 (1944)]. The construction of the transfer provision of the Suits in Admiralty Act, and its operation with respect to the statute of limitations, were involved in *Kunglig Jarnvagsstyrelsen v. United States*, 19 F. 2d 761 (C.A. 2d, 1927).

Rule 21 of the Federal Rules of Criminal Procedure provides for change of venue of criminal cases on motion of the defendant. 18 U.S.C.A. following § 3771 (1952).

⁵ *Seaboard Rice Milling Co. v. Chicago, R. I. & P. Ry. Co.*, 270 U.S. 363 (1926).

⁶ E.g., *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) (internal affairs of foreign corporations); *Slater v. Mexican National R. Co.*, 194 U.S. 120 (1904) (lack of remedy appropriate to foreign right).

⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mutual Cas. Co.*, 330 U.S. 518 (1947).

On September 1, 1948, the Revision of the Judicial Code became effective. Section 1404(a) provided:

Change of Venue. 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.⁸

The novelty of the provision, coupled with the history which had brought it forth, gave rise to numerous problems. One of the most important, and one of the most interesting, is reflected not at all in the legislative history of the section; it has arisen only sporadically in the cases which have been decided; and it has not yet been systematically analyzed in the law reviews. That problem arises from the fact that the device of change of venue—a device borrowed from the unitary judicial system, administering a single body of law—has been introduced into a system which administers many different bodies of law—and does so, moreover, on a peculiarly geographical basis: a federal district court applies the law of a particular state not because of choice-of-law rules of its own, but because it sits within a state, whose laws (including conflict-of-laws rules)⁹ it is bound to follow. It applies state law primarily when the rights and duties at issue are created by state as distinguished from federal law; but it sometimes applies state law even when the issues before it arise out of federally created rights.¹⁰ Certainly, for most purposes the federal courts may be regarded as an

⁸ 62 Stat. 937 (1948), 28 U.S.C.A. § 1404(a) (1952). Subsection (b) of the same section broadened existing provisions for transfer between divisions within a district, and subsection (c) authorized trial anywhere within a division. Section 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall [dismiss, or if it be in the interest of justice,] transfer such case to any district or division in which it could have been brought," the language in brackets having been inserted in 1949 [63 Stat. 101 (1949), 28 U.S.C.A. § 1406(a) (1950)].

⁹ *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Sampson v. Channell*, 110 F. 2d 754 (C.A. 1st, 1940).

¹⁰ "Apart from penal enactments, Congress has usually left limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946). Presumably, at least in practice, this means the law of the state in which the court sits, despite the contrary dictum in *Cope v. Anderson*, 331 U.S. 461, 466 (1947). See generally, *Federal Statutes without Limitation Provisions*, 53 Col. L. Rev. 68 (1953); *Blume and George, Limitations and the Federal Courts*, 49 Mich. L. Rev. 937 (1951). In other instances also, state law has been given persuasive or binding effect where there is an unanswered question as to some "remedial detail" of a federal cause of action. Here, again, the law applied is that of the state in which the court sits, though the possibility is not foreclosed that when the occasion arises federal conceptions of conflict of laws may lead to a different choice. *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939). See *Hart, The Relations between State and Federal Law*, 54 Col. L. Rev. 489, 509 (1954).

integrated judicial system, exercising the judicial power of the United States on a potentially nationwide basis; but a district court adjudicating a state-created right solely because of its diversity jurisdiction has been characterized, authoritatively if somewhat figuratively, as "for that purpose, in effect, only another court of the State. . . ."¹¹ In short, the law to be applied in the federal courts depends, in important classes of cases, on the place of trial. That circumstance produced results which did not escape criticism when the place of trial was determined solely by the limitations upon service of process, the statutory venue provisions, and the election of the plaintiff.¹² What results are to be expected when the place of trial, properly selected by the plaintiff in terms of the reach of process and the statutory venue, is subject to change by the court "for the convenience of parties and witnesses, in the interest of justice"?

The problem may be posed concretely by stating the facts of *Headrick v. Atchison, Topeka and Santa Fe Railway Co.*¹³—thus far, the leading case. J. T. Headrick, a citizen of Missouri, was injured in California while he was a passenger on a bus owned and operated by the railway, a Kansas corporation. His Missouri attorney entered into settlement negotiations which continued until after action was barred by the California statute of limitations. Thereafter he was advised that the railway would rely on the bar of the statute as a defense, and negotiations were discontinued. Headrick thereupon filed his action in a state court in New Mexico, where the railway was amenable to process and where action was not barred. The defendant removed to the United States District Court for the District of New Mexico on the ground of diversity of citizenship, and there moved for dismissal on grounds of *forum non conveniens*, or, in the alternative, for transfer to the Northern District of California pursuant to Section 1404(a). In almost every respect the case was of the type for which the transfer provision was enacted:¹⁴ the forum chosen was not the home forum of

¹¹ *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

¹² E.g., Cook, *The Federal Courts and the Conflict of Laws*, 36 Ill. L. Rev. 493 (1942), reprinted in Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. 5 (1942); 2 Crosskey, *Politics and the Constitution in the History of the United States*, c. XXVI (1953); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267, 285 et seq. (1946); Wolkin, *Conflict of Laws in the Federal Courts: The Erie Era*, 94 U. of Pa. L. Rev. 293 (1946).

¹³ 182 F. 2d 305 (C.A. 10th, 1950).

¹⁴ As to one respect a doubt may be suggested, though it cannot be pursued here. There are grounds for suggesting that the section should not be applied to cases removed

either party; the substantive law to be applied would in all probability be that of California; the witnesses, other than the plaintiff, were residents of California; the defendant alleged that the injury was caused by the negligence of a bus company which was amenable to process in California but not in New Mexico; the Northern District of California was one in which the action "might have been brought," since the defendant was amenable to process there, and venue there would have been in accordance with the statutes. But what of the statute of limitations? If the case is transferred to a district court in California, will the California statute of limitations be applied to bar the action? And, if so, will the transfer be "in the interest of justice" as well as for the convenience of parties and witnesses?

It may be well to make explicit the legal conditions which make such a problem possible. Under well-settled rules of conflict of laws, the state court in New Mexico, while applying the "substantive" law of California, would reject the California statute of limitations and apply its own, on the ground that the limitation of actions is a matter of "procedure" governed by the law of the forum.¹⁵ Under equally settled rules governing the law to be applied by federal courts in diversity cases, the district court sitting in New Mexico would also reject the California statute in favor of that of New Mexico, because the district court must follow the conflict-of-laws rules of the state in which it sits.¹⁶ If, in distinguishing between "substance" and "procedure" for the purpose of determining how much of the law of a sister state they will apply, the state courts were guided by a passion for uniformity of result comparable to that which the Supreme Court has exhibited where the objective is uniformity as between the courts of a given state and the federal courts sitting therein, the problem would not exist, at least in this particular form. Then New Mexico would apply California's statute of limitations as well as its "substantive" law, and the result, so far as time limitations are concerned, would be the same whether the action were brought in California or in New Mexico, in a federal court or a court of the state. The absence of such

from state courts. See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 934-35 (1947). But cf. *Ex parte Collett*, 337 U.S. 55 (1949); *White v. Thompson*, 80 F. Supp. 411 (N.D. Ill., 1948); *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y., 1953); *Chicago, R. I. & P. Ry. Co. v. Igoe*, 212 F. 2d 378 (C.A. 7th, 1954).

¹⁵ Rest., Conflict of Laws § 604 (1934).

¹⁶ See, in addition to the cases cited in note 9 supra, *Ragan v. Merchants Tfr. & Whse. Co.*, 337 U.S. 530 (1949); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

a passion for uniformity from state to state, however, is a fact; and clear notice has been given that it is not the business of the federal courts to attempt reform within the limited sphere of their competence. The ideal of uniformity from state to state has been subordinated to that of uniformity as between the two systems of courts within the state.¹⁷

The first question, then, must be: If the action is transferred, will the district court in California apply the California statute to bar the action? The initial response to that question is likely to be based upon one of two lines of approach. Each approach is readily suggested by existing formulations of doctrine; each is fairly simple, direct, and general; and each leads to a different result.

Of the two, the approach which is, perhaps, likely to present itself first is that which is suggested by cases in which the Supreme Court has applied and expounded the *Erie* doctrine. Those cases emphasize that the law to be applied is that of the state *in which the court sits*. They reiterate the underlying purpose of achieving uniformity of result as between the two systems of courts within the state, irrespective of the result in another state. The apparent conclusion, of course, is that the transferee court must apply the law of the state in which it sits: the district court in California will apply the California statute of limitations, and the action will be barred. This was the view that was uppermost in the mind of Judge Irving R. Kaufman, of the Southern District of New York, when he said:

Hence we see the anomalous situation, as in the *Headrick* case, that a federal court sitting in California in an action by a Missouri plaintiff against a Kansas corporation on a California tort is asked to apply the New Mexico statute of limitations. This was a diversity of citizenship case, and in such a case the federal court is required to follow the public policy of the state in which it sits. If it is against the public policy of California to entertain such an action, what is the federal court of California to do?¹⁸

¹⁷ "Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal court to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 496 (1941).

¹⁸ Kaufman, *Observations on Transfers under § 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 601 (1951).

This was also the view of the district court in the *Headrick* case.¹⁹ It was the result assumed by Mr. Justice Jackson when, dissenting from a decision which required a district court to adhere to the state conflict-of-laws rule applying the forum's statute of limitations to a foreign tort action, he argued:

Another very practical consideration indicates the unworkability of a doctrine for federal courts that the place of trial is the sole factor which determines the law of the case. 28 U.S.C. Sec. 1404(a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. The purpose was to adopt for federal courts the principles of forum non conveniens. . . . Are we then to understand that parties may get a change of law as a bonus for a change of venue? . . .²⁰

The other approach proceeds in part upon established conceptions of the effect of change of venue, and in part upon a different interpretation of the policy underlying the *Erie* doctrine. The conceptions referred to are, in the main, those concerning the effect of change of venue within a unitary system of courts applying a single body of law,²¹ for there is virtually no precedent in Anglo-American judicial history for change of venue from a court bound to apply one body of law to one bound to apply a different body of law.²² The interpretation

¹⁹ In two recent cases, Judge Weinfeld of the Southern District of New York has taken a somewhat similar position. In each case the parties took conflicting positions as to the effect of transfer upon the relevant period of limitation. Without resolving the question, Judge Weinfeld transferred one case on condition that the parties stipulate "that the statute of limitations which the District Court of New York would apply were the action to remain here, shall be applied in the Louisiana district court." *Frechoux v. Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D. N.Y., 1953). In the other case, the moving party not consenting to such an arrangement, transfer was denied. *Curry v. States Marine Corp.*, 118 F. Supp. 235 (S.D. N.Y., 1954). The latter decision especially is indicative of a belief that there is at least a substantial possibility that the transferee court must apply the law of the state in which it sits. Compare the action of the Court of Appeals in the *Headrick* case, discussed *infra*.

²⁰ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 522 (1953).

²¹ The general tenor of the state cases is to the effect that the transferee court has "precisely the same jurisdiction that would have obtained in the court from which the venue is changed. . . ." *Hazen v. Webb*, 65 Kan. 38, 45, 68 Pac. 1096, 1098 (1902), and that the transfer "will not deprive any party of a legal right." *Hall v. Castleberry*, 283 S.W. 581 (Tex. Civ. App., 1926). See generally 56 Am. Jur., Venue § 78 (1947); 67 C.J., Venue § 356 (1934).

²² The cases which arose under federal statutes making limited provision for change of venue are not particularly helpful. Of the enactments cited in note 4 *supra*, three dealt specifically with the effect of transfer, each in a different way. According to the Food, Drug, and Cosmetic Act, proceedings after transfer are to be conducted as if there had been no transfer; according to the acts of 1821 and 1839, they were to be conducted as if the action had originally been filed in the transferee court, though the former act specified that the transferee court should have all the powers of the court of original filing. In *United States v. Council of Keokuk*, 6 Wall. (U.S.) 514 (1867), a bondholder's

of the *Erie* doctrine which is dominant here is that which emphasizes the purpose to eliminate the advantage which the accident of diversity of citizenship may give to one of the parties by enabling him to achieve a result in the federal court which could not have been achieved in

action against an Iowa municipality had been transferred from the Circuit Court for the District of Iowa to that for the Northern District of Illinois because of interest on the part of the judges, and, after judgment, the bondholders applied to the transferee court for a writ of mandamus to compel the levy of a tax to pay the amount due. The Process Act of 1828 (4 Stat. 278) required that the "forms and modes of proceeding" at common law in the federal courts should be "the same in each of the said states, respectively, as are now used in the highest court, of original and general jurisdiction of the same. . . ." Apropos of the availability of mandamus in the circuit court in Illinois, the Court used language which is likely to be much quoted in discussions of the effect of transfer under Section 1404(a): "Transferred, as the cause had been, from the Circuit Court for the District of Iowa, it is quite clear that the power of the court to which it was transferred was exactly the same in respect to the controversy as belonged to the tribunal where it was commenced." 6 Wall. 514, 516 (1867). It proceeded to note that mandamus was the appropriate remedy under Iowa law, and that by virtue of the Process Act it was also the appropriate remedy in the circuit court in Illinois; then it passed to the principal question in the case, which related to the effect of an injunction issued by an Iowa state court. The possible significance of the quoted language for the problems raised by Section 1404(a) is qualified by the following circumstances:

(1) The Court buttressed its reference to Iowa law by noting the appropriateness of such a reference in a case involving the obligations of an Iowa municipal corporation, thus suggesting a reasoned choice of law as distinguished from a mechanical deduction from the "nature" of a change of venue.

(2) The Court made no reference to the Act of 1839, which, by its provision that proceedings after transfer should be conducted as if the action had been filed originally in the transferee court, might have pointed to a different rationale.

(3) There was no indication of any difference between the law of Iowa and that of Illinois respecting the appropriateness of the writ. The fact is that the procedure employed was equally appropriate in Illinois. *City of Chicago v. Hasley*, 25 Ill. 485, 488 (1861). Nothing, therefore, hinged on the determination that Iowa law rather than Illinois law governed.

(4) Obviously, a question of choice between the law of two states on a matter of procedure in the federal courts in 1867 had none of the implications that are involved when the choice relates to matters which are "substantive" in the context of the *Erie* doctrine.

In *Supervisors v. Rogers*, 7 Wall. (U.S.) 175 (1868), the Court, while noting that under the Act of 1839 the case is to be treated as if filed originally in the transferee court, approved the employment by that court of a procedure authorized by a statute of the state of original filing. No explanation was offered for the non sequitur. The facts were substantially identical with those of the *Keokuk* case of the year before (which was not cited), with the addition that, upon failure of the local government officials to comply with the mandate, the bondholders applied to the circuit court in Illinois for a writ directing the United States marshal for Iowa to levy and collect the tax, which was granted in reliance on an Iowa statute empowering the court, in cases of contumacy, to order the doing of the act by a court appointee. The use of this procedure was approved.

In *Spencer v. Lapsley*, 20 How. (U.S.) 264 (1857), an action of trespass to try title was transferred, under the Act of 1821, from a district court in Texas to the circuit court in Louisiana. The courts experienced no difficulties resulting from the transfer. Any embarrassment resulting from the "local" character of the action was presumably obviated by the express terms of that act, giving the transferee court all the powers of the court of original filing.

the state court. It was within Headrick's power to institute his action in the state court in New Mexico, and that court could not transfer it to California, where it would be barred. Hence if the case is removed and then transferred pursuant to federal power, and a different law applied, the difference in result stems directly from the accident of diversity. This view was also considered by Judge Kaufman:

Then again view the problem in the light of these facts: The plaintiff in the Headrick case brought his action in the New Mexico state courts. The defendant was doing business in New Mexico. Perhaps the *forum non conveniens* doctrine of New Mexico would not permit the dismissal of plaintiff's action. It evidently did not seem fair to the Court of Appeals that the action should be removed on diversity grounds to the federal courts and then transferred to a forum where the action would be dismissed if nothing were said to prevent such a result. Perhaps, as was said before, such an action would be violative of *Erie R. R. v. Tompkins*.²³

Thus Judge Kaufman stated a dilemma: If the district court in California were to apply the New Mexico statute, that might be a violation of the *Erie* doctrine; yet if it were to apply the California statute, that might also violate the *Erie* doctrine. The dilemma appears clearly when the action taken by the district judge in New Mexico is considered. Because he believed that the *Erie* doctrine would require application of the California statute of limitations after transfer, and therefore that transfer would be futile, he dismissed the action on the ground of *forum non conveniens*, thereby depriving the plaintiff of the right to maintain an action which, in all probability, he could have maintained in the New Mexico state court.

The second approach was the one taken by the court of appeals in the *Headrick* case. That court was able to quote Judge Learned Hand [addressing himself to a different question under Section 1404(a)] to the effect that "when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal. . . ."²⁴ The court continued:

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 Sec. 1404(a) is applicable and a transfer to the California court is ordered for the convenience of parties and witnesses and in the interests of justice, there is no

²³ *Op. cit. supra* note 18, at 601.

²⁴ *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F. 2d 866, 868 (C.A. 2d, 1950). His point was only that transfer as distinguished from dismissal is not a final disposition.

logical reason why it should not remain a New Mexico case still controlled by the law and policy of that state.²⁵

The court bolstered its decision by noting that the district judge could not have been sure that transfer would have been futile, since he did not know whether the defendant would plead the California statute, and by hinting that in moving for transfer the defendant might have estopped itself to plead the statute.²⁶

There are faults in both approaches which require that each be examined in detail. It should be observed at once, however, that while the first approach leads directly to its conclusion, the second does not necessarily lead to the application of the law of the state in which the action is filed. While the conception of a transfer from one state to another as being no different from a transfer from one county to another does, indeed, lead to the conclusion that transfer should not work any change in the applicable law, a more discriminating application of the second view of the *Erie* doctrine leads to a modification of that conclusion. Up to now, the argument has proceeded on the basis that the New Mexico state court had no power to transfer to California. It might, however, have dismissed on grounds of *forum non conveniens*. In that case, the order of the district judge dismissing Headrick's action would have produced a result squarely in line with the requirements of the *Erie* doctrine as interpreted by the court of appeals; and the mandate of the court of appeals would have produced a disparity of result in conflict with that court's own interpretation of the *Erie* doctrine. Hence a third approach, which may be only a necessary modification of the second, emerges. This approach was suggested by Judge Kaufman, in the passage quoted above, when he noted that nonrecognition of the doctrine of *forum non conveniens* by New Mexico might be a necessary ingredient of the argument that the district court in California should apply the New Mexico statute. It was explicitly advocated by a critic of the decision of the court of appeals in the *Headrick* case:

[T]he court did not make the analysis which *Erie* requires. It failed to ascertain whether or not New Mexico state courts have a doctrine of *forum non conveniens*

²⁵ *Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F. 2d 305, 309-10 (C.A. 10th, 1950).

²⁶ The court in *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410 (D. N.M., 1949), took the same view in transferring a federal cause of action subject to state statutes of limitation, but insured the correctness of the result by treating as a solemn waiver or estoppel the defendant's promise, made in open court, that it would not rely on the transferee state's statute.

which might have been applied to dismiss Headrick's suit. Whether the substantive law of the original or transferee forum applies in diversity cases turns on this determination.²⁷

Thus, upon preliminary consideration, it appears that there are three possible answers to the question concerning the law to be applied after transfer:

(1) The transferee court will apply the law of the state in which it sits, just as if the action had been originally filed in that court;

(2) The transferee court will apply the law of the state in which the action was originally filed, just as if it were a federal court sitting in that state, but without regard to the state law on *forum non conveniens*;

(3) The transferee court will apply the law of the transferee state if the action was subject to dismissal on the ground of *forum non conveniens* under the law of the state in which it was originally filed, but will apply the law of the state of filing if it was not thus subject to dismissal.

The problem is a complex one. It will not yield to simple and general attempts at solution. It involves the meaning of the doctrine of *forum non conveniens*, the role and the source of that doctrine in the federal courts, the relation between that doctrine and Section 1404(a), the meaning of the *Erie* doctrine, the nature of the federal judicial system, and the effect of the Constitution as requiring uniformity of decision from state to state. If a clear answer is found as to the law applicable upon transfer, the solution is still not complete. For the transfer is to be made only "in the interest of justice,"²⁸ and the second component of the problem remains: Given a change in the applicable law as a result of transfer, would the transfer be in the interest of justice?

The process of reasoning by which an adequate solution is to be reached cannot be anything but complex and controversial. Adequate analysis must raise fundamental questions concerning the function of the national judicial establishment in the adjudication of state-created rights, and a too fervent adherence to doctrines which have hitherto been orthodox will impede the attainment of a satisfactory solution. The solution itself, however, must be simple, workable, and just.

²⁷ Section 1404(a) and Transfers of Substantive Law, 60 Yale L.J. 537, 538-39 (1951).

²⁸ "The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." Reviser's Note following 28 U.S.C.A. § 1404(a) (1950).

The device of discretionary change in the place of trial, for convenience and in the interest of justice, is in itself a modest, uncomplicated, and natural adjunct of a judicial system, calculated, in an unspectacular way, to reduce the cost and promote the fairness of trial. In England, the device operates in just that fashion; appeals are rare, and reversals nonexistent.²⁹ By contrast, the functioning of the doctrine of *forum non conveniens* in the federal courts prior to the enactment of Section 1404(a) was notoriously complex and uncertain,³⁰ and the delay and expense resulting from litigation over the place of trial in the five years since that section was enacted are appalling.³¹ If either the complexities of the federal system, or doctrinal attitudes toward that system, result in the end in "turning a simple practical problem into a complicated mystery"³² then we would be better off without a provision for change of venue. The abuses of statutory venue, substantial as they were, will appear trivial as compared with the delay, expense, and capricious frustration of rights which will result if a sound and workable solution is not found.

II. SECTION 1404(a) AND THE DOCTRINE OF *Forum Non Conveniens*

There is no doubt at all about the origins of Section 1404(a). The official notes of the Reviser state that it was "drafted in accordance with the doctrine of *forum non conveniens*," and the Supreme Court has accepted that statement as "obviously authoritative."³³ On March

²⁹ See Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41, 45-46 (1930), and Rules of the Supreme Court, O. 36, r. 1 and r. 10, Annual Practice 585, 586, 596 (1952).

³⁰ See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 930 (1947).

³¹ See Kaufman, *op. cit. supra* note 18 at 595. In one case, involving Section 1406(a), the place of trial was debated five times, each time before a different federal court, and in the end the Supreme Court divided equally on the question: *Gulf Research & Development Co. v. Schlumberger Corp.*, 92 F. Supp. 16 (S.D. Calif., 1950) (action transferred to District of Delaware); *Gulf Research & Development Co. v. Harrison*, 185 F. 2d 457 (C.A. 9th, 1950) (mandamus refused); *Gulf Research & Development Co. v. Schlumberger Corp.*, 98 F. Supp. 198 (D. Del., 1951) (remand refused); *Gulf Research & Development Co. v. Leahy*, 193 F. 2d 302 (C.A. 3d, 1951) (mandamus refused), *aff'd* by equally divided Court, 344 U.S. 861 (1952). Precise statistics are not available, but the Administrative Office of the United States Courts states that the number of cases originating in the district courts by transfer from another district, exclusive of food and drug and admiralty cases, was 173 in 1952 and 226 in 1953. These figures, of course, give no hint as to the number of applications denied. Letter dated April 6, 1954, from Will Shafroth, Esq., Chief of the Division of Procedural Studies and Statistics, in the University of Chicago Law Library.

³² Foster, *op. cit. supra* note 29, at 41.

³³ *United States v. National City Lines*, 337 U.S. 78, 81 (1949).

7, 1945, Professor James William Moore, special consultant to the revision staff, had written a memorandum to the Reviser stating that recognition should be given to the doctrine of *forum non conveniens*, and specifically suggesting that provision should be made for the transfer to a convenient forum of cases brought under the generous venue provisions of the Federal Employers' Liability Act.³⁴ This memorandum led to the inclusion of Section 1404(a) in the Second Draft of the Code, which was considered and adopted at a meeting of the Advisory Committee and its consultants May 28-30, 1945. The section appeared unchanged in all subsequent drafts, and in the final enactment three years later.

The term *forum non conveniens*, a creature of Scottish law, became current in this country after 1929, when it was publicized by Mr. Paxton Blair.³⁵ In the years that intervened before the enactment of the Revision of the Judicial Code there was extensive comment on the doctrine, generally favorable to the Blair thesis.³⁶ There is thus available a comprehensive literature on the history and purpose of the doctrine, and on the constitutional questions associated with it, which makes it wholly unnecessary to discuss those matters here. There are, however, certain aspects of the doctrine in the federal courts, and its relation to Section 1404(a), which need emphasis for the purposes of the problem under discussion, or which have been neglected in the literature.

The doctrine came into its own in the federal courts only with the Supreme Court's decision of the *Gulf Oil*³⁷ case on March 10, 1947—two years after Section 1404(a) was conceived, and a little more than a year before it was given legislative birth. We shall shortly have occasion to inquire rather closely into the status of the doctrine in the federal courts prior to the *Gulf* case. At this point, however, it is sufficient to make this noncontroversial observation concerning the

³⁴ Ex parte Collett, 337 U.S. 55, 68-69 (1949); Moore, Commentary on the U.S. Judicial Code 206 (1949).

³⁵ Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929). This article, which urged wider dissemination of the doctrine and increased use of the plea, was frankly "directed toward the possibility of relieving calendar congestion by partially diverting at its source the flood of litigation by which our [New York] courts are being overwhelmed. . . ." Ibid.

³⁶ Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217 (1930); Foster, Place of Trial—Interstate Application of Intrastate Methods of Adjustment, 44 Harv. L. Rev. 41 (1930); Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867 (1935); Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1947); Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947).

³⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

situation as it existed in the spring of 1945, when the decision to propose Section 1404(a) was made: While the discretionary power of a district court to decline to exercise its jurisdiction was recognized in certain circumstances, some of which touched upon convenience of the place of trial, there was no explicit recognition of a general power to dismiss an action, brought in conformity with an applicable statutory venue provision, on the ground that the forum was inconvenient; and the specific evil at which the proposed provision for transfer was expressly aimed—the trial of personal injury cases under the Federal Employers' Liability Act in oppressively inappropriate forums—was expressly held to be one which the courts were without power to correct.³⁸

Section 1404(a), therefore, was plainly not conceived as a legislative codification of principles then followed in practice by the federal courts; on the contrary, it expressly purported to be a reform measure, designed to bring about a desired change in the law. The intention was expressed with sufficient clarity, both in the text of the section and in the note accompanying it, that the Supreme Court held by a vote of seven to two that the section effected, among other things, the precise change in the law suggested by the Reviser's note.³⁹ The section was not limited to Federal Employers' Liability Act cases, of course; the point is that it was designed to *introduce* the principle of *forum non conveniens* generally into federal civil procedure. But it was a moderate proposal. Taking advantage of the fact that the federal district courts belong to a single judicial system, its authors substituted transfer for dismissal, which was the frequently harsh consequence of the successful plea of *forum non conveniens*. Thus drafted, the section, conceived in accordance with a rather novel and somewhat alien doctrine with a Scottish-Latin name, took on a strangely familiar appearance: it was indistinguishable, on the surface, from many a state statute authorizing change of venue. Naturally, then, and perhaps significantly, it was entitled, "Change of Venue."

More than three years were to elapse, as we know, before the section was enacted by Congress. In that period other forces continued to

³⁸ *Gilbert v. Gulf Oil Corp.*, 153 F. 2d 883 (C.A. 2d, 1946), rev'd 330 U.S. 501 (1947); *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941); *Miles v. Illinois Central R. Co.*, 315 U.S. 698 (1942); Reviser's Note following 28 U.S.C.A. § 1404(a) (1950); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947); *Ex parte Collett*, 337 U.S. 55, 57-58 (1949); *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 385 (1953).

³⁹ *Ex parte Collett*, 337 U.S. 55 (1949); *Kilpatrick v. Texas & Pacific Ry. Co.*, 337 U.S. 75 (1949).

press for similar changes in the law. The Jennings Bill, an unsuccessful proposal to narrow the venue provisions of the Federal Employers' Liability Act, was under consideration in Congress while the proposed revision of the Code was pending.⁴⁰ The reform movement went forward in the courts as well. The Supreme Court had been sharply divided in its decisions establishing the absolute character of the plaintiff's venue privilege under the Federal Employers' Liability Act. The commentators had made a strong case for the general principle of discretionary refusal to exercise jurisdiction on the ground of the inappropriateness of the forum. Forces which, I think, may be called liberal (because they were seeking to improve procedure by gaining acceptance of a practical, equitable doctrine, potentially capable of eliminating, without injustice, unfair advantage derived from technical arrangements) were pressing upon and within the Court for reform. Then, in March 1947, the Court decided the *Gulf* case, and the battle was won, after a fashion—more than a year before the fate of the legislative provision was settled. The victory was not a perfect one. It was broad in scope, but it left untouched the specific problem of the Federal Employers' Liability Act cases, which undoubtedly constituted the most pressing evil. It was, as we shall see, a less moderate and liberal reform than that proposed to Congress in Section 1404(a). And the decision contained an analytical flaw which one might happily forget, now that the basic issue has been settled by act of Congress, if it were not for the fact that the majority opinion has assumed peculiar significance for the interpretation of Section 1404(a).⁴¹ The acknowledgment of *forum non conveniens* as a source of the section invites the drawing of inferences as to the law applicable after transfer, based upon the premises and the effect of that doctrine. It is necessary, therefore, to understand as precisely as possible the status of the doctrine of *forum non conveniens* in the federal courts; and, to that end, the *Gulf* case must be placed in proper perspective in the sequence of legislative and judicial developments; any substantial fault in its reasoning

⁴⁰ See *Ex parte Collett*, 337 U.S. 55, 63 et seq. (1949).

⁴¹ The section "was drafted in accordance with the doctrine of *forum non conveniens*. . . ." Reviser's Note following 28 U.S.C.A. § 1404(a) (1950). As the leading exposition of that doctrine by the Supreme Court, the *Gulf* case is frequently consulted as an authoritative statement of the legislative intent. *Wiren v. Laws*, 194 F. 2d 873, 875 (App. D.C., 1951); *Ford Motor Co. v. Ryan*, 182 F. 2d 329, 330 (C.A. 2d, 1950); *Nicol v. Koscinski*, 188 F. 2d 537 (C.A. 6th, 1951); *Foster-Milburn Co. v. Knight*, 181 F. 2d 949, 952, 953 (C.A. 2d, 1950). But cf. *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F. 2d 360, 362 (C.A. 4th, 1949); *Amalgamated Ass'n v. Southern Bus Lines*, 172 F. 2d 946 (C.A. 5th, 1949); *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (C.A. 3d, 1952).

must be recognized; and the practical considerations which may have motivated (and may justify) it must be sought. The proper administration of the present law may depend in good measure on a careful winnowing of the reasoning which produced the result.

The Gulf Oil Corporation, through a local distributor, was making a contract delivery of gasoline on the premises of a public warehouse in Lynchburg, Virginia, owned by Gilbert, when an explosion occurred, resulting in a fire which destroyed the warehouse and its contents. Gilbert's New York insurers caused suit to be filed in his name for an amount in excess of \$365,000, invoking the diversity jurisdiction of the United States District Court for the Southern District of New York. Venue was proper under the *Neirbo* case,⁴² the defendant, a Pennsylvania corporation, having appointed agents to accept service of process in both Virginia and New York. The district court dismissed on the plea of *forum non conveniens*, invoking the law of New York.⁴³ The court of appeals reversed, holding, without dissent, that New York law was inapplicable, and, with Judge Augustus Hand dissenting, that discretionary power to dismiss such cases did not exist in the federal courts.⁴⁴ The Supreme Court, in turn, reversed by a vote of five to four, holding, in an opinion by Mr. Justice Jackson, that dismissal was justified by the doctrine of *forum non conveniens*, and leaving open the question whether New York law applied.

The problem of appropriateness of the place of trial, from the standpoint of the convenience of parties and witnesses and the interests of justice, and perhaps also from the standpoint of a proper apportionment of judicial responsibilities, exists on two distinct levels. It exists, first, on the interstate and international level; for, *prima facie*, an action may be filed anywhere in the world, not excepting the island of Tobago. It exists, second, on the intrastate level (using the term "state" in the conflict-of-laws sense):⁴⁵ given the appropriateness of trial somewhere within the state, which of its counties or districts is the appropriate place of trial? Taking the two levels together, the problem is universal and pervasive. It urgently demands that the attention of

⁴² *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939).

⁴³ *Gilbert v. Gulf Oil Corp.*, 62 F. Supp. 291 (S.D. N.Y., 1945).

⁴⁴ *Gilbert v. Gulf Oil Corp.*, 153 F. 2d 883 (C.A. 2d, 1946). Cf. Mr. Justice Jackson's interpretation of the Court of Appeals decision, 330 U.S. 501, 503 (1947). The Court of Appeals had previously regarded New York law as relevant to the question whether a district court should dismiss an action involving the internal affairs of a foreign corporation. *Weiss v. Routh*, 149 F. 2d 193 (C.A. 2d, 1945).

⁴⁵ Rest., Conflict of Laws § 2 (1934).

lawmakers be directed to an appraisal of the conflicting interests involved, so that there may be as complete and certain a solution as possible; for hardship and injustice are inevitable if a plaintiff may maintain his action wherever he chooses, or if he cannot identify the places where it is appropriate for him to sue.

Complete and authoritative solution of the problem on the interstate and international level is impossible. A partial solution exists in the concept of jurisdiction, which, insofar as it is recognized as a principle of domestic or international law, or is comprehended in the due process clauses of our Constitution, limits the plaintiff's choice of the place of trial by excluding, in a crude and formalistic way, places in which trial tends to be egregiously oppressive to the defendant.⁴⁶ In many cases, however, maintenance of the action in the place chosen by the plaintiff would be inconvenient, vexatious, or oppressive to the defendant even though "jurisdiction" exists according to the conventionalized concepts of fairness, power, and due process which have been developed under that rubric. It was for such cases that the doctrine of *forum non conveniens* was developed. The doctrine is that a court may, on such terms as are just, decline to adjudicate a case even though the formal requirements of "jurisdiction" are complied with, if the place of trial chosen by the plaintiff gives him an unfair advantage, or tends to vex, harass, or oppress the defendant, or to make a full and fair hearing unreasonably difficult, or to impose an unwarranted burden on the court. A defensive weapon, it has its offensive counterpart in the power of a court of equity to enjoin a person subject to its jurisdiction from prosecuting an action abroad in similar circumstances. Like the concept of jurisdiction, it is judge-made law. It tends to restore to the idea of jurisdiction some realistic considerations relating to the reasonableness of opportunity to be heard which were squeezed out as that idea took shape under the pressure of formalism and power concepts. It restores them, however, not in terms of power and jurisdiction, but of discretion. Thus a further limitation is placed upon the plaintiff's choice of forum.

The solution of the problem on the interstate and international level is far from complete. The principles of jurisdiction and the doctrine of *forum non conveniens* operate in a negative fashion only. They tend to

⁴⁶ *Buchanan v. Rucker*, 9 East 192 (K.B., 1808); *Schibsby v. Westenholz*, L.R. 6 Q.B. 155 (1870); *Pennoyer v. Neff*, 95 U.S. 714 (1877). See Foster, *Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217, 1239 (1930); Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41 (1930).

apprise the plaintiff of the fact that if he sues in a particular court, that court will refuse to entertain his action for want of jurisdiction; or that, if the court does give him a judgment, it will not be recognized elsewhere; or that the court will decline to entertain his action for reasons of convenience. They do not tell him where he may safely sue. To be sure, he may, by studying the factors which are considered by courts in applying the doctrine of *forum non conveniens*, or by canvassing the states to find one which does not recognize the doctrine, make a shrewd guess as to a place in which his complaint will be heard; but he does so on his own responsibility, and perhaps at his peril. There is no one to tell him where he can go and be secure against the painful consequences of dismissal. This is so because of the existence of a power vacuum. There is no supreme law-making authority, legislative or judicial, which can authoritatively announce which of the states having jurisdiction is the appropriate forum for trial. Necessarily, therefore, the solution is partial; it relieves against hardship but leaves uncertainty; it tends to solve the defendant's problems but leaves those of the plaintiff unsolved; it is negative, and not positive.

On the intrastate level, the situation is different. Partial solutions, with their one-sidedness and uncertainty, are not to be tolerated if they can be avoided; and here the power exists to avoid them. There is a supreme law-making authority, which treats the problem of place of trial by the enactment of venue statutes. Given the assumption that trial somewhere within the state is appropriate, the legislature addresses itself to the question of the districts or counties which, in various types of cases, are appropriate, and which are inappropriate. Within the limits of its competence, the legislature forms its judgment on the basis of a consideration of the competing interests and of the factors bearing on convenience in various classes of cases. The result is a complete, if not a wholly satisfactory, solution. An authoritative determination has been made, not only that certain places of trial are not appropriate, but that certain others are. The solution is positive as well as negative. It gives the plaintiff relief from uncertainty as well as the defendant relief from hardship. It leaves no room for discretionary judicial dismissal of actions on grounds of the inconvenience of the place of trial; the discretion has been exercised by the legislature. The legislative determination may leave much to be desired, since it is based on assumptions regarding broad classes of cases; judicial discretion, at the price of uncertainty, provides a nicer adjustment of place of trial to the facts of a particular case. For this reason, the legislature may,

and frequently does, leave a measure of discretion to the court notwithstanding the judgments expressed in the venue statute. It can do this at a relatively minor cost in terms of uncertainty: it has, and it exercises, the power to provide the moderate corrective of transfer to another county or district. It provides not for discretionary dismissal, but for change of venue.

The device of change of venue is available only on the intrastate level; it is not available in the solution of the problem at the interstate or international level, which is the problem to which the doctrine of *forum non conveniens* is addressed. This, again, is because of the defect of power which distinguishes the interstate situation. No court has power to *transfer* a case to a court of another sovereign. *The problems with which the doctrine of forum non conveniens deals cannot be solved by transfer, or change of venue.*

The distinction between the problem at the interstate level and that at the intrastate level is basic to an analysis of the *Gulf* case. The distinction has been obscured both in the cases and in the commentaries by ambiguous use of the term "venue."⁴⁷ It would be presumptuous to maintain that the term can, in good usage, be applied only to the one level and not to the other. Doubtless it has come to mean, in modern times, simply "place of trial," so that there can be no objection, merely from the standpoint of usage, to applying it to a choice between state and state, or nation and nation. But it has come more especially to mean the place of trial as specified by statutes dealing comprehensively with that subject within a state. In the discussion that follows, therefore, a distinction will be made between the terms "place of trial," used with reference to the problem generally, and "statutory venue," used with reference to the problem at the intrastate level.

Now, either this analysis is dead wrong, or there is something amiss in the Supreme Court's decision of the *Gulf* case. Mr. Justice Jackson began his opinion by rejecting the plaintiff's contention that dismissal was improper because the venue statutes of the United States pointed to the Southern District of New York as a proper forum. "Indeed," he said, "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue."⁴⁸ This sentence says:

⁴⁷ See Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380 (1947); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 504 (1947); Frankfurter, J., dissenting, in *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 62 (1941).

⁴⁸ 330 U.S. 501, 504 (1947).

(1) If the court is without jurisdiction, the question of discretionary dismissal because of inconvenience of the place of trial will not be reached;

(2) If the action has been brought in a forum which is inappropriate by the terms of a venue statute, the question of discretionary dismissal because of inconvenience of the place of trial will not be reached;

(3) It is only when the court has jurisdiction, and when the forum is not declared inappropriate by an applicable venue statute, that the question of discretionary dismissal on the ground that the forum is inconvenient arises.

Each one of these statements is unimpeachable. But the sentence, read as an argument in support of the decision, says more. The third statement is compound; it says:

(A) Even though the court has jurisdiction, and even though the forum is not declared inappropriate by an applicable venue statute, the action may be dismissed at the court's discretion if it ought to be tried in a foreign tribunal—i.e., if trial is not appropriate in any district or county of the state (nation) in which it was filed;

(B) Even though the court has jurisdiction, and even though the action is appropriately triable in the state (nation) in which it was filed, as distinguished from a foreign state, and even though the forum is declared by an applicable venue statute to be among the appropriate counties or districts within the state for the trial of such a case, the action still may be dismissed, at the discretion of the court, if it appears that it can more appropriately be tried in another county or district within the state.

The first of these propositions states the doctrine of *forum non conveniens*, applied at the interstate level, and is perfectly sound. The second states quite a different matter. It asserts the applicability of the doctrine of *forum non conveniens* at the intrastate level—a level at which the doctrine is an unnecessary, inefficient, and harsh device for dealing with the problem of place of trial. By compounding a sentence declarative of both these propositions, Mr. Justice Jackson assumed the answer to the question which was before the Court.

The circumstance which makes this fault possible, and which impedes its exposition, is that it may be said with respect to both (A) and (B) that the "venue" is proper—i.e., there is no nonconformity to statutory venue provisions. It is easy to show that in situation (A) the place of trial may be improper even though there is conformity to the apparent direction of the venue statute; and it may seem to follow for

the situation in (B) that the place of trial may be improper notwithstanding conformity to statutory venue provisions. To escape the seduction of this *non sequitur*, it is necessary to appreciate the fact that statutory venue provisions are not addressed to, do not deal with, and have no relevance to the problem of place of trial on the interstate level. This is true because no legislature has the power to determine affirmatively and authoritatively the appropriate place of trial as between state and state, nation and nation; and a venue statute is an affirmative as well as a negative answer to the problem of place of trial. A legislature may, indeed, enact into law the principle of *forum non conveniens* for the case which should be tried in a foreign tribunal, instead of leaving that matter to the courts; but, in so doing, it is not enacting a venue statute of the sort with which we are familiar, or with which the Court was concerned in the *Gulf* case. A venue statute should be understood as saying, in effect: Assuming that the courts of this state have jurisdiction of the case, and that trial somewhere in this state, as distinguished from a foreign state, is appropriate, this statute designates the counties or districts, among those within this state, which are the appropriate places for trial.

Consider, for example, the leading case of *Collard v. Beach*,⁴⁹ in which the New York Supreme Court dismissed, on *forum non conveniens* grounds, an action between residents of Connecticut for a tort which occurred in Connecticut. There was then in force in New York a venue statute providing that, "If neither of the parties [at the time the action was commenced] resided in the state, [the action] may be tried, in any county, which the plaintiff designates, for that purpose, in the title of the complaint."⁵⁰ In a sense, then, the "venue" was properly laid, "in conformity with" the statute. But it is plain that the statute did not purport to declare that, of all possible places in the world, the New York county of the plaintiff's choice was the appropriate place of trial. All it did was to designate the county in New York which was appropriate for the trial of *such actions between nonresidents as might be appropriately brought in the state of New York*. Such a venue statute is simply irrelevant to the question of the appropriateness of the place of trial on the interstate level. It will not do to reason from the fact that the venue statute does not prevent dismissal on that level to the conclusion that it does not prevent dismissal on the intrastate

⁴⁹ 81 App. Div. 582, 81 N.Y. Supp. 619 (1st Dep't, 1903), 87 N.Y. Supp. 884 (1st Dep't, 1904).

⁵⁰ N.Y. Code Civ. Proc. (1902) § 984. Compare N.Y. Civ. Prac. Act (1942) § 182.

level. On the interstate level the venue statute is inapplicable; on the intrastate level it gives the legislature's answer to the question as to the appropriate place for trial.

The question in the *Gulf* case arose, in the conflict-of-laws sense, on the intrastate (intranational) level. There was no possible question about the appropriateness of trial somewhere within the system of United States district courts. The only question was: Which district? The legislative body having power to provide a complete solution to the problem in those terms—Congress—had provided the comprehensive answer.⁵¹ But Mr. Justice Jackson, having persuaded himself that no statutory venue provision need foreclose the use of judicial discretion to determine the appropriateness of the place of trial (except where Congress, by enacting a *special* venue statute for a specific cause of action, demonstrates unmistakably that it is in fact providing the positive solution which is the distinguishing characteristic of venue statutes),⁵² was unperturbed. He proceeded to treat the problem, from that point on, as merely one of whether a federal court is disabled, on constitutional principles possibly peculiar to our federal judicial system, to exercise a power which courts in general possess—to decline to

⁵¹ The relevant venue statute was Section 112 of the old Title 28 [24 Stat. 552 (1887), 25 Stat. 433 (1888)], providing that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Since a corporation was a resident only of the state of its incorporation, the gloss of the *Neirbo* case [308 U.S. 165 (1939)] was needed to complete the justification of the venue. That circumstance, however, does not distinguish the case from one in which the venue statute expressly refers to the forum as appropriate. If anything, it should be more difficult for a defendant to procure dismissal from a district in which it has "consented" to be sued than from one merely designated by a venue statute.

⁵² *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947). Frankfurter, J., dissenting in the *Kepner* case, had said: "If the privilege afforded a plaintiff to bring suit under the Federal Employers' Liability Act in one place rather than in another is to be regarded as an absolute command to the federal courts to take jurisdiction regardless of any considerations of justice or fairness, why is not the same effect to be given the comparable general venue provisions of Sec. 51 of the Judicial Code, 28 U.S.C. Sec. 112? Nothing in the language or the history of the venue provision of the Act differentiates it from the numerous other provisions of the Judicial Code. Is the settled doctrine of *forum non conveniens* to be deemed impliedly repealed by every such venue provision?" *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 62 (1941). Two features of this statement disturb me: (1) its confusion of the problem of place of trial on the interstate level with that on the intrastate level; and (2) its quite remarkable suggestion that *forum non conveniens*, as an instrument for dealing with the problem of place of trial on the intranational level, where that problem is dealt with by the venue statutes, was "settled doctrine" in the federal courts in 1941. But with respect to the precise point he was making, surely Mr. Justice Frankfurter was right—at least as a purely analytical matter. There is no logical reason for inferring that Congress has affirmatively determined the propriety of the place of trial in a special venue statute, and that it has not done so in a general venue statute.

exercise jurisdiction for good cause, whether the cause relates to the convenience of the place of trial or to some unrelated matter. That such a crippling disability does not exist might well have been conceded by the plaintiff. Still, there had been a good deal of talk in the cases about constitutional obligation to exercise jurisdiction conferred;⁵³ so Mr. Justice Jackson aimed his blows at this somewhat shadowy obstacle—with inevitably telling effect. He invoked (1) cases in which federal courts (in admiralty) had applied the doctrine of *forum non conveniens* on the international level; (2) cases in which the Supreme Court had held that a state may or even must apply the doctrine of *forum non conveniens* on the interstate level; (3) cases in which the Supreme Court had held that a federal court may, or must, decline to exercise jurisdiction for some cause unrelated to the locality of trial, such as deference to a state system of administrative regulation, or the lack of an appropriate remedy; (4) cases in which federal courts (in equity) had declined to intervene in the internal affairs of foreign corporations; and (5) cases in which state or foreign courts have exercised the power to dismiss because of inappropriateness of the place of trial in interstate, or international, terms. These cases surely establish that the federal courts have, and must have unless they are to be uniquely limited, a discretionary power to decline to exercise jurisdiction in some circumstances, for good cause. Just as surely, they do *not* support the decision of the Court. Not a single case cited by Mr. Justice Jackson sustains the discretionary power of a court to dismiss an action upon considerations relating solely to the convenience, in intra-state terms, of the place of trial as such. Nor has any such case, other than the *Gulf* case itself, been found.⁵⁴

⁵³ See the cases cited by Black, J., dissenting in the *Gulf* case, 330 U.S. 501, 513-14 (1947). Despite language that is sometimes sweeping, such cases hold no more than that jurisdiction must be exercised in the absence of an adequate reason for abstention.

⁵⁴ There is a dictum in one admiralty decision by a district court, not cited in the *Gulf* case, which might have lent some color to the idea that dismissal was proper where trial would be more convenient in another district. *Neptune Steam Nav. Co. v. Sullivan Timber Co.*, 37 Fed. 159 (S.D. N.Y., 1888). But the holding was that service of process should be set aside because the person served was not the defendant's managing agent. Moreover, there are, in general, no statutory venue provisions for libels in personam in admiralty. 2 Benedict, Admiralty 79 (6th ed., Knauth, 1940); *In re Louisville Underwriters*, 134 U.S. 488 (1890). Even if the dictum were less isolated and more authoritative, therefore, it would not support the power of a court to dismiss because of the inconvenience of the forum where Congress has exercised its power to determine the place of trial.

In *Summerall v. United Fruit Co. (The Metapan)*, 1935 A.M.C. 1202 (S.D. N.Y., 1935), there is talk of discretionary refusal to entertain jurisdiction where another district court would be more appropriate; but the action was one at law under the Jones Act, and the simple fact was that the venue was wrongly laid.

A brief examination of the cases will make the point clear:

(1) The admiralty cases, represented in the *Gulf* opinion by the typical *Canada Malting Co. v. Paterson Steamships, Ltd.*,⁵⁵ are cases in which the problem of place of trial is considered on the international level.⁵⁶ The question is whether trial anywhere in the United States is appropriate, as distinguished from trial in a foreign country. In the *Canada Malting* case Mr. Justice Brandeis said: "[I]n a suit in admiralty *between foreigners* it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction. . . . Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted *in a foreign tribunal*."⁵⁷ This is not a holding that a district court may decline jurisdiction on the ground that trial would be more appropriate in another district in the United States.

(2) All the cases in which the Supreme Court has held that a state may, or must, apply the principles of *forum non conveniens* have concerned the appropriateness of the place of trial on the interstate level.⁵⁸ They do not hold that a state court may or must exercise discretion with respect to the place of trial within the state.

(3) In cases such as *Burford v. Sun Oil Co.*,⁵⁹ the Supreme Court held that a district court should refrain, with "a sound respect for the independence of state action,"⁶⁰ from interjecting its jurisdiction into "a unified method for the formation of policy and determination of cases"⁶¹ by the Texas Railroad Commission and the Texas courts. Plainly, the considerations involved had nothing to do with geograph-

⁵⁵ 285 U.S. 413 (1932).

⁵⁶ Subject to the qualifications noted in note 54 *supra*.

⁵⁷ 285 U.S. 413, 423 (1932). The parties were all citizens of Canada; the vessels involved in the collision were of Canadian registry; the material witnesses were Canadians; the lost cargo was shipped under a Canadian bill of lading from one Canadian port to another; the collision occurred in American waters only because the vessels had proceeded there unintentionally. Dismissal was on the ground that the controversy concerned "matters . . . properly the subjects of hearing and determination" by the *Canadian* courts.

⁵⁸ *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929); *Anglo-American Provision Co. v. Davis Prov. Co.*, 191 U.S. 373 (1903); *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923). To the same effect are the dicta in *Broderick v. Rosner*, 294 U.S. 629, 643 (1935), and *Williams v. North Carolina*, 317 U.S. 287, 294 n. 5 (1942).

⁵⁹ 319 U.S. 315 (1943). The other case cited by Mr. Justice Jackson is *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941).

⁶⁰ 319 U.S. 315, 334 (1943).

⁶¹ *Ibid.*, at 333.

ical convenience of the place of trial. The action in the *Burford* case was brought in the United States District Court for the Western District of Texas, which sits at Austin, the state capital—clearly the most convenient of all possible *locations* for the trial. Yet Mr. Justice Jackson referred to these cases as having been decided “on substantially forum non conveniens grounds.”⁶² The gentlest reproof would be phrased in the language of Mr. Justice Reed: such cases “may, at the expense of analysis, be grouped under the doctrine of forum non conveniens.”⁶³

The other case in this category, *Slater v. Mexican National Railroad*,⁶⁴ is on the international level; but, more important, it does not deal with geographical convenience of the place of trial. The sole obstacle to the exercise of jurisdiction was the supposed lack of power in the court to afford a remedy appropriate to the foreign cause of action. If such a case is relevant, then so is every other in which a court has declined to entertain a foreign cause of action, no matter how remote the reason may be from considerations which enter into determination of the fair and convenient geographical location for trial.

(4) The cases involving foreign corporations do involve an element of geographical convenience, and they do deal with the appropriateness of the place of trial on the intrastate (intranational) level. But they involve more than geographical convenience. In the beginning they involved something else predominantly: the power to grant an effective decree, the feasibility of quasi-administrative supervision outside the district, the exercise of visitorial powers.⁶⁵ Convenience of location, originally, was subordinated to such considerations of power and feasibility. While the term *forum non conveniens* appears in the *Rogers* case,⁶⁶ the tendency to identify the internal-affairs rule with the doctrine of *forum non conveniens* did not get under way until the *Green Bay*⁶⁷ case was decided in 1946, and the identification was not complete until the *Koster*⁶⁸ case was decided—on the same day as *Gulf*.

⁶² 330 U.S. 501, 505 (1947).

⁶³ Dissenting in *Koster v. Lumbermens Mutual Cas. Co.*, 330 U.S. 518, 534 (1947).

⁶⁴ 194 U.S. 120 (1904).

⁶⁵ *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 144–45 (1933) (dissenting opinion); Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 918 (1947); *The Development of the “Internal Affairs” Rule in the Federal Courts*, 46 Col. L. Rev. 413 (1946).

⁶⁶ In the dissenting opinion of Mr. Justice Cardozo, 288 U.S. 123, 151 (1933).

⁶⁷ *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 554 et seq. (1946).

⁶⁸ *Koster v. Lumbermens Mutual Cas. Co.*, 330 U.S. 518, 527–28 (1947).

It is one thing to suggest that, in enacting a general venue statute, Congress may not have taken into account the practical complexities of supervision of corporate activities by a court not located in the state of the corporate domicile; it is quite another to suggest that, in enacting a general venue statute, Congress did not take into account the competing interests of plaintiff and defendant with respect to the convenience of the place of trial. If a venue statute does not reflect a consideration and adjustment of such interests, it is nothing.

(5) Every case cited from state and foreign courts, supporting the power of a court to decline jurisdiction on considerations relating to convenience of the place of trial, deals with the appropriateness of the forum on the international level.⁶⁹ Not one affirms the power of a court to exercise its discretion as to the place of trial within a state.

In the light of this analysis, consider two statements made by Mr. Justice Jackson:

(1) "The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."⁷⁰

The principle of *forum non conveniens* is simply that a court may resist imposition on its jurisdiction *in the absence* of an applicable venue statute—i.e., on the interstate or international level. The reference to "the letter" of the venue statute discloses awareness that such a statute can be read as applying to the interstate situation only by the indulgence of literal formalism. A venue statute does not deal with the

⁶⁹ *Collard v. Beach*, 81 App. Div. 582, 81 N.Y. Supp. 619 (1st Dep't, 1903), 87 N.Y. Supp. 884 (1st Dep't, 1904); *Murnan v. Wabash R. Co.*, 246 N.Y. 244, 158 N.E. 508 (1927); *Jackson & Sons v. Lumbermen's Mut. Cas. Co.*, 86 N.H. 341, 168 Atl. 895 (1933); *Langfelder v. Universal Laboratories*, 293 N.Y. 200, 56 N.E. 2d 550 (1944) (internal affairs); *Egbert v. Short*, [1907] 2 Ch. 205; *Logan v. Bank of Scotland*, [1906] 1 K.B. 141 (stay of proceedings); *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français"*, [1926] Sess. Cas. (H.L.) 13; *Pietraroia v. New Jersey & H.R. Ry. & F. Co.*, 197 N.Y. 434, 91 N.E. 120 (1910); *Great Western Ry. Co. v. Miller*, 19 Mich. 305 (1869).

Mr. Justice Jackson might have added a well-known case in which a United States district court, with the approval of the court of appeals, similarly invoked the doctrine of *forum non conveniens*—in an action at law on a contract. *Heine v. New York Life Ins. Co.*, 50 F. 2d 382 (C.A. 9th, 1931), affirming 45 F. 2d 426 (D. Ore., 1930); but there, too, the decision was that no federal court would be an appropriate forum. He might also have pointed to the fact that long practice in the District of Columbia supports the doctrine of *forum non conveniens*. *Simons v. Simons*, 187 F. 2d 364 (App. D.C., 1951), and cases cited. But, as a territorial court for the seat of the federal government, the District Court for the District of Columbia occupies a special status, not unlike that of a state court. These cases, therefore, are again instances of the application of the doctrine on the interstate level. See *United States v. E. I. DuPont de Nemours & Co.*, 83 F. Supp. 233, 235 (D.C., 1949).

⁷⁰ 330 U.S. 501, 507 (1947).

interstate problem; the legislature lacks power to solve that problem in the complete way that it solves the intrastate problem to which the venue statute is addressed. When the legislature has power to act comprehensively, the importance of the problem demands a complete solution, "authorizing" suit in the appropriate forum in the interest of certainty. When such a complete solution is provided, as it is on the intrastate level, a court which "resist[s] imposition on its jurisdiction" resists "imposition" by the legislature.

(2) "[General venue] statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy."⁷¹

Then what does a general venue statute give a plaintiff that he did not have before? Generally, any person who has a complaint against another, arising under some ascertainable law, may be quite sure that somewhere in the world there is a place in which he may pursue his remedy. The possibilities are limited by concepts of jurisdiction; but among the remaining possible places, he cannot be sure which is the appropriate one. If the choice is between nations or independent states, no power exists to inform him where he may sue and be secure against dismissal; but where that power does exist—as it does when the choice is between counties or districts within a single judicial system—the legislature either tells him in no uncertain terms that there is a specific place in which he may sue and be secure against dismissal, or the legislature is guilty of dereliction in failing to use its power to resolve an important problem.

The dissenting opinion of Mr. Justice Black⁷² does not criticize the majority opinion for its disregard of the distinction between the interstate and the intrastate levels. It acquiesces in the treatment of the problem as the general one of whether a federal court has discretion to decline to exercise jurisdiction vested in it by law; and, equating such discretion with abdication,⁷³ it explains the cases most troublesome to that position as exceptional, resting on "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity."⁷⁴ But the instances in which federal courts have declined jurisdiction of actions which could more appropriately be tried in a foreign country

⁷¹ Ibid. In context, this statement plainly means that the statute assures the plaintiff that some one, but not all, of the designated courts will be appropriate.

⁷² Concurred in only by Rutledge, J., although Reed and Burton, JJ., also dissented.

⁷³ Ibid., at 513.

⁷⁴ Ibid.

are peculiar to admiralty only in the sense that, because of the definition of federal judicial power, the federal courts are less likely than state courts to be presented with the *forum non conveniens* problem in cases outside the admiralty category. Other heads of federal jurisdiction are so defined as to necessitate the presence of some element tending to make trial in the United States, as distinguished from a foreign country, appropriate. Even so, cases other than in admiralty may be imagined, and a few have actually arisen, suggesting that the greater appropriateness of a foreign tribunal may justify dismissal.⁷⁵ The cases which are distinguished as involving equitable discretion might have been more effectively distinguished as not involving primarily considerations of convenience of the place of trial.

The severity of the doctrine adopted in the *Gulf* case should not be minimized. Dismissal is a harsh penalty to visit upon a plaintiff for miscalculation or for carrying notions of legitimate strategy a bit too far. The plaintiff in the *Gulf* case filed the action in a forum to which he was invited by the venue statute, as construed. He did so without any reprehensible purpose to vex, harass, oppress, or gain an unfair advantage; the insurance lawyers were New Yorkers who, professedly, feared that the magnitude of the claim would "stagger the imagination" of a provincial jury, and who anticipated prejudice on account of "local influences and preconceived notions."⁷⁶ Because their understanding of the venue privilege was held erroneous and their fears unfounded, the plaintiff was required to start over from the beginning, more than three years after the fire. A statement in the dissenting opinion imputes to the majority an almost incredible indifference to the result: "Whether the statute of limitations has run against the plaintiff, we do not know."⁷⁷ Perhaps the explanation is that the majority *did* know; a reference to the Virginia statute would have given reassurance, confirmed by the failure of counsel to refer to any risk that the action might be barred.⁷⁸ Fortunately, the action could be refiled, in good time, in the district court in Virginia.⁷⁹ But the Court could have no

⁷⁵ *De Sairigne v. Gould*, 83 F. Supp. 270 (S.D. N.Y., 1949). See *Cuba R. Co. v. Crosby*, 222 U.S. 473, 480 (1912); *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D. N.Y., 1950); *Heine v. New York Life Ins. Co.*, 50 F. 2d 382 (C.A. 9th, 1931).

⁷⁶ 330 U.S. 501, 510 (1947).

⁷⁷ *Ibid.*, at 516-17.

⁷⁸ Code Va. (1950) § 8-24 provides a five-year statute of limitations, derived from the 1919 Code, for actions for injuries to property.

⁷⁹ See *Gilbert v. Gulf Oil Corp.*, 175 F. 2d 705 (C.A. 4th, 1949). Ironically, the result of the trial in Virginia confirmed the fears of plaintiff's counsel on the score of local

assurance that the doctrine would operate as mildly in other cases, and for that reason it seems unfortunate that there was no reference to the devices for softening the blow of dismissal which are established concomitants of the doctrine on the international level. "The doctrine of *forum non conveniens* is an instrument of justice."⁸⁰ In the very cases cited by Mr. Justice Jackson there was ample evidence of power to attach conditions to the dismissal, or to order a stay instead, thus scaling the consequence to the proportions of the miscalculation.⁸¹ Whether the omission of reference to that ameliorating power was significant is not altogether an academic question; the answer may bear on the administration of the transfer power under Section 1404(a).

It seems clear, then, that the Court's importation of the doctrine of *forum non conveniens* into the determination of place of trial on the intranational level, where the venue statutes presumably occupied the field, was a striking judicial innovation, the more remarkable because the doctrine on this level was possibly to be less liberal and flexible than in its native habitat, and because, as the Court certainly knew, Congress was even then considering the more moderate proposal embodied in Section 1404(a) for relief against abuse of the venue privilege.⁸²

But when so much has been said, something remains to be added. No outraged cries of "Usurpation!" greeted the decision. The law re-

prejudice. Coupled with the statement of plaintiff's counsel that local influences and preconceived notions might make it difficult to procure a jury having no previous knowledge of the facts [330 U.S. 501, 510 (1947)], the result at least suggests that, under a comprehensive scheme for regulating the place of trial such as is in force in some states, the case might well have been remitted for trial to a district other than the Western District of Virginia.

⁸⁰ Cardozo, J., dissenting in *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 151 (1933).

⁸¹ *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413, 424 (1932) ("The District Court embodied in the decrees an order that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment"); *Logan v. Bank of Scotland*, [1906] 1 K.B. 141 (stay of proceedings); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 149 (1933) (dissenting opinion). Conditions have been attached to the dismissal of actions at law: *Wendel v. Hoffman*, 258 App. Div. 1084, 259 App. Div. 732, 18 N.Y.S. 2d 96, 97 (2d Dep't, 1940). See also Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41, 50-53 (1930).

⁸² Judge Clark, in the opinion of the court of appeals, had quoted the provisions of the proposed Section 1404(a). 153 F. 2d 883, 886 (C.A. 2d, 1946). See generally the history of the Revision in the Collett case, 337 U.S. 55, 65 et seq. (1949), and in Moore, *Commentary on the U.S. Judicial Code* 63 et seq. (1949).

views approved, or were mildly critical.⁸³ There were no repercussions in Congress. Even in Mr. Justice Black's dissent, the language of protest was jurisprudential rather than indignant. He characterized the grafting of the doctrine of *forum non conveniens* on the general venue statutes as "far more than the mere filling in of the interstices of those statutes."⁸⁴ He observed in a footnote that it was not the duty of the Court to "amend" the venue statute, and in another, quoting Justice Holmes, he implied that the court was indulging in "molar" rather than "molecular" motion.⁸⁵ How can we account for such a quiet reaction to a decision so vulnerable?

This is a big country. Yet Congress, in enacting the general venue statutes, has on the whole done little more than imitate, and that not very selectively, provisions enacted by state legislatures dealing with the problem on a far smaller scale.⁸⁶ In addition, there is, in a sense, no venue statute for removal cases.⁸⁷ Worst of all, Congress failed (until 1948) to emulate the state practice in respect to change of venue, although the need for flexibility was proportionately greater on the national scale. The result was an unparalleled opportunity for abuse by plaintiffs in selection of the forum. In a realistic sense it may be said that, although Congress enacted general venue statutes, and thus went through the motions of balancing competing interests and considerations respecting the place of trial, it never came to grips with the problem posed by a nationwide system of courts, and never achieved an informed and mature legislative solution to the problem.⁸⁸ Similarly, it may be said that, although in formal analysis the question of the convenient place of trial as between different districts in the federal system is an instance of the problem on the intrastate (intranational)

⁸³ The case was noted in 27 B.U.L. Rev. 495 (1947); 47 Col. L. Rev. 853 (1947); 15 Geo. Wash. L. Rev. 489 (1947); 60 Harv. L. Rev. 908 (1947); 46 Mich. L. Rev. 102 (1947); 26 Tex. L. Rev. 218 (1947); 21 Tulane L. Rev. 669 (1947); 15 U. of Chi. L. Rev. 332 (1948).

⁸⁴ 330 U.S. 501, 515 (1947).

⁸⁵ *Ibid.*, at notes 3 and 4.

⁸⁶ See New Limitations on Choice of Federal Forum, 15 U. of Chi. L. Rev. 332 (1948); Barrett, Venue and Service of Process in the Federal Courts, 7 Vand. L. Rev. 608 (1954).

⁸⁷ *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663 (1953).

⁸⁸ Yet, as a matter of history, the worst abuses involved the special venue provisions of the Federal Employers' Liability Act—an instance in which Congress had, in fact, made a deliberate choice as to the relevant considerations; and the drive within the Court for recognition of the doctrine of *forum non conveniens* had its origin in FELA cases. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941); *Miles v. Illinois Central R. Co.*, 315 U.S. 698 (1942).

level, in actuality it presents substantially the same problems that are encountered on the interstate level. If the maintenance of an action in the Supreme Court of New York in New York City would be vexatious or oppressive, it would be equally so in the United States District Court for the Southern District of New York. It may be that the Court was weary of the inadequacies of congressional solutions to the problem of place of trial. It may be that the Court was impatient with the artificiality of conventions which would require it to say: (1) that Congress had considered the whole problem carefully, and deliberately intended all the ill effects; (2) that, while the Supreme Court of New York could remit a plaintiff to Virginia, that being as to New York, a "foreign" state, the District Court for the Southern District of New York could not remit the same plaintiff to the Western District of Virginia, that being another unit of the same judicial system.⁸⁹ It may even be that there was a subconscious desire to emphasize, by the relatively harmless decision in the case before the Court, the need for favorable action by Congress on the pending proposal for reform embodied in Section 1404(a).

It is doubtful that the decision had any direct influence on the event in Congress. There is no mention of it in the legislative history of Section 1404(a). Yet this much may be said with confidence: The *Gulf* decision alone, even if there had been nothing else in the judicial history of the problem of place of trial in the federal system, would have made a provision like that of Section 1404(a) inevitable. The decision exposed the inadequacy of the general venue statutes; it introduced uncertainty and delay as preferable to oppressive rigidity; and it imposed the disproportionately drastic penalty of dismissal for bad judgment or overreaching by plaintiffs in the selection of the forum. It cried aloud for legislative attention to the problem; it would have proved intolerable if relief had not been forthcoming; and relief did come, with rare celerity. Relief came so swiftly and so aptly that it appeared to be what it was not: a direct and calculated response to the very problem created by the decision. And an interesting thing happened. Although the decision is not even mentioned in the legislative history, it became almost at once the prime source of information as to what Congress intended when it enacted the section "in accordance with the doctrine of forum non conveniens."⁹⁰ The formal legislative

⁸⁹ With this general interpretation compare Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 18, 22, 27, 31 (1945).

⁹⁰ See note 41 *supra*.

history of Section 1404(a) is almost obsolete. It was useful primarily on the question, quickly settled, whether the section accomplished the one thing it purported specifically to achieve: a change in the law concerning the special venue provisions of the Federal Employers' Liability Act and similar special venue provisions. On the basis of the Reviser's statement that the section was "drafted in accordance with the doctrine of *forum non conveniens*," the *Gulf* decision has become, for other questions of construction, the legislative history. The extent to which this conception of the relation between the *Gulf* case and Section 1404(a) permeated the bench and bar (and thus, perhaps, influenced Congress indirectly) may be judged by the comments of Judge Albert B. Maris, as he explained the highlights of the new Judicial Code in the *American Bar Association Journal*. He did *not* observe that Section 1404(a) would curtail the notorious abuses under the Federal Employers' Liability Act, although that was the most explicit purpose when the section was drafted. Instead, he spoke of its effect in terms which unmistakably show that he regarded it as redressing the ill effects of the *Gulf* decision: Coupling it with Section 1406(a), he said: "Both provisions will protect many plaintiffs, whose cases would otherwise have been dismissed, from having their causes of action barred by the statute of limitations."⁹¹

In perspective, therefore, the brief career of the doctrine of *forum non conveniens* on the intranational level in the federal courts was a mere episode in the development of the law. The *Gulf* decision may be regarded, analytically, as an unsound aberration which had to be, and was, corrected by congressional action which at the same time provided a better solution for the underlying problem. Preferably, it may be regarded as a pragmatically justified protest against the inadequacy and inflexibility of the venue statutes, and as one step in the process of securing enactment of a statute authorizing change of venue—a simple and obvious device inexplicably missing from the federal system. On either view, the result, so far as *forum non conveniens* is concerned, was episodic. We have moved through two stages to a third: (1) from protracted submission to the rigidities of statutory venue and its abuses (2) to a brief period of bold rebellion, employing the crude weapon of dismissal for want of a better, then quickly (3) to the comfortable situation, which might have been enjoyed all along, of being empowered to deal with the problem of place of trial

⁹¹ Maris, New Federal Judicial Code, 34 A.B.A.J. 863, 963 (1948).

on the flexible basis of discretion in the individual case, with the sensible and moderate device of transfer. This entire evolutionary process has taken place, be it noted, *without any effect whatsoever on the doctrine of forum non conveniens proper*. Here is striking confirmation for the thesis that the problem of place of trial on the intrastate level is appropriately dealt with by venue statutes and provisions for discretionary change of venue, while on the interstate level it is necessarily dealt with by the incomplete and relatively harsh doctrine of *forum non conveniens*. Beyond any question at all, Section 1404(a) has abolished dismissal as the penalty for choice of an inconvenient federal forum,⁹² and substituted transfer—*on the intranational level*. But the problem of place of trial as between nations still exists, and cannot be solved by transfer. Cases still arise, in admiralty and in other categories of jurisdiction, which should more appropriately be tried in a foreign country. For such cases the doctrine of *forum non conveniens* still exists, as before; and the remedy is still dismissal, as before.⁹³ The only possible explanation for the fact that this doctrine remains unaffected by a statute purporting to modify it is that, despite all the talk, the doctrine of *forum non conveniens* had nothing to do at any time with the problem with which the statute deals, except as a displaced but persuasive forensic argument. A doctrine appropriate only to the international problem was warped to the uses of intranational judicial reform, with an end result that might have been achieved without the slightest reference to the doctrine.

But the question remains: Does the role played by the doctrine of *forum non conveniens* in the evolutionary process leading to the enactment of Section 1404(a) have implications for the administration of that section, especially on the question of the law to be applied? If we take the view that the same result could have been accomplished without reference to the doctrine, simply by the enactment of a change-of-venue statute on the model supplied by the states, the in-

⁹² *Schoen v. Mountain Producers Corp.*, 170 F. 2d 707, 714 (C.A. 3d, 1948); see *Burges v. Proctor & Gamble Defense Corp.*, 172 F. 2d 541 (C.A. 5th, 1949). Cf. *Hammet v. Warner Bros. Pictures*, 176 F. 2d 145 (C.A. 2d, 1949), and the dissenting opinion of Clark, J., at 152. But the device of staying an action, where that would be an appropriate implementation of the doctrine of *forum non conveniens*, is not superseded. *Mottolese v. Kaufman*, 176 F. 2d 301, 303 (C.A. 2d, 1949); and see the dissent of Clark, J., in the *Hammet* case, *supra*.

⁹³ *De Sairigne v. Gould*, 83 F. Supp. 270 (S.D. N.Y., 1949), *aff'd* 177 F. 2d 515 (1949), cert. denied 339 U.S. 912 (1950). See also *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 91 F. Supp. 469 (S.D. N.Y., 1950).

ference will be that Section 1404(a) is to be regarded simply as a provision for federal judicial housekeeping, and that the relevant precedents on the effect of transfer are those arising from state practice. But the same practical considerations, stemming from the peculiar attributes of a continental federal system, which justified the Court's rejection of analytical logic in the *Gulf* case, may very well cause it to resort again to the doctrine of *forum non conveniens* for guidance in determining the effects of transfer.

III. PRELIMINARY APPROACHES TO SOLUTION

Some progress toward a solution of the problem of the effect of transfer on the applicable law can be made at once by summarily rejecting the first of the three tentative approaches set out in Part I: that the transferee court should apply the law of the state in which it sits, just as if the action had been brought in that state. Such a result could be dictated only by a superficial application of some of the language in which the *Erie* doctrine has been expressed, and would be based on a fundamental misunderstanding of the policy embodied in that doctrine. To be sure, the Court has stated the obligation of the district court under the *Erie* doctrine as an obligation to follow the law of the state in which it sits; but when such statements of the doctrine were formulated, the present problem did not exist. Diversity cases came before a district court only by virtue of having been originally filed there, or by removal from a court of the state in which the court sat; never by transfer from a district court in another state. To apply such formulations of the doctrine literally to a situation which was not in contemplation when they were made is mechanical jurisprudence of the crudest sort. Furthermore, such a result, though contrived in fancied obedience to the *Erie* mandate, would actually be in diametric opposition to the *Erie* doctrine. "The nub of the policy that underlies *Erie R. Co. v. Tompkins*," said Mr. Justice Frankfurter, "is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."⁹⁴ The required uniformity is between the district court which decides the case and the courts of the state in which the action is filed, not between the district court and the courts of some other state; that is, between the district court in California (in the *Headrick* case), to

⁹⁴ *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

which the action may be transferred, and the New Mexico state court in which the action was filed, and from which it was removed, because of the "accident" of diversity, to the district court "a block away."

This position may be clarified, and the arguments for and against it put in perspective, by reference to the leading case of *Sampson v. Channell*.⁹⁵ There the "transaction" was an automobile collision in Maine. Because of the "accident" of diversity of citizenship, the action was brought in the United States District Court for the District of Massachusetts, instead of in a state court "a block away." The question was whether the district court should apply the Massachusetts rule, that the burden of proof on the issue of contributory negligence is on the defendant, or the Maine rule, that the burden is on the plaintiff. In one of the most lucid opinions ever written on the *Erie* principle, Judge Magruder, for the court of appeals, held that it must apply the Massachusetts rule, because the Massachusetts court would have done so, consistently with the Constitution, under its choice-of-law rule. Beyond question, this result was in harmony with the spirit of the *Erie* doctrine. Yet the case was of a type which might very well be transferable to Maine under Section 1404(a). If, upon such a transfer, the district court in Maine should apply "the law of the state in which it sits," then the law of the case would be precisely the opposite of that which the court of appeals held it should be; and, by hypothesis, the result of the action may be "substantially different" from what it would have been in the Massachusetts court—and this solely by virtue of the fact that the accident of diversity of citizenship permitted the case to be maneuvered into Maine, by way of the Massachusetts district court.⁹⁶ Plainly, such a result is not dictated by, but is subversive of, the *Erie* policy.

⁹⁵ 110 F. 2d 754 (C.A. 1st, 1940), cert. denied 310 U.S. 650 (1940); approved in *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 496 n. 2 (1941).

⁹⁶ This argument assumes (necessarily, given the conditions of the hypothetical problem) that trial in Maine would not have been the consequence of filing the action in a Massachusetts state court. That is, it assumes either (1) that Massachusetts would not have dismissed on forum non conveniens grounds, or (2) that, if Massachusetts would have dismissed, a third forum would have been available in which the plaintiff would have been secure against such dismissal. If Massachusetts would dismiss, and if no third forum were available, the result stated in the text would conform to the result in the state court, agreeably to the *Erie* doctrine. That outcome, however, would be a resultant of the application of the law of the transferee state, coinciding with the state law of forum non conveniens and the facts relating to the third forum. Its appraisal, therefore, involves the question whether the solution to our problem is conditioned by the state law of forum non conveniens. But the first tentative solution makes no provision for taking the state law on that subject into account. The question we must be concerned with at this point is: Without regard to the state law on forum non conveniens, does

True it is that, from the viewpoint of an ideal system of conflict of laws, the result in this precise situation may be thought desirable: the result is the more complete application of the law which governs the transaction, the discouragement of forum-shopping, and the general uniformity which are primary aims of a system of conflict of laws. But the fact remains that the "better result" achieved in this fashion is available only to those privileged to enjoy diversity of citizenship; and the same considerations which led the court of appeals to reject it for the district court in Massachusetts demand its rejection for the district court in Maine, when the action is filed in Massachusetts. The *Erie* doctrine we have with us; and not even those critics who regret especially the loss of power in the federal courts to make an independent choice of law would recommend recapture of that power through the medium of Section 1404(a), construed according to the rule of thumb under consideration. For not only would such a recapture be partial—limited to cases in which transfer is justifiable for the convenience of parties and witnesses, and in which there is another district in which the action "might have been brought"; it would, in addition, result in application of the law of a state which, though providing a convenient place of trial, may have no such connection with the transaction as to make the application of its law rational. It is quite conceivable, for example, that such a case as *Sampson v. Channell* might be transferred to New Hampshire, or to Georgia, given appropriate assumptions as to the residence of the parties and the convenience of witnesses. The coincidence of appropriate law and convenient location upon transfer to Maine would be quite fortuitous.

Mr. Justice Jackson was right when he said, in his dissent in the recent *Wells* case:

Are we then to understand that parties may get a change of law as a bonus for a change of venue? If the law of the forum in which the case is tried is to be the sole test of substantive law, burden of proof, contributory negligence, measure of

the *Erie* doctrine require application of the law of the state of filing, or the law of the state to which the action is transferred? There is a degree of artificiality involved in discussing the ideal of conformity to the state result under such a limitation; yet that procedure is justified by the fact that strict conformity of result in terms of forum non conveniens is impossible. Even assuming that the law of the state on forum non conveniens is determinable (as to which see the discussion of the third approach, *infra*), the facts as to the availability of a third forum (which would not dismiss) can seldom be known. Hence the discussion in the text proceeds on the premise that we can almost never be certain that, had the action been filed in the state court (and not removed), the result would have been trial in the courts of the transferee state.

damages, limitations, admission of evidence, conflict of laws and other doctrines, . . . then shopping for a favorable law via the *forum non conveniens* [transfer] route opens up possibilities of conflict, confusion, and injustice greater than anything *Swift v. Tyson*, 16 Pet. 1, ever held.⁹⁷

If it should be established as a rule of thumb that the transferee court is to apply the law of the state in which it sits, every case in which there is a difference of law between the original and the transferee state would become a game of chess, with Section 1404(a) authorizing a knight's move; and nothing would be certain except that the parties would land on a square of a different color.⁹⁸

The second tentative approach is: The transferee court should apply the law of the state in which the action was originally filed, just as if it were a district court in that state, but without regard to the state law on *forum non conveniens*.

Consideration of this proposition should be undertaken with care. At the outset, there is this to be said of it: it offers a relatively simple and workable solution, and one which, on the basis of present indications, the courts are not unlikely to adopt. If we were free to ignore the history of Section 1404(a), and the philosophy which has been developed concerning the role of the federal courts in adjudicating state-created rights, there might be much to commend it. But this approach, like the other two, purports to offer a solution consistent with the full purpose of the section and with the requirements of the

⁹⁷ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 522 (1953). Mr. Justice Jackson was protesting a decision which required a district court in Pennsylvania to adhere to state law and apply the local statute of limitations to an action for wrongful death arising in Alabama. His criticism was directed against a rule which deprives the district court of freedom to choose the applicable law, and requires it to follow the choice-of-law rule of the state in which the action is filed and tried. If, however, that rule is accepted as established law, the chaotic results envisioned by Mr. Justice Jackson can be avoided only by re-examining and rejecting the assumption that the state law to be applied is necessarily that of the state in which the action is tried, as distinguished from that in which it is filed, where the two are different as a result of transfer.

⁹⁸ In *Heaton v. Southern Ry. Co.*, 119 F. Supp. 658 (W.D. S.C., 1954), a plea of *res judicata* was interposed to an action transferred from Alabama. The court said: "Since this is a diversity case the plea of *res judicata* must be determined in accordance with the laws and policy of the State of South Carolina." *Ibid.*, at 660. The implication that the law of the transferee state applies upon transfer is weakened by the fact that Alabama also would have referred to the law of South Carolina to determine the effect of the former judgment, which was rendered by a South Carolina court.

Trust Co. of Chicago v. Pennsylvania R. Co., 183 F. 2d 640 (C.A. 7th, 1950), left open the possibility that transfer to another state might cure a defect of jurisdiction of the subject matter [the defect stemming from the Illinois statute on foreign wrongful death actions which was held unconstitutional in *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952)].

Erie doctrine. For the rhetorical purposes of this paper, the proposition has been called an "approach" to a solution. Actually, of course, it is itself a conclusion, purporting to be defensible in terms of existing principles of federal-state relationships; therefore the reasoning on which it is based must be examined.

The keystone of the structure is the qualifying phrase, "without regard to the state law on *forum non conveniens*."⁹⁹ Under the *Erie* doctrine, the only state law that can be disregarded is "procedural." In order to characterize this as a procedural problem, to which the *Erie* doctrine does not apply, the focus of the reasoning shifts from the state law on *forum non conveniens* to Section 1404(a). On purely conceptual grounds, colored by the traditional function of state provisions for change of venue, such a characterization is superficially plausible; but that such grounds are inappropriate for purposes of the *Erie* doctrine is too clear for argument. That doctrine puts aside "abstractions" regarding "substance" and "procedure" and concentrates on the objective: "the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."¹⁰⁰ Accordingly, the logic of this approach must be that Section 1404(a) is procedural because the transfer it authorizes will not substantially affect the result. Why will it not affect the result? Because, after transfer, the law to be applied will be that of the state of original filing. Why will it be that of the state of filing rather than that of some other state?

If the response is that this follows from the fact that Section 1404(a) is a procedural provision, the circularity of the reasoning is apparent. The fundamental question being what law governs after transfer, it is plainly inadmissible to characterize the section as procedural because transfer has no substantial effect on the result, and then to reason from that characterization to the conclusion that no change takes place in the applicable law. The argument need not, however, be quite so sterile. Under the *Gulf* decision it was never clear whether the power of a district court to dismiss on *forum non conveniens* grounds was conditioned by state law or not.¹⁰¹ A state court might react to circumstances stamping the forum as inconvenient by

⁹⁹ Without that qualification, we would be remitted at once to the third approach, which proceeds on the basis that state law on that subject is relevant.

¹⁰⁰ *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

¹⁰¹ 330 U.S. 501, 509 (1947). The point is discussed in detail in Part IV *infra*.

dismissing, or it might retain the case notwithstanding.¹⁰² Either course would be unsatisfactory; and the lack of a uniform practice in the federal courts would compound the difficulty. Against such a background, it would have been reasonable for Congress to resolve the question by providing a superior solution, independent of what the state court would do: to provide that, whether a state court would dismiss the case or retain it, a federal court should have power to transfer. This purpose may rationally be attributed to the legislation although we know that it was not in fact enacted in response to the *Gulf* problem. In dealing with the general problem to which the section is addressed, it would be little short of a congressional duty to take advantage of national power over the federal courts to provide a preferable solution which is absent from state law only because of a defect of power. We can thus read in Section 1404(a) a purpose to substitute transfer for dismissal, clearly evincing recognition of the fact that dismissal may have undesirable consequences. There can be no reasonable doubt of the power of Congress to make such a rule for the federal courts; we may grant, therefore, that the power of a district court to transfer a case under Section 1404(a) is independent of state law.

Nevertheless, the argument under discussion must still assume the answer to a fundamental question. Conceding a legislative purpose to conserve the beneficial effects of the *forum non conveniens* doctrine while avoiding its undesirable ones, the question remains: Which effects of dismissal were to be retained as desirable, and which obviated as undesirable? Among the effects of unconditional dismissal were these: the plaintiff suffered loss of the time invested in the dismissed action; he was put to the additional expense of refile; it was necessary for him to perfect service on the defendant again; he lost the security of any attachment or similar lien that might have accrued; the limitation period in the appropriate forum might have expired in the meantime; and he lost the benefit of any advantage that might have resulted from a difference between the law that would have been applied by the state of original filing and that which would be applied by the forum or forums left open to him. Broadly speaking, and for immediate purposes, it may be assumed that all except the last of these were effects to be obviated by the substitution of transfer for

¹⁰² It might dismiss conditionally, but that possibility was not considered in the *Gulf* case. The complexities which conditional dismissal injects into any effort to conform the federal practice to state law are noticed in the discussion of the third approach *infra*.

dismissal. But what about the last? The second approach gives an unsupported answer: a change in the applicable law is one of the undesirable effects of dismissal on *forum non conveniens* grounds, and is to be obviated by the substitution of transfer. But one of the prime considerations in forum-shopping has always been the search for a more favorable law, and one of the grounds for invoking the doctrine of *forum non conveniens* has always been that the plaintiff, in the choice of the forum, sought to obtain an inequitable advantage in terms of the law which the forum would apply.¹⁰³ A legislative purpose to ignore this aspect of the doctrine is not to be lightly assumed.

Moreover, the reasoning underlying the second approach involves a not very subtle shift in the meaning of terms. When we are told that the result of the case will not be substantially affected by transfer, because the "law" of the state of original filing will continue to apply, we must remember that the law here referred to is not the whole law of that state; the segment of that law dealing with *forum non conveniens* has been carved out and set apart as irrelevant. This fact is obscured by concentration on the conclusion that the power of the district court to order a transfer is independent of state law; but that conclusion does not tell us what law is to be applied after transfer, nor does it avoid the problem of how the state law on *forum non conveniens* is to be treated for purposes of the *Erie* doctrine. It is clear that, under this approach, the result in the federal court, made possible by the accident of diversity of citizenship, will differ from that which would have been reached in the state court in every case in which, there being a substantial difference of law between two possible forums, the state court would have dismissed on *forum non conveniens* grounds. Apart from any particular approach or solution, congruity between the result in the transferee district and that in the courts of the state of original filing depends on two factors: the law of that state on *forum non conveniens*, and the law applied after transfer. The permutations may be stated in terms of the *Headrick* case:

(1) If New Mexico law rejects *forum non conveniens*, allowing the plaintiff to maintain the action, and if, upon transfer, the district

¹⁰³ Difference of law was a factor in the *Canada Malting* case, which was heavily relied on by the majority in the *Gulf* decision. 285 U.S. 413, 418, 424 (1932). It was a factor in the leading case of *Heine v. New York Life Ins. Co.*, 50 F. 2d 382 (C.A. 9th, 1931). It is the principal factor in injunctions against prosecutions abroad, which represent the doctrine of *forum non conveniens* in its aggressive role. Consult Foster, *Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217, 1242-44 (1930), citing numerous cases. But it was not among the factors mentioned by Justice Jackson in the *Gulf* case.

court in California applies the New Mexico statute of limitations, the result is the same in state and federal courts.

(2) If New Mexico law rejects *forum non conveniens*, and if the district court in California applies the California statute of limitations, the result is different from what it would have been in the state court.

(3) If New Mexico law requires dismissal on *forum non conveniens* grounds, and if the California district court applies the New Mexico statute of limitations, the result is different from what it would have been in the state court.

(4) If New Mexico law requires dismissal, and if the California district court applies the California statute of limitations, the result is the same as it would have been in the state court.¹⁰⁴

Fidelity to the prevailing interpretation of the *Erie* doctrine requires attention to the manner in which disregarding state law would affect the result of the litigation. If the *forum non conveniens* rule of the state of filing is disregarded, then, as a matter of pure chance, a determination to apply the law of the state of filing after transfer will produce conformity of result in just half of the cases; the same is true of a determination to apply the law of the transferee state. Simply in the interest of conformity of result, therefore, there is no more reason for applying the law of the original state than for applying that of the transferee state.¹⁰⁵

It should be evident that it is logically impossible to classify Section 1404(a) as "procedural" or "substantive" for purposes of the *Erie* doctrine, and then to deduce from that classification the effect of transfer in terms of the applicable law. Any classification consistent with the spirit of the *Erie* doctrine must itself depend upon the effect of transfer on the outcome of the action. The temptation to slip into this question-begging argument must be sternly resisted. It will do

¹⁰⁴ This analysis assumes that the defendant was not amenable to process in any other state in which the action was not barred.

¹⁰⁵ In *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y., 1953), the court denied a motion for transfer to California partly on the ground that, under the New York choice-of-law rule, New York law governed the transaction, and that the New York courts were more at home with the law than those in California. In thus assuming that New York law would continue to apply after transfer, the court seems to have assumed either that the California choice-of-law rule was the same, or that transfer would not operate to displace the New York rule.

In a second case reported with *Rhodes v. Barnett*, there is a somewhat confused discussion of the effect which transfer might have on the defendant's claim to contribution from one not a party to the New York proceeding. Actually, the situation seems to present no real problem as to the effect of transfer on the law governing contribution. See *Strypek v. Schreyer*, 118 F. Supp. 918, 919 (S.D. N.Y., 1954).

no good to invoke state decisions as to the effect of change of venue; they do not involve choice of law, nor any such problem as that posed by the *Erie* doctrine, and the problems of *forum non conveniens* are no part of their matrix. They cannot tell us that change of venue under Section 1404(a) is procedural, because it does not substantially affect the result of the case; they can tell us only that such a classification and such a result are possible, in the uncomplicated intrastate situation, and thereby suggest that a like result is attainable in the federal courts, if that is what is desired. Much the same is true of early federal cases, arising out of the isolated situations in which transfer of an action was authorized before Section 1404(a).¹⁰⁶

Hardest of all to resist will be the temptation to take certain language of the Supreme Court, classifying Section 1404(a) for other purposes, as controlling its classification for purposes of the *Erie* doctrine. In *Ex parte Collett* the plaintiff contended that his action should not have been transferred because it was instituted prior to the effective date of the section. Chief Justice Vinson said: "Clearly, Section 1404(a) is a remedial provision applicable to pending actions. And 'No one has a vested right in any given mode of procedure. . . .'"¹⁰⁷ The case involved no question as to the effect of transfer on the applicable law. In the abstract, lawyers may cite the quoted language as indicating that the Court must have meant either (1) that no change in the applicable law resulting from a transfer could amount to a denial of due process, although the case was pending on the effective date; or (2) that no change in the applicable law could result from transfer. The second imputation is the more likely, but the two are equally fantastic. The Court cannot rationally be supposed to have solved, without discussion, the complex problem of whether transfer effects a change in the applicable law. The solution that no change in law occurs as a result of transfer is a possible one; but the rationale for such a solution has yet to be explained and defended. All that was decided in the *Collett* case was that a change of venue for the convenience of parties and witnesses, no more being involved, deprives the parties to a pending action of no right protected against retrospective legislation. It does not follow that Section 1404(a) is "procedural" for *Erie* purposes, so that state law on the convenience of the forum may be disregarded.

¹⁰⁶ See note 22 *supra*.

¹⁰⁷ 337 U.S. 55, 71 (1949).

The only way out of these logical difficulties is to begin at the beginning, and to determine, without reference to concepts of "substance" and "procedure," the purpose and effect of Section 1404(a). If such a determination can be made, we can with some confidence judge the relevance of state law under the *Erie* doctrine, and form an opinion as to what effect a transfer should have on the applicable law. The assignment is a difficult one. Section 1404(a) is fundamentally ambiguous: viewed in one light, it appears to be no more than a provision for change of venue for the convenience of parties and witnesses; in another, it appears to be declaratory of the doctrine of *forum non conveniens*—and the implications are quite different. An attempt to deal with this ambiguity, based on the preceding part of this paper, will be made in the part which follows. At this point it is necessary to examine the third tentative approach.

The third approach is: The transferee court will apply the law of the transferee state if the action was subject to dismissal on the ground of *forum non conveniens* under the law of the state in which it was originally filed, but will apply the law of the state of filing if it was not so subject to dismissal. In the light of the foregoing discussion, this may appear at first glance to be a satisfactory solution. If so, appearances are deceptive. The proposition bristles with difficulties.

This approach deals in an ingenious way with the troublesome question of whether state and federal laws relating to convenience of place of trial are "substantive" or "procedural" for the purpose of determining, under the *Erie* doctrine, whether the state law is relevant. It separates the question of whether there may be a transfer from that of the effect of transfer. State law is irrelevant on the first question; but it is relevant to the second.¹⁰⁸ By virtue of this separation, it seems possible to achieve a strict uniformity (under the facts of the *Headrick* case) between the result in the federal court and that in the courts of the state in which the action was filed, thus apparently satisfying the demands of the *Erie* doctrine.

There are these objections to such a solution:

(1) It is impracticable to an intolerable degree. Assume for the moment that the problem of ascertaining state law on *forum non conveniens* is simply that of determining whether the state accepts or rejects the doctrine—the sort of problem one might hope to solve by consulting the census compiled by Professor Barrett in 1947.¹⁰⁹

¹⁰⁸ Section 1404(a) and Transfers of Substantive Law, 60 Yale L.J. 537 (1951).

¹⁰⁹ Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380 (1947).

At that time, fourteen states could be identified as having rejected the doctrine, and six as having accepted it. In twenty-eight states—more than a majority—the status of the doctrine was unknown. In seven of these, Professor Barrett found indications that the courts would follow the doctrine if an appropriate case should arise. But in twenty-one states he could find no basis for even a guess as to what the law of the state was or would be.

The real problem, of course, is far more complex. As to the fourteen states which have rejected the doctrine, the matter is ended when they are identified as belonging to Professor Barrett's first category. But what is the scope and effect of the doctrine in the six states which have accepted it—not to mention the seven which indicate that they may accept it if the proper occasion arises, nor the twenty-one which have given no indication? New York has embraced the doctrine for as long, and has expounded it as fully, as any state; yet it is uncertain whether the doctrine as developed in that state would have required dismissal on the facts of either the *Gulf* case or the *Headrick* case. In New York, the doctrine has no application to contract actions; "it . . . is said not to apply to cases of a commercial or property nature";¹¹⁰ and "it seems in practice restricted to claims for personal injury and wrongful death."¹¹¹ Does it apply to an action like the one in the *Gulf* case, which was one for negligent injury to property growing out of the performance of a contract? The Court of Appeals for the Second Circuit, which is certainly "at home" with the New York law, thought there was "a very substantial doubt" that the New York courts would decline to exercise jurisdiction.¹¹² Moreover, there is some ground for questioning the assumption that the doctrine is one that *requires* dismissal. The court of appeals in the *Gulf* case pointed out that *acceptance* of jurisdiction in personal-injury actions between nonresidents "seems not unusual by the trial courts, and quite acceptable to the appellate courts."¹¹³ Thus jurisdiction is accepted where the remedy elsewhere is unduly expensive or inconvenient for the plaintiff, *or is barred by the statute of limitations*.¹¹⁴

¹¹⁰ *Gilbert v. Gulf Oil Corp.*, 153 F. 2d 883, 885 (C.A. 2d, 1946).

¹¹¹ *Ibid.*, at 884.

¹¹² *Ibid.*, at 885. Consult Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 928 (1947).

¹¹³ 153 F. 2d 883, 885 (C.A. 2d, 1946). But cf. *Collard v. Beach*, 81 App. Div. 582, 81 N.Y. Supp. 619 (1st Dep't, 1903), 87 N.Y. Supp. 884 (1st Dep't, 1904).

¹¹⁴ 153 F. 2d 883, 885 n. 4 (C.A. 2d, 1946), citing *Williamson v. Palmer*, 181 Misc. 610, 43 N.Y.S. 2d 532 (S. Ct., 1943), and *Randle v. Inecto, Inc.*, 131 Misc. 261, 226 N.Y. Supp. 686 (S. Ct., 1928), for the statute of limitations point. See Part V *infra*.

The assumption, therefore, that the uniformity required by the *Erie* doctrine can be achieved in the *Headrick* situation by applying the California statute of limitations if New Mexico "accepts the doctrine of *forum non conveniens*" turns out to be a glib and dangerous one.

Finally, the doctrine of *forum non conveniens* was never one which, having been invoked in the exercise of discretion, required outright dismissal.¹¹⁵ As an "instrument of justice," it has always appeared in its best light when administered on an equitable basis. Stay of proceedings may be substituted for dismissal; stipulations may be exacted from the defendant as to the conditions of trial in the foreign forum; security may be required to protect the plaintiff against loss of advantages not unfairly gained by resort to the forum; generally, within the limits of the court's power to affect the foreign proceedings, an order of dismissal may be on such terms and conditions as seem just, and the principles of estoppel or waiver may operate in the foreign forum. Even if the state accepts the doctrine of *forum non conveniens*, and even if the case seems to be one in which the state could, and even probably would, decline jurisdiction, how is the district court to know the form that action would take, or the terms and conditions which would be attached? The assumption that outright dismissal is the consequence of invoking the doctrine in an appropriate case is a distorting oversimplification.

In *Meredith v. Winter Haven*,¹¹⁶ the Supreme Court held that, when the *Erie* doctrine requires adherence to state law, the obligation to decide cannot be avoided because the ascertainment of that law is burdensome. But, in the problem under discussion, it has not yet been determined that state law must be followed; and the impracticability of ascertaining and applying that law should be a weighty factor in the determination. Moreover, *Meredith v. Winter Haven* was addressed to a condition which is relatively rare; the progress of litigation in the district courts is not likely to be braked on frequent occasions by frustrating searches for nonexistent state law on decisive points. But a mandate that state law be observed in passing upon applications for transfer under Section 1404(a) would expose every diversity case, in every state except those in which the doctrine has been definitely rejected, to delay and frustration.

(2) The adoption of such a solution would inject unanticipated elements into pending cases, unreasonably disappointing the expecta-

¹¹⁵ See note 81 *supra*.

¹¹⁶ 320 U.S. 228 (1943).

tions of the parties. Already, the number of cases which have been transferred runs into the hundreds.¹¹⁷ In only a few has attention been directed to a difference of law in the transferee state. It may well be that the natural disposition of lawyers is to regard Section 1404(a) as being just what it purports to be: an uncomplicated provision for change of venue. Certainly, in the overwhelming number of cases, the question of transfer has been argued and decided as if nothing more than the choice of a location, in terms of the convenience of parties and witnesses, were involved. The announcement of such a solution would be the cue for both parties to every transferred case pending at the time to comb the law of the transferee state for variances which could give them a windfall. The same criticism applies to the first tentative solution, as it does to any solution which contemplates the automatic applicability, upon transfer, of the law of a state other than that of the original filing.

(3) The effect of such a solution would be to create countless pitfalls for the unwary—which, in the realm of conflict of laws, means practically everybody. The essence of the objection stated in (2), above, will not be overcome as time goes on. Lawyers will still tend to take Section 1404(a) at its face value—as a simple provision for change of venue. The conflict-of-laws aspects of a legal problem are notoriously—and perhaps naturally—the last to come to mind. There is a permanent risk that after transfer a difference of law will come to light which was unknown to—or undisclosed by—the party moving for transfer, and which was not considered in the argument or the decision on the motion.

(4) By the same token, such a solution would inject a new element of uncertainty into diversity cases. Even though both parties may be fully aware that transfer will entail application of the law of the transferee state, the significance of that fact for the case in hand can be determined, in the early stages of litigation when the motion for transfer is ordinarily made, only by an extraordinarily prescient and thorough investigation of the law of both states. Some such investigation is no doubt involved whenever there is a choice between forums, but the burden is magnified in this situation by the opportunity for maneuvering which is afforded to both parties. The burden would be especially hard on the plaintiff who has chosen his forum in good faith, and who cannot effectively oppose a defendant's motion for transfer until he knows all its implications.

¹¹⁷ See note 31 *supra*.

(5) The argument for this solution is infected with the logical fault of assuming the conclusion to be reached. Just as the second approach, influenced by the conception of Section 1404(a) as a provision for change of venue for the convenience of parties and witnesses, assumes that a plaintiff is not to be deprived of an advantage of law gained by his choice of forum, so this third approach, influenced by the conception of the section as a codification of the interstate *forum non conveniens* doctrine, assumes the opposite legislative purpose, at least where the state of filing "accepts" the doctrine. That may be the true interpretation, but it cannot be established without argument.

(6) Such a solution ignores entirely the requirement of Section 1404(a) that the district court must find that transfer would be "in the interest of justice." There are two components of our problem: (a) What law will apply after transfer? and (b) Assuming that a law other than that of the original forum will apply, would transfer be in the interest of justice? The two questions may—indeed, must—be separated for purposes of analysis; but the second must not be forgotten in any solution that purports to be complete. The way to deal with overreaching or even vexatious motives on the part of the plaintiff in the choice of forum is to deprive him of the unfair advantage he has thereby gained—not to deprive him blindly, or on the basis of chance, of all remedy. The same criticism applies to the first approach, as it does to any which attempts a complete solution simply on the basis of the mechanical application of a different law after transfer.

(7) Finally, such a solution, like the first, suffers from the fatal defect that it calls for the fortuitous application of the law of a state which may have no such connection with the transaction as to make the choice of its law rational. Doubtless this error stems from the fact that in situations like that in the *Headrick* case the contemplated transfer is to a state whose substantive law is appropriately applicable to the transaction. Such, it may be conceded, will be the usual situation. Especially in personal-injury and wrongful-death cases, the convenient place of trial will normally be the place of injury, and on widely accepted principles the law of that place should govern. But all that Section 1404(a) says about the transferee district is that it must be convenient for parties and witnesses, and that it must be a district in which the action might have been brought. If the other passengers on Mr. Headrick's bus had been a group of Chicago school teachers on tour, the convenient forum might well have been the

Northern District of Illinois; but to apply the Illinois statute of limitations, or rule on burden of proof, or public policy (or doctrine of *forum non conveniens*!) would be capricious to the point of raising substantial constitutional questions.

Though the error is induced by the assumption that the *Headrick* case sets the pattern, it is no mere oversight that can be corrected, within the framework of the first and third solutions, by substituting the law of some more appropriate state for that of the transferee forum. By what rules is the alternate state to be determined? Not even unanimous agreement among the states and the text writers that the *lex loci delicti* should govern will create a "brooding omnipresence" pointing to California. Nor can any help come from the law of New Mexico. New Mexico has no rule for determining the appropriate statute of limitations by sorting out the contacts of various states with the transaction. Its only rule is that it will apply its own statute, irrespective of where the transaction occurred, merely because it is the forum. To designate the law of the place of injury as supplying all of the law which is appropriate after transfer, and to attribute the choice to the operation of New Mexico choice-of-law rules, would be to take refuge in transparent fiction.

Application of the law of the transferee state, merely as such, can never be justified. Under any solution requiring such a result, the district court in which the action is filed necessarily makes a choice of law, wittingly or unwittingly, when it passes on the motion to transfer. If a decision against the motion is actuated by distaste for the application of the transferee state's law, despite factors favoring transfer,¹¹⁸ the result is a regrettable impairment of the procedural reform effected by Section 1404(a). If the decision is in favor of the motion, the choice may be made in the worst possible fashion: by the mechanical, and perhaps blind, application of an irrational choice-of-law rule. And no third state can be substituted for the transferee state as the one whose laws should, on rational principles, govern after transfer, unless the district courts in diversity cases have power to make an independent choice of law—a power which is denied them under present doctrine.

None of the three tentative approaches is acceptable as a solution. The first must be rejected out of hand. The second leads to a solution which is possible, although the logic of the argument does not

¹¹⁸ As in *Curry v. States Marine Corp.*, 118 F. Supp. 234 (S.D. N.Y., 1954).

establish that the solution is the proper one. The third is, if anything, more objectionable than the first.¹¹⁹ Even so, the second and third approaches should serve to promote progress toward an acceptable solution, if only by challenging exposure of their defects.

IV. A CLOSER APPROACH TO SOLUTION

The major conclusion to be drawn from the foregoing discussion is that the question, whether transfer under Section 1404(a) entails a change in the applicable law in any case, can be soundly answered only by determining whether the ascertainable purposes of the section contemplate such an effect. Such a determination cannot be made by classifying the problem of place of trial as procedural, or as substantive, for purposes of the *Erie* doctrine, and then deducing the answer in terms of disregarding or applying the law of the state, because the classification itself must depend on whether the result of the case will be substantially affected by a change in the place of trial, and also because in important instances the law of the state is impotent to indicate the law applicable after transfer.

Nevertheless, it would be helpful to the further consideration of the problem if we could know how the Supreme Court regarded its intra-national doctrine of *forum non conveniens* for purposes of the *Erie* doctrine before Section 1404(a) was enacted. The academic analyst cannot make his own classification of the problem as "substantive" or "procedural" and reason from it to the pre-ordained result; but if the Supreme Court had clearly held either that the district court must observe the state law of *forum non conveniens*, or that it need not do so, we would have an authoritative exposition of the source of the doctrine and its function in the federal courts, and the basic ambiguity which harasses all attempts at solution would have been resolved.

Such help, however, is not available. Three times the Court de-

¹¹⁹ A note in the Harvard Law Review [Limitations on the Transfer of Actions under the Judicial Code, 64 Harv. L. Rev. 1347, 1354 et seq. (1951)] (1) rejects the view that the applicable law is unaffected by transfer; (2) rejects the suggestion that transfers should be made purely on the basis of convenience, without considering differences in law; (3) rejects the view that transfer should be to a forum whose law is appropriately applicable; and (4) concludes that the best solution is "not to transfer at all where the law which would be applied in the transferee forum would be materially different from that applied by the transferring court." *Ibid.*, at 1355. This, of course, assumes a great deal as to the effect of transfer; but the decisive objection to it is that it would very seriously impair the utility of the transfer provision, whether or not a purpose of the provision is to bring about a change of law.

liberately left open the question whether the *Erie* case required adherence to state law concerning *forum non conveniens* and the related doctrine concerning internal affairs of foreign corporations.¹²⁰ The nearest approach to an indication of the way the Court might have been tending is a footnote appended by Mr. Justice Jackson to the opinion of the Court in the *Koster* case:

We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.¹²¹

Extreme caution should attend any effort to build an answer to the current problem on the basis of such a statement, when the body of the opinion shows clearly that the application of the *Erie* doctrine was not decided. Nor can any very helpful inferences be drawn from the effect of the *Gulf* decision itself. Since the consequence of a misguided choice of forum, under that decision, was outright dismissal, the effect was, of course, to deprive the plaintiff of any advantage he might have gained by virtue of a difference between the law of the state in which the action was filed and that of any one of the other states in which it could be refiled and maintained. Thus the effect might have been very drastic in terms of change in the applicable law, or there might have been none at all, depending on the circumstances. The plaintiff was still left with a choice, within the limitations of jurisdiction and venue; the law to be applied after dismissal was not designated. Moreover, it must be remembered that the Supreme Court was using the sanction of dismissal only because it was powerless to transfer; the possibly drastic application of a different law cannot be taken as the preferred effect, from which the nature of the policy can be inferred. Finally, any inferences drawn from the effect which dismissal had on the applicable law may be offset by the congressional substitution of transfer.

The problem we must attempt to solve is whether Section 1404(a)

¹²⁰ *Williams v. Green Bay & W. R. Co.*, 326 U.S. 549, 559 (1946); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 529 (1947). See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 927 et seq. (1947), and Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 398-99 (1947), both noting the views of lower federal courts. On the question whether the state law of *forum non conveniens* is relevant to the administration of Section 1404(a), Judge Wyzanski has been similarly cautious: "And though it *may* be that this state rule does not govern a federal court sitting in Massachusetts, the policy expressed in State decisions ought not to be regarded as entirely without weight in the exercise of this Court's discretion." *Josephson v. McGuire*, 121 F. Supp. 83, 84 (D. Mass., 1954).

¹²¹ 330 U.S. 518, 520 n. 1 (1947).

is simply a provision for change of venue, for the convenience of parties and witnesses, suitable to a unitary judicial establishment applying a single body of law; or whether it imports into the federal judicial system the doctrine of *forum non conveniens*, with the connotations of its interstate and international background. The two ideas are inextricably mingled in the language and the legislative history of the section, and are completely confused in the *Gulf* decision by the Court's failure to discriminate between the problem of the place of trial on the interstate and on the intrastate levels.

In Part II it was suggested that the *Gulf* decision may be regarded as an analytically unsound aberration; that the doctrine of *forum non conveniens* was never appropriate to the problem of place of trial within a unitary judicial system; that the problem of place of trial within such a system is appropriately dealt with by venue statutes, modulated by provision for discretionary change of venue; and that Section 1404(a) may therefore be interpreted as being simply the long-overdue correction of a defect in the statutory scheme for regulating the place of trial. In this view, Section 1404(a) is a simple change-of-venue statute, contemplating no change of law as the result of transfer; the brief appearance of the doctrine of *forum non conveniens* in its legislative history is an episode to be forgotten. If this view were adopted, it would lead directly to the conclusion that after transfer the case remains what it was before; an action filed in New Mexico would continue to be governed by New Mexico law to the same extent as if it had remained in a district court in that state; the transferee court would sit as a mere substitute for the district court in New Mexico, having only a derivative jurisdiction; the convenience of parties and witnesses would be satisfied, as would the vague "interest of justice," and no more would be required. Transfer would never result in a change in the applicable law.

But it was also suggested that such a view is more formal than realistic. While the federal judicial establishment is a unitary system, it occupies the territory and applies the law of forty-eight different states. If Virginia is a "foreign" state from the point of view of New York, is not the Western District of Virginia similarly foreign to the Southern District of New York? If the maintenance of an action in the Supreme Court of New York would be oppressively inconvenient, would it not be equally so in the Southern District of New York? If a plaintiff, by choosing to sue in the Supreme Court of New York, obtains an unfair advantage because of the law which that court will apply, does he not

obtain an equally unfair advantage if he sues in the District Court for the Southern District of New York, which will apply the same law? Why not, then, borrow the doctrine of *forum non conveniens*, precisely because one of its characteristic functions is to deprive the plaintiff of an inequitable advantage in terms of the applicable law? If this view were adopted, it would lead directly to the conclusion that one of the consequences of transfer, in appropriate instances, would be a change in the applicable law.

If we trace the consequences of these two views, we shall see that neither can be satisfactorily embraced to the exclusion of the other; and we shall, incidentally, understand why the Supreme Court was reluctant to define the source and function of its doctrine as long as the task could possibly be avoided—and why it is fortunate that the Court did not, by formulating such a definition, prematurely crystallize the lines of approach to a solution of the current problem.

Under the first, or “change-of-venue,” view, the federal courts would be unable to deal comprehensively with the problem of place of trial within the federal system. Insofar as the plaintiff’s choice of forum causes inconvenience to parties or witnesses; insofar as it is designed to vex, harass, or oppress, or to make a fair hearing for the defendant impracticable, or to force a settlement; insofar as it is calculated to derive advantage from differences in calendar conditions, or in the supposed dispositions of jurors in a particular locality; insofar as it tends to a maldistribution of judicial business; in short, insofar as it may be judged a bad choice in terms of geographic, demographic, and administrative factors—the courts could regulate it effectively by the instrument of transfer. But insofar as the choice is judged bad because it gains for the plaintiff an advantage by virtue of the law to be applied, they could not regulate it at all. The device of transfer, borrowed from unitary systems, is inadequate to the needs of the federal system. Unitary though it is, the federal judicial system presents the problems that are encountered on the interstate level, because of the different bodies of law which are applied. If the problem is to be dealt with comprehensively, the intrastate device of change of venue is not enough; there must be something comparable to the interstate device of *forum non conveniens*.

Not only would the federal courts be unable to deal comprehensively with the problem; they would be forced to create a situation wholly incongruous and almost impossible to justify in terms of the *Erie* doctrine. In states which reject the doctrine of *forum non conveniens*,

cases which would have remained in the state courts would be whisked away to another part of the country for trial. This might be explained on the ground that venue, the place of trial, when nothing more is involved, is purely procedural. But in states which accept the doctrine of *forum non conveniens*, cases which probably would be dismissed by the state court could be filed in the district court; and, while they might be sent elsewhere for trial, the plaintiff would retain the inequitable advantage in terms of applicable law which the state court would have denied him. Thus the plaintiff might win a case which never could have been won but for the fact that, by dipping his brush into the forbidden pigment of the state's law, he was able to give his claim a favorable and durable coloration. This he would be enabled to do only by virtue of the "accident" of diversity. There is nothing "procedural" about such a result.

The principal objection to the second, or *forum non conveniens*, view is that the doctrine of *forum non conveniens* was an anomaly in the federal courts, its sanction of dismissal being inappropriate in a unitary system where place of trial is regulated by statute and where ample power exists to provide the more moderate sanction of transfer. That objection has been removed by the enactment of Section 1404(a). But under the view that the section embraces that doctrine and its incidents, including that which deprives the plaintiff of an advantage sought in the laws of the chosen forum, the federal courts would encounter serious difficulties arising from established interpretations of the *Erie* doctrine. To deprive the plaintiff of an advantage stemming from the law of the state in which the action is filed would be to reach a result different from that which would have been reached in the state court, in those states that reject the doctrine of *forum non conveniens*. In the states that accept or may accept the doctrine, it would be nearly impossible to determine with any assurance what the result in the state court would be in a particular case, although a good idea might be formed as to the over-all probabilities. But the most serious problem would be: By what law are the federal courts to determine whether the advantage sought by the plaintiff in his choice of forum is an "inequitable" one, and what law is to be substituted for that of the forum? The first question cannot be answered by reference to the law of the state of filing, since so many states take the view that all is fair in forum-shopping. And once we abandon, as we must, the superficial notion that the law of the transferee state is the proper substitute, if there is to be one, it becomes clear that no help can be derived from

the law of the state of filing in determining what law should be substituted for that which, in equity, should not apply. The federal court cannot deprive the litigants of one law, and substitute another, by transfer or otherwise, unless it makes a choice of law; it cannot impute the responsibility for that choice to the law of the state in which it sits. Therefore, the *forum non conveniens* view of Section 1404(a) is illusory and unworkable unless the federal courts may exercise a power which is now denied them—the power to make an independent choice of law.

The fact is that the fundamental ambiguity of Section 1404(a) cannot be resolved. It is too deeply rooted in the ideas which gave the section birth: the interstate idea of *forum non conveniens* and the intrastate idea of change of venue. Each idea is appropriate, and each is inappropriate. The problem of place of trial in the federal system ought to be dealt with as a problem of change of venue, because the federal system is a unitary one, so that the problem arises on the intrastate level; it ought also to be dealt with as a problem of *forum non conveniens*, because the distances involved and the numerous bodies of law which are administered make the problem almost indistinguishable from that which arises on the interstate level. The ambiguity is deeply rooted in the nature of the federal judicial system, which, even for diversity cases alone, is both a unitary national establishment and an arrangement for special courts in and for the several states.¹²² We cannot view the system in either of its two aspects, to the exclusion of the other, and satisfy all our legitimate desires. For example: the unitary character of the system, and its nation-wide territorial scope, should theoretically make it possible for the process of any district court to reach to the remotest corner of the continent and summon a defendant to make his plea thousands of miles from home. No territorialist theory of jurisdiction and due process would stand in the way. Yet if a state court located in the same district were to attempt the same feat, the attempt would, in the ordinary case, be pronounced a presumptuous nullity—not merely because of territorialist conceptions, but because of elementary considerations of fairness. It is because that which would be unfair in a state court would also be unfair in the district court “a block away” that nation-wide service of process has never been generally authorized by Congress. We do not use an intranational power because it is too clearly inappropriate to our interstate character.

¹²² Compare Blume, Place of Trial of Civil Cases, 48 Mich. L. Rev. 1, 29 (1949).

We are quick to take advantage of nation-wide power and the unitary judicial system, however, whenever the exigencies of national policy require, and when circumstances make it reasonable to do so.¹²³ The problem of place of trial within the federal system is both an intra-state and an interstate one; it cannot be satisfactorily dealt with if it is viewed as exclusively the one or the other.

Section 1404(a) is an unbroken colt, disposed to go in opposite directions at once. We cannot resolve its innate ambivalence any more than we can change the pedigree of an animal. All we can do is break it to harness, and require it to do a maximum of useful work despite its contrary disposition. It is not a simple, uncomplicated provision for change of the location of trial, merely as such, nor is it merely an importation of the interstate doctrine of *forum non conveniens*.¹²⁴ It is something of both—as much of both, in fact, as can be usefully adapted to the ends of justice in our system of federal courts without doing violence to the proper function of those courts in the federal system.

Paradoxical though this may seem, it leads, I think, to a solution which is simple, workable, and just, and which, while not entirely consistent with orthodox doctrine as to the function of the federal courts in diversity cases, is secure against objection on constitutional grounds. To the extent that clarification or modification of current doctrine is suggested, it may well be that the change is one which would have been desirable independently of the present problem; or it may be one which is a necessary consequence of the enactment of Section 1404(a) by the supreme legislative authority. At all events, doctrinal apprehensions cannot stand in the way of continued search for an adequate solution when not one that has been suggested is acceptable.

The most perceptive and constructive formulation of the doctrine of *forum non conveniens* is that of Professor Foster:

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

¹²³ See generally *Robertson v. Railroad Labor Board*, 268 U.S. 619 (1925); 2 Moore, *Federal Practice* 1035-36 (2d ed., 1948); Hart & Wechsler, *The Federal Courts and the Federal System* 951-52 (1953). Compare the provision for registration of a judgment in any district. 62 Stat. 958 (1948), 28 U.S.C.A. § 1963 (1950).

¹²⁴ There is a well-defined tendency to treat the section as authorizing transfer although the circumstances would not have supported dismissal under the doctrine of *forum non conveniens*. *Amalgamated Ass'n of S.E.R. & M.C. Employees v. Southern Bus Lines, Inc.*, 172 F. 2d 946 (C.A. 5th, 1949); *Cinema Amusements, Inc. v. Loew's, Inc.*, 85 F. Supp. 319 (D. Del., 1949); *Greve v. Gibraltar Enterprises, Inc.*, 85 F. Supp. 410 (D. N.M., 1949); *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F. 2d 360 (C.A. 4th, 1949). See note 41 supra.

by a dismissal, but whether the ends of justice might better be served by trial elsewhere, *and on what terms*.¹²⁵

Add to this that in the federal system we now have available, as a substitute for dismissal, the more appropriate device of transfer, and the essential ingredients for administering Section 1404(a) in such a way as to realize its maximum potentialities for federal jurisprudence are at hand.

The first principle underlying the proposed solution is: *Except to the extent that it is literally impracticable for the transferee court to apply foreign law, the law of the state of original filing should govern after transfer, just as if the case had not been transferred, unless the order granting transfer otherwise provides.*

Section 1404(a) appears, on its face, to be a routine provision for change of venue, entailing no change of law upon transfer. It has been so regarded in the bulk of the cases which have arisen. Lawyers will continue so to regard it. When a solution is announced, it should not have the effect of injecting into transferred cases, pending at that time, differences of law unanticipated when transfer was argued and ordered. Nor should future cases be affected after transfer by differences of law which were not contemplated in the argument or the decision on the motion. A significant and avoidable change of law should not be a necessary incident of change of venue. In the interest of certainty, and of the administration of the section "in the interest of justice," all parties and the court should be fully aware of the extent to which transfer is intended to work a change of the applicable law. Surprise and the opportunity for sharp practice should be eliminated.

In some instances, the classification of a rule of law as "procedural" for interstate conflict-of-laws purposes reflects the fact that it would be truly impracticable for the court which must try a case to attempt the application of foreign law.¹²⁶ As between the federal courts in different states, such instances are reduced to a minimum, since the Federal Rules of Civil Procedure provide substantial uniformity. If any such instance remains,¹²⁷ it concerns the law of evidence. To the extent that

¹²⁵ Foster, Place of Trial—Interstate Application of Intrastate Methods of Adjustment, 44 Harv. L. Rev. 41, 50 (1930) (italics supplied).

¹²⁶ Rest., Conflict of Laws, Introductory Note to c. 12 (1934).

¹²⁷ In *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588 (S.D. Calif., 1951), an action for patent infringement, the plaintiff resisted a motion under Section 1404(a) to transfer to the Southern District of New York on the ground, *inter alia*, of differences in procedure under the practice of the two courts, asserting that trial in New

the district court in the transferee state is rightly accustomed, under Rule 43(a), to applying the law of the state in which it sits,¹²⁸ it would perhaps be unreasonable to expect it, in ruling on routine objections, to apply the law of the state from which the action was transferred.¹²⁹ Therefore, the principle permits the assumption that, with respect to such routine matters, and with respect to any other true instance of impracticability, the law of the transferee state will apply after transfer. Even so, if one or more specific questions as to admissibility or competency should appear to be particularly significant for the result of the case, and if it is feasible to limit the invocation of a foreign law of evidence to those specific questions—as it would be, by pre-trial procedure in the transferee court or otherwise—the application of the law of the state of original filing would be no more difficult than that of any other element of foreign law, and a party who would be adversely affected by the law of the transferee forum should be entitled to insist that the transfer should not have a result which was not taken into account in the decision on the motion.

The second principle is: *The court to which the motion for transfer is addressed should be free to take into account any particular in which the law of the state of filing differs from that of the state to which transfer is contemplated, or is alleged to give a party an inequitable advantage, or is otherwise relevant to the question whether transfer would be in the interest of justice; and, if it finds that a law other than that of the state of filing ought to apply after transfer, it should be free*

York "would be likely to prejudice consideration of interlocutory questions." *Ibid.*, at 593. Counsel for the plaintiff has provided a fuller explanation of the procedural differences in question: "[They] involved the handling of motions and discovery proceedings. In New York the District Court operates on a master calendar, that is, a particular Judge is assigned to the case who handles motions and similar types of preliminary judicial matters. The Judge who rules on such motions may or may not ultimately be the Judge who tries the case. In Southern California in the District Court the case is assigned to an individual Judge upon its filing and any matter pertaining to the case is brought before that Judge, who tries the case. Many attorneys consider it a disadvantage to present motions to a Judge who is unfamiliar with the litigation." Letter dated March 9, 1954, from R. Douglas Lyon, Esq., of Lyon & Lyon, Los Angeles, in the University of Chicago Law School Library. The court held the argument without merit. *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, supra, at 593.

¹²⁸ See Green, *The Admissibility of Evidence under the Federal Rules*, 55 Harv. L. Rev. 197 (1941); Green, *Federal Civil Procedure Rule 43(a)*, 5 Vand. L. Rev. 560 (1952); *Federal Rule 43(a)—A Decadent Decade*, 34 Cornell L. Q. 238 (1948).

¹²⁹ It should be noted that this circumstance is also an obstacle, though a minor one, to the second tentative solution, which contemplates the continued application of the whole law of the state of original filing upon transfer.

to determine what that law shall be, by the exercise of independent judgment in the light of the relevant general jurisprudence.

Section 1404(a) requires two findings as a condition of transfer: (1) that transfer is necessary for the convenience of parties and witnesses, and (2) that it is in the interest of justice. At least as a matter of strict interpretation, the question of difference in law may not enter into the first finding; it does, however, affect the second, if we assume that a change of law is ever possible as a result of transfer; and a change of law must be possible in some cases unless an important aspect of the doctrine of *forum non conveniens* is to be excluded in the application of the section. Suppose the court finds that, for convenience of parties and witnesses, a case filed in the Southern District of New York should be transferred to the Western District of Virginia; and suppose it appears from the record and the argument on the motion that a provision of Virginia law, applicable if the action had been filed in the federal court in Virginia, would bar recovery by the plaintiff if applicable after transfer. If change of venue never entails a change of law, of course, there is no problem; the "interest of justice" finding is very nearly subsumed in the finding as to convenience. On the assumption that Virginia law will apply after transfer, the court must determine whether the transfer would be in the interest of justice. It may conclude: (1) that it would be, because (for one reason or another) the Virginia law in respect of the particular matter to which the difference relates should govern the transaction, and that the loss of his remedy is precisely the fate that the plaintiff deserves; or (2) that it would not be, because (for one reason or another) the New York law (or the law of some third state) should govern the transaction in that particular, or, at all events, that the considerations favoring Virginia as the convenient forum do not justify depriving the plaintiff of his remedy.

In reaching the first conclusion, the court will, it is clear, be making a choice of law, and one which it has full power to implement (if we continue to assume that Virginia law will apply after transfer) simply by granting the motion. In reaching the second, the court will similarly be making a choice of law. In that event, does it have the power to implement its choice? A conceivable answer, based upon a narrow reading of Section 1404(a), is that it has power to do so only at the expense of its first finding, that convenience requires transfer: it could deny the motion, thus assuring the application of New York law, and saving the plaintiff's remedy, but thus also assuring the inconvenience

of the place of trial.¹³⁰ Such a result is highly undesirable. There is enough of *forum non conveniens* in the history of the section to provide abundant justification for the course pursued with respect to the first conclusion. Why should the court be disabled to deal completely with the question of the applicable law as it affects the justice of transfer? The answer cannot be that the court is prohibited from determining the applicable law independently of state conflict-of-laws rules; its determination for purposes of the first conclusion is independent of state law. If the change-of-law aspects of *forum non conveniens* are included in the make-up of Section 1404(a) at all, they should be included in their best form and with the full benefit of the substitution of transfer for dismissal: the court should have complete power to determine where the case should be tried, *and on what terms*. It should have power to transfer the case to Virginia for convenience, but only on condition that with respect to the difference under consideration the New York law (or the law of another state) shall govern after transfer.¹³¹

The third principle is: *The order granting the transfer should never specify the law of the transferee state, merely as such, as the law to be applied after transfer.*

The reason underlying this principle has been fully stated in Part III. Briefly restated, it is that the transferee state is, by definition, no more than a convenient forum, in which the action might have been brought. It may have no such relation to the transaction as to make the application of any part of its law rational (except insofar as the application of any different law would be impracticable—a contingency provided for in the first principle). In the great majority of cases, probably, if there is to be a change of law, the law of the transferee state will be the appropriate substitute; but that will be because of circumstances which make the law of that state appropriate on conflict-of-laws principles, which are not necessarily the same as those which make it the convenient place for trial or one in which the action might have been brought.

The fourth principle is: *If the court to which the motion is addressed*

¹³⁰ Even so, its power is only partial; the court can effect a result which will entail application of the law of New York, but not that of a third state.

¹³¹ If the court depends on consent of the defendant instead of on its power to transfer on condition, or to designate the applicable law, the result is to give the congressional policy and the court's judgment into the keeping of an interested litigant. See *Curry v. States Marine Corp.*, 118 F. Supp. 234 (S.D. N.Y., 1954); cf. *Frechoux v. Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D. N.Y., 1953).

finds that a law other than that of the state of original filing should be applied after transfer, its order should specify that law; wherever feasible, it should specify it in terms of content as well as source; and this determination should constitute the law of the case after transfer.

Still assuming that transfer may sometimes result in a change of law, the orderly administration of the section, "in the interest of justice," imperatively requires that there be no alteration, after transfer, of the factors entering into the decision on the motion. At the least, this means that the transferee court should not apply the law of any state other than that designated in the order as the proper source. It also means that the court passing on the motion should form a clear view as to the content of the governing law which it designates, where the problem involves a specific difference between the law of the state of filing and some other state, and that the precise effects which were contemplated should not be altered by the transferee court's assignment of a different content to the law specified as appropriate. This aspect of the principle may seem out of harmony with the observation in the *Gulf* case, that one of the functions of the doctrine of *forum non conveniens* is to remit ascertainment of the content of the applicable law to the forum which is "at home" with that law, and thus to avoid conflict-of-laws problems.¹³² But that observation assumed the refiling of the case in a state which was appropriate both as the place of trial and as the source of the governing law; it was addressed, moreover, to the whole body of governing law, and not to the relatively rare quirks which produce disuniformity from state to state and make forum-shopping profitable. A judge who understands the specific content of a foreign law well enough to take it intelligently into account in passing on the motion to transfer should understand it well enough to settle it between the parties for other purposes of the same litigation.

These four principles reduce to a solution which can be stated in a sentence: Normally, and in the absence of a contrary provision in the order granting transfer, the transferee court will, to the fullest extent practicable, apply the law that would have been applied if there had been no change of venue; but the order transferring the action may specify a different law as applicable, and such a specification will constitute the law of the case.¹³³

¹³² 330 U.S. 501, 509 (1947). Note that the only one of the tentative solutions which is at all feasible—the second, requiring the continued application of the law of the state of original filing—entails habitual resort to foreign law by the transferee forum.

¹³³ "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely

Under such a solution, Section 1404(a) would operate, in the great majority of cases, as a simple change-of-venue provision, entailing no conflict-of-laws problems. The practical desirability of such a mode of operation becomes apparent upon a reading of the reported decisions in which the section has figured: not one in twenty contains any indication that a change of law as a consequence of transfer was contemplated, or taken into account in the decision on the motion. The burden would be placed upon the party desiring a change of law in conjunction with transfer to bring his design into the open and justify it. On the other hand, the burden would be upon any party anticipating prejudice as the result of application of some routine, ingrained practice of the transferee court to make his claim to the law of the state of original filing at some suitable preliminary stage.

Such a solution means, of course, that, at least for the purposes of Section 1404(a), there must be developed a federal law of conflict of laws. In the light of the development of the *Erie* doctrine, such a consequence may seem startling. It seems less so as the requirements of the section are analyzed, and as the alternatives are considered.

The area in which the district court would be called upon to make an independent choice of law is a narrow one. When a motion for transfer is made, and when considerations of the convenience of parties and witnesses indicate the propriety of transfer, and when the attention of the court is directed to some particular in which the law to be applied might be, or should be, affected by transfer, then, and perhaps only then,¹³⁴ will the court be called upon to determine the applicable law; and the determination need not relate to the law which is to govern the case in general, but only to that which will govern with respect to the particular in question. Using *Sampson v. Channell*¹³⁵ for illustration, and assuming that a transfer to Maine is indicated for the convenience of parties and witnesses, the district court in Massachusetts, upon being advised of the difference between the laws of the two states re-

expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). Perhaps all that need be said, by way of specifying the result sought, is that the transferee court should not reopen the question of what law applies without also reopening the question of the propriety of the transfer. For discussion of the doctrine of the law of the case in connection with Section 1404(a), see *Brainard v. Atchison, T. & S.F. R. Co.*, 87 F. Supp. 921 (D. Kan., 1950); *Gulf Research & Dev. Co. v. Schlumberger Well Sur. Corp.*, 98 F. Supp. 198 (D. Del., 1951).

¹³⁴ See Part V *infra*.

¹³⁵ 110 F. 2d 754 (C.A. 1st, 1940).

garding the burden of proof, would not find it necessary to determine the source of the governing "substantive" law; the Massachusetts rule referring to the law of Maine would still supply that reference. The court would be required, in the course of deciding whether a transfer would be in the interest of justice (or, broadly, of determining where the case should be tried, and on what terms), to determine what law should govern on the burden of proof, and what that law is. This, of course, is just what the district court and the court of appeals *did* decide in *Sampson v. Channell*. The fact that the decision was in terms of the *Erie* doctrine, and resulted in the choice of Massachusetts rather than Maine law, does not make it any the less a choice-of-law decision. The *Erie* doctrine as interpreted is a choice-of-law rule, and one which has a rational justification; but it cannot be applied mechanically, under the new conditions resulting from Section 1404(a), as the only possible rule for choice of law, and still retain its justification.

For that matter, the *Gulf* case itself authorized federal courts to make at least a negative choice of law; and the fact that the Court deliberately and pointedly refrained from subjecting that choice to the all-encompassing *Erie* principle is itself significant for the question whether the choice was to be made independently. On the assumption that it was to be made in conformity with state law, the Court gave an impressive demonstration of how cavalierly the obligation to conform might be discharged. The decision stands for the proposition that a district court in New York may reject as inappropriate to the transaction any law which would be applied by a New York state court as the law of the forum. To reject without supplying the alternative is, of course, to choose, although in incomplete fashion; moreover, when there is only one alternative forum, the choice is, as a practical matter, complete.

Any alternative solution also involves an independent federal choice of law. To the extent that any solution is predicated on the automatic application of the law of the transferee state after transfer, the district judge will in fact choose the applicable law in the exercise of his discretion to grant or deny the motion. This is true even if, as suggested by the third tentative approach, he purports to observe the state law of *forum non conveniens*; for (1) the disposition which would be made of the case under the *forum non conveniens* doctrine, in states which accept it, is too uncertain to furnish a guide for the district court's choice; and (2) the state court has no power to make a com-

plete choice; like the federal courts in the *Gulf* period, all it can do is dismiss, thus rejecting as inappropriate the law which it would apply as the law of the forum, but leaving the alternative to be determined by the plaintiff's subsequent forum-shopping.¹³⁶ Thus the federal court must make a choice, and the choice must be independent of state law. An unfortunate aspect of the matter is that the choice, under such a solution, must be a hobbled one, because the possibilities are arbitrarily limited to the state of filing and the state of transfer; and it is more unfortunate still that the choice may be made unwittingly.

To the extent that any solution is predicated on the continued applicability after transfer of the law of the state of filing, the choice will be in favor of the law of the original forum, no matter how inequitable the advantage thus preserved to the astute forum-shopper. Choice is not avoided, under the third tentative approach, even though the state of filing rejects *forum non conveniens*. True, the choice would be made authoritatively by the Supreme Court for the district courts, and it would be dressed in the old clothes of the *Erie* doctrine; but it would be nonetheless an independent federal choice of the applicable law, and one, moreover, quite inconsistent with that part of the aura of Section 1404(a) which suggests the purpose of Congress, as a matter of the "autonomous administration" of the federal courts, to invest them with something of the power, which *forum non conveniens* gives to courts at the interstate and international level, to decline to be used as instruments of inequitable advantage.

The Rules of Decision Act, which is the authoritative source of the *Erie* doctrine, provides only that

The laws of the several states, *except* where the Constitution or treaties of the United States or Acts of Congress otherwise *require* or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.¹³⁷

Since Section 1404(a) cannot be administered, at least in such a way as to effectuate its purpose completely, without an independent choice of law by the federal courts, it seems reasonable to conclude that we have in that section an act of Congress which requires, although it does

¹³⁶ This overstates the case somewhat, since the state court might, by astute employment of the device of conditional dismissal, determine the forum in which the case is to be tried, and hence the applicable law. But this circumstance merely serves to emphasize that an independent choice by the district court is inevitable.

¹³⁷ 62 Stat. 944 (1948), 28 U.S.C.A. § 1652 (1950) (*italics supplied*).

not expressly provide for, a departure from the general practice of regarding the laws of the several states as rules of decision.¹³⁸

There can be little doubt as to the power of Congress to enact a law requiring or empowering the district courts to make an independent choice of law, at least for the purposes of Section 1404(a), in diversity cases.¹³⁹ In the first place, there can be no possible doubt as to the power of Congress to enact a provision for change of venue, in the exercise of its power to establish federal courts and to regulate the place of trial therein. If such a provision entails complexities concerning the law to be applied after transfer, the power to deal appropriately with those incidents is surely a necessary concomitant of the primary power.¹⁴⁰ In the second place, the rule that a district court in a diversity case must apply state conflict-of-laws rules was not an inevitable consequence of the *Erie* decision; it was only a possible one.¹⁴¹ In the third place, I take it to be the general understanding that Mr. Justice Brandeis' invocation of the Constitution as a basis for overruling *Swift v. Tyson*¹⁴² was a bit of judicial hyperbole¹⁴³ which, having served

¹³⁸ I leave aside arguments based on the phrase "in cases where they apply," as to which see Hart, *The Relations between State and Federal Law*, 54 Col. L. Rev. 489, 515 (1954); 2 Crosskey, *Politics and the Constitution in the History of the United States* 867, 927 et seq. (1953); Cook, *The Federal Courts and the Conflict of Laws*, 36 Ill. L. Rev. 493, 494 (1942).

¹³⁹ Of course there can be no suggestion at all of a lack of power when the problem arises in connection with federally created causes of action, as in *Greve v. Gibraltar Enterprises, Inc.*, 85 F. Supp. 410 (D. N.M., 1949).

¹⁴⁰ Recall that Congress has three times prescribed the effect of change of venue—twice in such circumstances as to include diversity cases. Cases cited note 22 supra. The guarded intimation in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941), that Congress may lack power to "abolish or nullify a right recognized by the substantive law of the state" is significantly limited to the law of the state "where the cause of action arose. . . ." Thus it can be argued that any constitutional basis the *Erie* case may have does not extend to the *Klaxon* case. Compare Hart & Wechsler, *The Federal Courts and the Federal System*, c. VI § 3, at 633 et seq. (1953).

¹⁴¹ The source of the direction to apply the law of Pennsylvania rather than that of some other state was not made clear by the opinion in the *Erie* case, 304 U.S. 64 (1938). The question was expressly left open in *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208 n. 2 (1938). In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the Court seems clearly to have assumed that the choice of the appropriate state law was to be made by the federal courts independently: "[I]f the right to be exempt from such an order is one of substantive law, the Rules of Decision Act required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose. . . ." *Ibid.*, at 10–11. And it was a conflict between circuits that led to the decision in *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

¹⁴² 16 Pet. 1 (1842), in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77 et seq. (1938).

¹⁴³ Macaulay's characterization of "the boldest figure of rhetoric"—"it lies without deceiving"—is incomplete. Hyperbole lies also without intent to deceive.

its purpose, should not be permitted to mislead even the most literal-minded reader.¹⁴⁴ It is difficult to take seriously any objection to a general power to prescribe rules of decision for the federal courts in the face of the clear language of the Constitution:

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.¹⁴⁵

The proposed solution, or something basically similar to it, seems clearly preferable to any of the three alternatives which have been discussed. It contemplates that the choice of law will be as enlightened and concordant with the dual congressional purpose as the general jurisprudence and the capacity of the federal bench can make it. It does mean that in a substantial number of diversity cases the result will be significantly different from what it presumably would have been if the case had been tried in a state court "a block away." But the accident of diversity will not give a letter of credit to make forum-shopping easy. There will be no automatic consequences, no rules of thumb, no certain advantages to be gained by filing in the federal court or removing to it. All either party can be sure of is that in the federal court a just discretion will be exercised on the basis of all factors bearing on the appropriateness of the forum. And when the result is significantly different, it will be so only because the choice of forum entailed an adventitious application to the case of a law which, in the interest of justice, should not be applied. If that is the only consequence of trimming the *Erie* doctrine to conform it to the requirements of the new procedural device, the evil does not seem intolerable.

The remaining question is: On what basis, and by what standards, is the district court to determine what law should be applied in the interest of justice? The law of the state in which the court sits will not be controlling. The whole body of general jurisprudence is available.

¹⁴⁴ See the concurring opinion of Reed, J., in the *Erie* case, 304 U.S. 64, 90 (1938); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267, 273, 278 et seq. (1946); Cook, *The Federal Courts and the Conflict of Laws*, 36 Ill. L. Rev. 493, 518, 522 et seq. (1942); 2 Crosskey, *Politics and the Constitution in the History of the United States* c. XXVI (1953); Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 935, 937 (1947). Professor Hart, though acknowledging a constitutional element in the *Erie* decision, sees no constitutional impediment to the independent determination of choice-of-law questions by the federal courts in diversity cases. Hart & Wechsler, *The Federal Courts and the Federal System* 633-36 (1953); Hart, *op. cit. supra* note 138.

¹⁴⁵ U.S. Const. Art. I, § 8.

From that body there must, of course, be subtracted precedents rejecting the doctrine of *forum non conveniens*, since Congress has clearly adopted that doctrine, or at least a substantial part of it, in modified form for the federal courts. But the question is still not quite answered. The general jurisprudence, thus amended, contains not only a body of precedents applying the doctrine of *forum non conveniens*, but a greater body of precedents on the whole question of choice of law. Which of these bodies of law is to supply guidance for decision? A consideration of this question will be the first business of the section to follow.

V. APPLICATIONS AND IMPLICATIONS

1. *The statute of limitations.* How should the *Headrick*¹⁴⁶ case be decided? The accident happened in California. The state court in New Mexico would apply the substantive law of California, but would apply its own statute of limitations as "procedural." The district court in New Mexico, absent a motion for transfer, would do the same. The defendant's motion for transfer is persuasive in terms of convenience of parties and witnesses. The factor of difference of law is clearly in view. What determination should the district court make with respect to the statute of limitations which is to apply after transfer?

Given freedom on the part of the court to make an independent choice of the law governing time limitations, the premise most likely to commend itself to modern academic opinion is that the court should reject the misclassification of statutes of limitation as procedural, and refer the question to the state which furnishes the governing substantive law.¹⁴⁷ In so doing, the federal court would foster the ideal of state-to-state uniformity of result, and contribute to the accumulation of a superior body of precedents on the conflict of laws. In fact, in the cases applying the *Erie* doctrine in the debatable zone, the federal courts already have available a body of doctrine which might, with generally beneficial results, be applied to the classification of laws as substantive or procedural for interstate choice-of-law purposes. There is appeal in the argument that, if the federal courts are to go into the

¹⁴⁶ *Headrick v. Atchison, T. & S. F. R. Co.*, 182 F. 2d 305 (C.A. 10th, 1950). See Part I *supra*.

¹⁴⁷ Consult Stumberg, *Principles of Conflict of Laws* 147 (2d ed., 1951); Goodrich, *Handbook on the Conflict of Laws* 241 (3d ed., 1949); Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. VI (1949). Compare *The Statute of Limitations and the Conflict of Laws*, 28 *Yale L. J.* 492 (1918). On the other hand, see Ailes, *Limitation of Actions and the Conflict of Laws*, 31 *Mich. L. Rev.* 474 (1933).

choice-of-law business for themselves, they should do so on the highest plane, and do honor to themselves while setting an example for others.

But the matter may not be quite so simple. Thus far, at least, we have not claimed for the federal courts general power to make an independent choice of law in diversity cases; we have claimed only a limited degree of independence, based upon the necessities of administering Section 1404(a) according to what appears to be its purpose. The argument has been that, since the section is based upon the doctrine of *forum non conveniens*, it contemplates that one consequence of transfer may be to deprive the plaintiff of an advantage which he sought in the law of the chosen forum, just as dismissal on grounds of *forum non conveniens* had that as one of its consequences. The contention may be made, therefore, that a district court, in the administration of Section 1404(a), should deprive the plaintiff of an advantage given him by the law of the state of filing only when warrant can be found in the precedents for treating the advantage as "inequitable."

If we turn to the *forum non conveniens* precedents, we find that the courts, so far from treating the benefit of the forum's statute of limitations as an inequitable advantage to the plaintiff, treat the circumstance that the action would be barred upon refile in the more convenient forum as a reason for refusing to invoke the doctrine.¹⁴⁸ The cases which have been found, however, are not decisive of the question here. From the facts reported it is not always possible to determine whether the actions were filed before or after the expiration of the foreign period of limitations;¹⁴⁹ but the existence in New York of a borrowing statute¹⁵⁰ makes it clear that the cases from that jurisdiction are not instances of attempts by plaintiffs to avoid the bar of the statute in the convenient forum.¹⁵¹ If we turn to the precedents on in-

¹⁴⁸ *Randle v. Inecto, Inc.*, 131 Misc. 261, 226 N.Y. Supp. 686 (S. Ct., 1928) (motion to dismiss denied, in part because "the cause of action has expired under the Delaware statute of limitations"); *Williamson v. Palmer*, 43 N.Y.S. 2d 532, 533 (S. Ct., 1943) (motion to dismiss denied: "It appears that an action in Connecticut would now be barred by the statute of limitations . . . so that if this motion should be granted the plaintiffs would probably be deprived of any remedy. . . ."); *Wendel v. Hoffman*, 258 App. Div. 1084, 259 App. Div. 732, 18 N.Y.S. 2d 96 (S. Ct., 1940) (motion to dismiss granted on condition that defendants waive the foreign statute); *Thistle v. Halstead*, 95 N.H. 87, 58 A. 2d 503 (1948).

¹⁴⁹ The significance of the distinction is discussed *infra*.

¹⁵⁰ N.Y. Civ. Pract. Act (1941) § 13.

¹⁵¹ If the actions had not been filed in New York within the time allowed in the state where the cause of action arose, they would be barred in New York by Section 13 of the Civil Practice Act, and there would be no occasion for the plea of *forum non conveniens*. Similarly, where the Virginia court declined to enjoin the prosecution in Tennessee of an

junctions against the prosecution of actions abroad,¹⁵² we find them inconclusive with respect to whether a purpose to evade the bar of the statute of limitations in the normal forum is ground for equitable relief. Two cases hold that it is. In *Culp v. Butler*, the Appellate Court of Indiana, finding that the defendant's claim against the plaintiff was barred in Indiana but not in Illinois, affirmed a judgment enjoining prosecution of the claim in Illinois, saying: "These facts clearly bring the parties within the rule . . . with reference to enjoining a citizen of one state from prosecuting an action against another citizen of the same state in the courts of a foreign state, for the purpose of evading the law of his own state."¹⁵³ In *Oates v. Morningside College* the Iowa Supreme Court took a similar position, holding that the prosecution of a claim against the executor of an Iowa decedent in another state where ancillary administration was pending, and where the claim might not be barred, as it was in Iowa, would subject the executor to "irreparable injury."¹⁵⁴ On the other hand, the Illinois Supreme Court has firmly refused to enjoin an action in another state against the estate of an Illinois decedent, where the claim was barred in Illinois:

The fact that the remedy at law is barred here does not give even a legal, much less an equitable, right to interpose the bar in the action in the foreign State against the property therein. . . .

No case has been cited, and we are aware of none, holding that it is inequitable for a party to prosecute a legal demand against another within any forum that will take legal jurisdiction of the case merely because that forum will afford him

action on an insurance policy, reasoning in part that a new action in Virginia would be barred by the policy provision limiting the time for filing actions, it is clear that there was no question of evading a bar which had accrued while the plaintiff slept on his rights. *United States Fire Ins. Co. v. Fleenor*, 179 Va. 268, 18 S.E. 2d 901 (1942).

¹⁵² When a defendant moves for transfer and asks an order settling the applicability of a statute of limitations other than that of the original forum, the situation may be regarded as analogous to his asking for an injunction against the prosecution of the action in the forum on the ground that the plaintiff is not equitably entitled to the forum's statute of limitations. [But an order of transfer is not appealable under 28 U.S.C. § 1292 (1) (1952), *Arrowhead Co. v. The Aimee Lykes*, 193 F. 2d 83 (C.A. 2d, 1951).] There are differences: the usual feelings of delicacy about interfering with the processes of a foreign court are absent, since the demand is addressed to the court in which the action to be restrained is pending; and, by the same token, doubts as to the efficacy of the order are removed. Alternatively, of course, the situation may be viewed as merely one in which the defendant asks that the law governing limitations be determined on rational principles of conflict of laws.

¹⁵³ 69 Ind. App. 668, 674, 122 N.E. 684, 685-86 (1919).

¹⁵⁴ 217 Iowa 1059, 1067, 252 N.W. 783, 787, 91 A.L.R. 563, 570 (1934). The force of the holding is weakened by the co-ordinate ground for the decision—a questionable holding that the rights of the parties were res judicata by virtue of a previous proceeding in Iowa in which the executor successfully invoked the bar of the Iowa statute.

a better remedy than that of his domicile. To justify equitable interposition in a case like the present, it must be made to appear that an equitable right will otherwise be denied the party seeking relief.¹⁵⁵

The Indiana view that evasion of the local statute is ground for equitable relief was promptly condemned by a commentator in the *Harvard Law Review* on the unconvincing ground that the statute bars only the remedy and not the right, and hence that there can be no evasion of the home law, "for admittedly there is a good cause of action."¹⁵⁶ Dean Pound also expressed his disapproval:

In these cases it cannot be said that plaintiff (in equity) has a legal right only to be sued at home, nor may he claim a legal interest in the procedure or substantive law of his domicile. . . . As between a plaintiff and a defendant, each seeking the tribunal more favorable to him, why should not equity leave the matter to the law?¹⁵⁷

On the other hand, for what they may be worth, the opinions of two anonymous annotators support the Indiana-Iowa position:

Such statutes relate to the remedy, and not to the right of action, but they do relate to the just rights of the parties, and it would seem that a court should not permit the assertion of a foreign claim not barred in the forum, but stale everywhere because barred by lapse of time in the jurisdiction where it arose.¹⁵⁸

[W]e should naturally expect that if in that state its statute of limitations had operated so as to completely bar all further judicial remedy therein upon a cause of action, that he would not be permitted to resort to the courts of another state or country for the purpose of avoiding such bar. It is true that the statutes of limitation . . . are universally regarded as parts of the *lex fori*. . . . This, however, ought by no means to be conclusive of the question we are now considering, for we have already shown that statutes exempting property from execution are also regarded as parts of the *lex fori*, but that creditors may, nevertheless, be enjoined from proceeding in the courts of another state for the purpose of evading the force of these laws.¹⁵⁹

¹⁵⁵ *Thorndike v. Thorndike*, 142 Ill. 450, 452 (1892).

¹⁵⁶ *Injunctions to Restrain Foreign Proceedings*, 33 Harv. L. Rev. 92, 94 (1919).

¹⁵⁷ Pound, *The Progress of the Law, 1918-19: Equity*, 33 Harv. L. Rev. 420, 425-27 (1920).

¹⁵⁸ *Power of Court, in Exercise of Discretion, To Refuse To Entertain Action for Non-statutory Tort Occurring in Another State or Country*, 32 A.L.R. 6, 66 (1924).

¹⁵⁹ When Transitory Causes of Action May Not Be Prosecuted in a Foreign State or Country, 59 A.S.R. 869, 878-79, 885 (1898). In *Weaver v. Alabama G.S.R. Co.*, 200 Ala. 432, 434, 76 So. 364, 366 (1917), the annotator is identified as Judge [A.C.] Freeman.

See also Annotation, 69 A.L.R. 591 (1930); Messner, *The Jurisdiction of a Court of Equity over Persons To Compel the Doing of Acts outside the Territorial Limits of the State*, 14 Minn. L. Rev. 494, 495 et seq. (1930) ("this difference in laws must be a difference in the substantive laws, and a difference merely in procedural laws will not be

Thus it is not clear whether a plaintiff's avoidance of the normally applicable statute of limitations, by filing in a jurisdiction in which the action is not barred, is regarded as giving him an "inequitable" advantage; still less is it clear how we are to find authoritative or satisfying criteria for determining the inequitable character of such an advantage. If I may state a general impression, however, it is that American legal opinion on the whole adopts an attitude of indulgent tolerance toward such forum-shopping as is induced by the vagaries of limitations in the conflict of laws. There is appeal in the argument that cases should be decided on the merits.

In this connection, we must reckon with the concept of the plaintiff's "venue privilege."¹⁶⁰ It is not quite clear just what this privilege implies. Certainly, it is less than the absolute privilege which a plaintiff normally had, before the *Gulf* case, to maintain his action in the forum of his choice so long as he had complied with the venue statute. Just as certainly, it is something more than the privilege which the venue statutes gave him, qualified as that privilege was by the decision in the *Gulf* case. It has to do primarily with the process of weighing the considerations bearing on the convenience of parties and witnesses. It means at least that, *prima facie*, the plaintiff is entitled to maintain the action in the chosen forum, and that the burden is on the defendant to justify transfer. Probably it means that the process of weighing starts not with the scales in equilibrium but with a substantial weight already operating in the plaintiff's favor.¹⁶¹ Its operation otherwise than on the balance of conveniences is not so clear. It may be thought to mean that the plaintiff should not be deprived of certain minimum benefits of having commenced the action. Thus, the date of the commencement of the action is fixed for purposes of the statute of limitations,¹⁶² and no new service of process is required.¹⁶³ But, since both these effects of

sufficient"); Exercise of the Power of Equity To Enjoin Proceedings in Another State, 22 Col. L. Rev. 360 (1922); Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217, 1242 et seq. (1930).

¹⁶⁰ *Ford Motor Co. v. Ryan*, 182 F. 2d 329, 331 (C.A. 2d, 1950); *Wiren v. Laws*, 194 F. 2d 873, 875 (App. D.C., 1951).

¹⁶¹ *Ford Motor Co. v. Ryan*, 182 F. 2d 329, 332 (C.A. 2d, 1950) (concurring opinion of L. Hand, J.).

¹⁶² See *Cinema Amusements, Inc. v. Loew's, Inc.*, 85 F. Supp. 319, 322 (D. Del., 1949).

¹⁶³ See *United States v. Reid*, 104 F. Supp. 260 (E.D. Ark., 1952). Doubts were expressed on this point before the enactment of the statute. Consult *The Proposed Revision of the Federal Judicial Code*, 60 Harv. L. Rev. 424, 435-36 (1947); compare Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 934 (1947). It seems clear, how-

the substitution of transfer for dismissal follow equally under Section 1406(a), where the venue has been wrongly laid, it seems clear that they are not dependent upon any privilege conferred on the plaintiff by the venue statutes.

In a different context, the Supreme Court has been at some pains to emphasize that venue statutes and Section 1404(a) "deal with two separate and distinct problems," and that the section does not effect a repeal of statutory venue provisions.¹⁸⁴ "Section 1404(a) does not limit or otherwise modify any right granted in Sec. 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."¹⁸⁵ Inevitably, this language, coupled with references to the plaintiff's "venue privilege," will be cited in support of the proposition that transfer should not deprive the plaintiff of advantages available to him under the law of the original forum. Of course, nothing in the language of the Court has any reference to the question as to what law applies after transfer, and it is irrational to suppose that the Court decided that complex question when it was not involved and was neither argued nor considered. Such considerations, however, will not deter a certain type of legal mind from insisting on an answer to the question, deduced from the Court's statements as to the nature and operation of the section. But we cannot reason from the assertion that the plaintiff has a venue privilege to the conclusion that he is entitled to retain the benefits given him by the law of the chosen forum. The question is whether retention of those benefits is part of the privilege. All we know about the privilege is that it consists of what the venue statutes give him, minus what the doctrine of *forum non conveniens* took away, plus what the substitution of transfer for

ever, that the requirement of new process is obviated by the revised Judicial Code even where the venue is wrongly laid and the transfer is made under Section 1406(a). The value of this construction is picturesquely illustrated by *Chicago & N. W. Ry. Co. v. Davenport*, 95 F. Supp. 469 (S. D. Iowa, 1951).

¹⁸⁴ *Ex parte Collett*, 337 U.S. 55, 60 (1949). The question was whether the section applied to cases under the Federal Employers' Liability Act, with its special venue provisions. The argument was that Congress had evidenced its intention not to repeal those provisions by omitting them from the list of statutes repealed; that to construe the section as applicable would be to give it effect as an implied repeal of those provisions, contrary to the intent thus expressed. The Court agreed that no repeal was intended. The quoted language is directed to the point that Section 1404(a) did not effect a repeal by implication.

¹⁸⁵ *Ibid.* Note that, under Section 1406(a), an action may be brought in a district in which it could *not* have been brought previously, in conformity with the venue statutes; and the result will be similar to that which follows a transfer under Section 1404(a).

dismissal restored. It is difficult to determine whether the doctrine of *forum non conveniens*, as it was invoked in the *Gulf* case, was deliberately designed to have the effect (which it did have) of depriving the plaintiff of advantages in the forum's law; it is still more difficult to determine whether Section 1404(a) was designed to restore those advantages. But we cannot surmount the difficulties by ignoring the problem.

The question becomes, then, one of statutory construction. One of the most significant features of Section 1404(a) is its provision for transfer as distinguished from dismissal. Clearly enough, that provision was designed to obviate some of the consequences attendant upon dismissal under the *forum non conveniens* doctrine. There can be no doubt, for example, that, as Judge Maris noted,¹⁶⁶ one purpose of the provision was to avoid the loss of remedy, resulting from the bar of the statute of limitations, which was a notable consequence of dismissal. That is, there can be no doubt that this was the purpose *at least in one class of cases*.¹⁶⁷ But the problem of the statute of limitations is compound. Two distinct classes of cases are involved:

(1) The action is filed within the period allowed by the state of the transaction; but, after dismissal from the inconvenient forum, the time allowed by the other state has expired.

(2) The action is not filed until after the time allowed by the state of the transaction has expired. (This was the situation in the *Headrick* case.)

The first type presents no problem; the policy of avoiding loss of remedy as a penalty for miscalculation in the choice of forum is clearly applicable. The plaintiff has not slept on his rights. But for the transfer provision, he could protect himself only by filing both in the forum of his choice and in the alternate forum or forums. To save the plaintiff here is to do no more than to give an elementary procedural reform its minimum significance.¹⁶⁸

¹⁶⁶ New Federal Judicial Code, 34 A.B.A.J. 863, 963 (1948).

¹⁶⁷ "Dismissal often resulted in leaving a plaintiff without a remedy because of the running of the statute of limitations. No such harsh result would flow from change of venue, at least where the statute is the same in both forums." *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588, 593-94 (S.D. Calif., 1951) (italics supplied).

¹⁶⁸ In 1910 Dean Pound advanced the principle that "[n]o cause, proceeding or appeal should be dismissed, rejected or thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved." Pound, *Some Principles of Procedural Reform*, 4 Ill. L. Rev. 491, 497 (1910). As his references show, his concern was with the running of the statute while the action was pending in the wrong forum. *Ibid.*, at 498 n. 56.

The second class of cases presents a different problem. To save the plaintiff in such a situation is not merely to withhold a disproportionate penalty for misjudgment, or to make multiple filing unnecessary; it is to allow one who may be said to have slept on his rights to retain the advantage he seeks in the hospitality of a more indulgent lawmaker—one having nothing in particular to do with the matter. The substitution of transfer for dismissal may mean only that for purposes of the applicable statute of limitations the action must be regarded as having been commenced on the date on which it was in fact commenced, though in an inappropriate court. On such a construction, the plaintiff in the second class of case would not be helped.

Section 1406(a) provides for transfer in cases in which the venue is *wrongly* laid. Consistently with the elementary reform principle, this saves the plaintiff in cases paralleling those in the first class. But it will hardly be contended that in cases of the second type the plaintiff can secure the advantage of a longer statute of limitations by filing his action in a forum where venue is improper. No "venue privilege" supports him here; no statute gives him the "right" to resort to this forum; he can have no possible claim to retain the benefit of its laws.¹⁶⁹

¹⁶⁹ A similar but more forceful point can be made if the courts develop a tendency, already exhibited, to identify the factors determining whether inconvenience of the forum warrants dismissal or transfer with the factors determining whether the assertion of jurisdiction over a foreign corporation comports with due process of law. Prior to the enactment of Section 1404(a) Judge Learned Hand said: "The Court [in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)] did give a new explanation to corporate 'presence,' for it held that in order to determine that question the court must balance the conflicting interests involved: i.e., whether the gain to the plaintiff in retaining the action where it was, outweighed the burden imposed on the defendant; or vice versa. That question is certainly indistinguishable from the issue of 'forum non conveniens.'" *Kilpatrick v. Texas & P. Ry. Co.*, 166 F. 2d 788, 790-91 (C.A. 2d, 1948). A year later he reaffirmed this position, regarding the *Gulf and Koster* cases as answering any constitutional objection to dispensing with the "second factor" in corporate "presence"—the second factor being the "estimate of inconveniences" of the *International Shoe* case. "[E]ven though it were held that doing any continuous business whatever subjected the corporation to a judgment in personam . . . it could relieve itself of any oppressive prejudice by recourse to the plea, *forum non conveniens*." *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F. 2d 184, 186 (C.A. 2d, 1949). These statements have been understood by some district courts to mean that actions against corporations, which would formerly have been dismissed for want of jurisdiction, may now be transferred instead. *Magnetic Eng. & Mfg. Co. v. Dings Mag. Sep. Co.*, 86 F. Supp. 13, 17 (S.D. N.Y., 1949), appeal dismissed 178 F. 2d 866 (C.A. 2d, 1950); *Cooke v. Kilgore Mfg. Co.*, 105 F. Supp. 733, 738 (N.D. Ohio, 1952); *Kendrick v. Seaboard Airline R. Co.*, 98 F. Supp. 372, 373 (E.D. Pa., 1949). See also *Black and Jackson, JJ.*, dissenting, in *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 667, 670-72 (1953). But cf. *Pan American Airways, Inc. v. Consolidated Vultee Aircraft Corp.*, 87 F. Supp. 926 (S.D. N.Y., 1949); *Smith v. Louisville & N. R. Co.*, 90 F. Supp. 189 (S.D. N.Y., 1950). It would be going rather far to assert that the plaintiff has an interest in the law of the forum of his choice, if the order of transfer was necessary to remove doubts as to jurisdiction over the defendant in that forum.

Here, clearly, the transfer provision means simply that the action was commenced when it was commenced, and the plaintiff is saved only if the date is within the time allowed by the statute which the transferee court will apply. *Both* sections provide for transfer as distinguished from dismissal; under Section 1406(a) transfer does not carry with it retention of the advantage of the first forum's statute. Consequently it is impossible to establish, merely on the premise that transfer has been substituted for dismissal, that transfer under Section 1404(a) carries with it retention of that advantage. We are remitted to the previous question, whether such an advantage is "inequitable," if not to the earlier question, whether the federal courts should not start over from the beginning, and determine the applicable statute of limitations on enlightened principles of conflict of laws.

It may be helpful at this point to consider for a moment the phenomenon of the transitory cause of action. When a court entertains a suit on a foreign cause of action, as the New Mexico court presumably would have entertained the *Headrick* case, it undertakes a rather unwelcome and extraordinary task. It adds to the congestion of its typically overloaded calendars, to the burden of the local taxpayer, and to the citizen's burden of jury service. It engages to ascertain and apply the law of the foreign state—a task recognized by the highest authority as an irksome one.¹⁷⁰ It does all this in the interest of a civilized legal system, in order that the reasonable expectations of parties will not be frustrated merely because redress in a particular court is not available.¹⁷¹ In theory, it applies its own procedural law only for its own convenience, and because it is impracticable for it to indulge to the full its desire to have the result conform to that which would have been reached in the state of the transaction. Suppose that, in such a situation, the court determines that it need not assume the burden; that there is no need to entertain the case in furtherance of the objectives stated; that there is another court in which the action might have been more appropriately brought, and that to bring it here is an imposition on the court. Would it not be strange if the plaintiff, on being sent away, were to have the right to take with him the law which the court would have applied, not for his benefit, but in self-

¹⁷⁰ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

¹⁷¹ Compare Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 *Tulane L. Rev.* 4, 165 (1944); Rest., *Conflict of Laws*, Introductory Note to c. 12 (1934). It may do so under compulsion of the full faith and credit clause, U.S. Const. Art. IV, § 1. *Hughes v. Fetter*, 341 U.S. 609 (1951).

defense? Why should a litigant have a vested interest in the practical difficulties which his chosen forum would experience in extending its hospitality? If it be suggested that, realistically, the advantages to be found in the law of the forum are among the inducements offered to attract out-of-state litigants, and therefore that the plaintiff should be allowed to keep his quid pro quo, surely the answer is that in Section 1404(a) Congress has declared a policy which prohibits a district court from participating in such a bargain.

These reflections, of course, are directed to the interstate or international situation. It may conceivably be suggested in response that on that level the loss of advantage in the law of the forum is a necessary incident of unconditional dismissal, and properly so, since no paramount legislature has authorized the choice of forum; but that the situation is different within the federal system, where Congress has provided for transfer and has also designated more than one forum in which the plaintiff has the "right" to sue. The suggestion assumes a congressional purpose to give the plaintiff not only a choice of forums but a right to the most favorable law offered by any one of them. I find it difficult to believe that Congress consciously entertained such a purpose in framing the venue statutes and followed it consistently through the years while major changes took place in the law applied in the federal courts.¹⁷² What is more important, the most-favorable-law privilege which plaintiffs did in fact enjoy was plainly taken from them by the Supreme Court in the *Gulf* case, with the unmistakable implication that Congress intended no such extraordinary privilege. The question now, therefore, is whether, in enacting Section 1404(a), Congress intended to give them, or restore to them, that favored position. The only candid answer is that we do not know. The mere existence of the venue statutes does not furnish an answer.¹⁷³ The fact that the

¹⁷² No significant changes in the venue scheme can be correlated, for example, with *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842), nor with the adoption of the Federal Rules of Civil Procedure, nor with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). And the widest range of choice was introduced into the general venue scheme not by Congress, but by the Court. *Ex parte Schollenberger*, 96 U.S. 369 (1878); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939). Mr. Justice Frankfurter, author of the *Neirbo* opinion, was the Court's first strong advocate of the doctrine of *forum non conveniens*. *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, 54 (1941) (dissenting opinion).

¹⁷³ Judge Learned Hand, who has attached the greatest importance to the venue privilege [*Ford Motor Co. v. Ryan*, 182 F. 2d 329, 332 (C.A. 2d, 1950)], has said, referring to the reviewability of transfer orders: "We do not believe . . . that a suitor has any legally protected interest in having his action tried in any particular federal court, except in so far as the transfer may handicap his presentation of the case, or add to the costs of trial." *Magnetic Eng. & Mfg. Co. v. Dings Mfg. Co.*, 178 F. 2d 866, 869 (C.A. 2d, 1950).

section was "drafted in accordance with the doctrine of forum non conveniens" is some indication that the answer should be negative. The *Gulf* case contained no recognition of the power of conditional dismissal. Even if that power is recognized as part of the doctrine, it would be difficult to justify exercising it in such a way as to secure to the plaintiff the benefits of the inappropriate forum's statute of limitations in cases of the second class.

Up to now, however, the courts have exhibited a strong disposition to protect the plaintiff against the bar of the statute upon transfer, even in the second type of case. There are four cases which deal directly with the effect of transfer on the applicable law.¹⁷⁴ All four relate to the statute of limitations; all are of the type in which the action is barred in the transferee forum at the time of filing; and all agree that the action is not to be barred upon transfer. Two of the cases¹⁷⁵ proceeded on the theory that transfer works no change in the applicable law, although each relies to some extent on waiver or estoppel to insure the result. In the other two,¹⁷⁶ the court made no decision as to the effect of transfer, simply noting that the parties had taken conflicting positions on the question; but change of venue was granted in the one case only upon stipulation of the parties that there should be no change in the applicable statute of limitations, and was denied in the other when that stipulation was not forthcoming. Thus the underlying theory of these two cases is that a change of law as a result of transfer is at least a substantial possibility. But the significant fact for present purposes is that, whether by interpreting Section 1404(a) as entailing no change of law, or by treating the defendant's motion for transfer as a waiver or estoppel, or by exacting consent from the defendant as the price of transfer, the courts in each case have sought to secure to the plaintiff the benefit of the forum's statute. A similar tendency appears in the language of decisions which do not deal directly with the problem.¹⁷⁷

¹⁷⁴ *Headrick v. Atchison, T. & S.F. R. Co.*, 182 F. 2d 305 (C.A. 10th, 1950); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410 (D. N.M., 1949); *Frechoux v. Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D. N.Y., 1953); *Curry v. States Marine Corp.*, 118 F. Supp. 234 (S.D. N.Y., 1954). The first of these was a diversity case; the others were based on federal law.

¹⁷⁵ *Headrick v. Atchison, T. & S.F. R. Co.*, 182 F. 2d 305 (C.A. 10th, 1950); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410 (D. N.M., 1949).

¹⁷⁶ *Frechoux v. Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D. N.Y., 1953); *Curry v. States Marine Corp.*, 118 F. Supp. 234 (S.D., N.Y., 1954).

¹⁷⁷ "Under Section 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

Perhaps this tendency is to be explained, in part, by the rather general disposition to assume without qualification that the substitution of transfer for dismissal was intended to obviate the loss of remedy resulting from the statute of limitations.¹⁷⁸ Clearly, however, it reflects the prevalent attitude of indulgence toward this particular kind of forum-shopping.¹⁷⁹ The question is: Does such a tendency presage acceptance of the conclusion that transfer works no change in the applicable law?

Any such development is likely to encounter trouble. With surprising frequency, the converse of the situation in these four cases occurs: the action is barred in the state in which it is filed, but not (at the time of filing) in that to which transfer is sought. Here it is the plaintiff who seeks transfer, and here the assumption always is that the effect will be to bring into operation the statute of the *transferee* state.¹⁸⁰ The right of the plaintiff to a transfer under Section 1404(a) has not been finally determined. In many of the cases the question of the effect of transfer on the statute of limitations is academic, since the

anew in the more convenient forum, carrying with it the inherent and jeopardous hazard of being barred therein by the statute of limitations. The danger of having the action barred in such a manner was one of the principal reasons for Mr. Justice Black's dissent in *Gulf Oil Corp. v. Gilbert*. . . ." *Cinema Amusements, Inc. v. Loew's, Inc.*, 85 F. Supp. 319, 322 (D. Del., 1949). "[O]nly a most unusual case would justify a transfer unless on the same facts a dismissal could be sustained under the doctrine of forum non conveniens. This would seem to be true except where the running of the Statute of Limitations might enter into the conclusion as to dismissal. The new transfer section, of course, allows of no question as to Limitations." *Brown v. Insurograph, Inc.*, 85 F. Supp. 328, 329 (D. Del., 1949). "No new process need be served when an action is transferred and there is no question of the statute of limitations." *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45, 49 (S.D. N.Y., 1950). On the other hand, in *Bruner v. Skibsaktieselskabet Hilda Knudsen*, 123 F. Supp. 903 (S.D. Tex., 1954), the court assumed that the statute of the transferee state applied.

¹⁷⁸ Only one case recognizes the difference between treating transfer as preserving the efficacy of the original commencement of the action, and treating it as a transfer also of the original forum's statute of limitations. "Dismissal often resulted in leaving a plaintiff without a remedy because of the running of the statute of limitations. No such harsh result would flow from change of venue, *at least where the statute is the same in both forums.*" *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588, 593-94 (S.D. Calif., 1951) (*italics supplied*).

¹⁷⁹ "True, [the plaintiff] may have been forum-shopping, but the law has not, particularly in the case of seamen and others in his category, frowned upon this." *Curry v. States Marine Corp.*, 118 F. Supp. 234, 235 (S.D. N.Y., 1954).

¹⁸⁰ *McDaniel v. Drotman*, 103 F. Supp. 643 (W.D. Ky., 1952); *Wilson v. Kansas City Southern Ry. Co.*, 101 F. Supp. 56 (W.D. Mo., 1951); *Bolten v. General Motors Corp.*, 81 F. Supp. 851 (N.D. Ill., 1949); *Quinn v. Simonds Abrasive Co.*, 199 F. 2d 416 (C.A. 3d, 1952); *Trust Co. of Chicago v. Pennsylvania R. Co.*, 183 F. 2d 640 (C.A. 7th, 1950).

plaintiff has the alternative of filing anew in the other forum.¹⁸¹ However, the action may be commenced so near the expiration of the foreign limitation period, as in *Riley v. Union Pacific R. Co.*,¹⁸² that re-filing after dismissal is not an alternative. If, for the sake of securing to the plaintiff a trial on the merits in situations of the *Headrick* type, the courts should embrace the theory that the law of the state of original filing continues to govern after transfer, the logical consequence will be to deny a trial on the merits to the plaintiff in situations of the *Riley* type. Thus the anomalous result will be that the plaintiff who has delayed filing his action until it has been barred in the normal forum will be protected if he can file in a more hospitable state, while the plaintiff who has filed within the time allowed by the normal forum, but in one less appropriate, will be barred. Surely the safe and impartial approach to the problem is to eschew the sentiments and mechanisms which produce such a result, and to apply the statute of limitations which should be applied on rational principles.

2. *Matters relating to proof.* A situation like that in *Sampson v. Channell*¹⁸³ presents a similar problem. If we suppose that the defendant moves for transfer to the district court in Maine, making a persuasive case for transfer for convenience of parties and witnesses, there will be, under the proposed solution, no change in the applicable law after transfer, nothing else appearing. But if the defendant submits that one of the consequences of transfer ought to be to deprive the plaintiff of the advantage he sought in the Massachusetts rule on burden of proof, the court will be required to decide on what terms the transfer shall be ordered with respect to that point. We may be reasonably sure that the defendant will make an issue of the point at this stage only in critical situations. In the ordinary case, the burden of going forward is of largely academic interest; it becomes crucial if no evidence is available on the issue. In the ordinary case, the burden of persuasion is a verbal formula, a ritual part of the charge to the jury; it becomes crucial if the minds of the jury are in equilibrium.¹⁸⁴ Let us suppose, therefore, that the motion is made in a case in which both

¹⁸¹ In *Berk v. Willys-Overland Motors*, 107 F. Supp. 643 (D. Del., 1952), the plaintiff's motion for transfer was denied partly on the ground that no statute of limitations in the transferee state would bar his action there.

¹⁸² 177 F. 2d 673 (C.A. 7th, 1949) [plaintiff's motion for transfer under Section 1406(a) denied because no impropriety in the venue; no motion under Section 1404(a)].

¹⁸³ 110 F. 2d 754 (C.A. 1st, 1940), *supra* Part III.

¹⁸⁴ Morgan, *Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 185 (1944).

parties know that no evidence whatever is available on the issue of contributory negligence. If the burden of going forward is placed on the plaintiff, he will lose. If it is placed on the defendant, he will lose.¹⁸⁵ How is the district court to deal with the allocation of the burden in connection with its ruling on the motion to transfer?

Under the proposed solution, we postulate that the court is freed, for this purpose, from any obligation to follow the conflict-of-laws rules of Massachusetts.¹⁸⁶ If the court undertakes to solve the problem on general conflict-of-laws principles it will find in the authorities: (1) an inert orthodoxy, according to which such matters as burden of proof are governed by the law of the forum;¹⁸⁷ (2) a vigorous and critical dissent:

It is time to abandon both the notion and the expression that matters of procedure are governed by the law of the forum. It should be frankly stated that (1) the law of the locus is to be applied to all matters of substance except where its application will violate the public policy of the forum; and (2) the law of the locus is to be applied to all such matters of procedure as are likely to have a material influence upon the outcome of litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum.¹⁸⁸

Only one result is possible here, no matter which view the court accepts. A preference for the law of the forum, or for the law of the state of the transaction, as governing such a matter as burden of proof is meaningful only if the case is to be tried in a state other than that of the transaction. Here the two are the same. Both rules contain references to the law of the forum. A situation like the one under consideration raises, perhaps for the first time, the question: *Which forum?* Plainly, the answer must be: the forum in which the case is to be tried,

¹⁸⁵ Either way, the outcome will not be based "on the merits"; so that a satisfaction attainable in the case of the statute of limitations is not attainable here.

¹⁸⁶ The problem cannot, of course, be solved by an original, independent policy determination as to which party should bear the burden. Such matters are beyond the competence of the federal courts in diversity cases. The claim advanced in this paper is only that the federal courts must be free, at least in ordering transfers under Section 1404(a), to determine what state law is applicable on transfer; not that they may construct independent principles of municipal law.

¹⁸⁷ Except where "the remedial and substantive portions of the foreign law are so bound together that the application of the usual procedural rule of the forum would seriously alter the effect of the operative facts under the law of the appropriate foreign state." Rest., Conflict of Laws § 595 (1934); compare *ibid.*, § 385; Goodrich, Handbook on the Conflict of Laws § 84 (3d ed., 1949); Stumberg, Principles of Conflict of Laws 137 (2d ed., 1951).

¹⁸⁸ Morgan, *op. cit. supra* note 184, at 195. See also Cook, The Logical and Legal Bases of the Conflict of Laws, c. VI (1949).

as distinguished from the one in which it is filed; for the considerations of convenience and practicability which alone justify rejection of the foreign rule on burden of proof¹⁸⁹ have to do with trial, not with filing.¹⁹⁰

Both the orthodox position and the dissent rest on the same foundation: certain portions of the law which is acknowledged as governing the transaction are rejected because the values attained by applying them are outweighed by the inconvenience which their application would entail. Certain other portions may be rejected because they conflict with a legitimate policy of the forum. The difference between the two positions is that the foundation of the orthodox position is obscured by encrustations of doctrine according to which "inconvenience" has been conventionalized to mean anything that can be described as procedural, or relating to the remedy, whereas the critics would scrape away the encrustations and bring the original foundation into view. A district court, looking for guidance to enlightened principles of conflict of laws, would recognize, first, that no real question of inconvenience or of conflict with local policy is involved in applying a foreign rule on burden of proof in the critical situations in which that rule operates. Above all, however, it would recognize that, with respect to questions pertaining to conduct of the trial after transfer, considerations of convenience have nothing whatever to do with the court from which the case is transferred, and can never justify the invocation of that court's law. That court simply drops out of consideration as a source of the *lex fori* except with respect to proceedings prior to transfer.¹⁹¹ If the transfer is to the state whose substantive law governs,

¹⁸⁹ Rest., Conflict of Laws, Introductory Note to c. 12 (1934); *ibid.*, § 595, Comment a. A similar point might be made with respect to the statute of limitations, but for the fact that application of the foreign statute so obviously has nothing to do with convenience and practicability in trial processes.

¹⁹⁰ Note that, according to Professor Morgan's analysis, the second tentative solution (no change in the applicable law results from transfer) states an absurdity: because the original forum would have found it burdensomely inconvenient to apply the rule of the state of the transaction, the transferee court in the state of the transaction is saddled with the equally burdensome task of applying the rule of a foreign state, having no connection with either the transaction or the trial, instead of its own rule, which is by hypothesis preferable.

¹⁹¹ The question as to what law governs proceedings after transfer should be kept distinct from the question as to the status in the transferee court of proceedings in the case prior to transfer. With respect to the latter question, it seems safe enough to borrow from the precedents on change of venue within a state the concept that "when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been already done." *Magnetic Eng. & Mfg. Co. v. Dings Mfg. Co.*, 178 F. 2d 866, 868 (C.A. 2d, 1950). Yet there are expressions

clearly the rule of that state on burden of proof should also apply. If the transfer is to a third state, there is room for a choice between the law of that state and the law of the transaction; but on rational principles, no court would ever hold applicable after transfer any rule of the state of filing merely because such a rule is part of the "procedural law of the forum." If any such rule is ever to apply after transfer, it must be on the basis of some other consideration.¹⁹²

in the cases indicating the belief that transfer may validate or invalidate prior steps in the proceedings.

McKeen v. Union Pacific R. Co., 111 F. Supp. 876 (W.D. Mo., 1953), assumes that transfer will obviate objections to the capacity of a foreign personal representative to maintain the action in the original forum. *Mazinski v. Dight*, 99 F. Supp. 192 (W.D. Pa., 1951), suggests but does not discuss a similar problem.

Leppard v. Jordan's Truck Line, 116 F. Supp. 130 (W.D. N.C., 1953), is open to misinterpretation as indicating that the law of the transferee state may invalidate a joinder of parties which was proper under the law of the state of filing. The law of South Carolina, where the action was filed, permitted joinder of the defendant's liability insurer in actions against common carriers; the law of North Carolina expressly prohibited such joinder. After transfer the district court in North Carolina dismissed the insurance companies in reliance on North Carolina law; but it is clear that under South Carolina conflict-of-laws rules the same result would have been proper in the absence of transfer, the accident having occurred in North Carolina. See *Leppard v. Jordan's Truck Line*, 110 F. Supp. 811 (E.D. S.C., 1953). The case was settled before any appellate court considered the several interesting problems involved. Letter dated March 12, 1954, from Turner Clayton, Esq., of Leppard & Leppard, Chesterfield, S.C., in the University of Chicago Law School Library.

Lehman v. Napier, 101 F. Supp. 313 (S.D. Iowa, 1951), assumes that service on a partnership, sued in its common name in Iowa where such procedure is proper, may be invalidated by transfer to Illinois, where the entity concept for partnerships is rejected. There is some doubt as to whether the Iowa service on a partner in the Illinois firm gave the Iowa court jurisdiction in the circumstances, but it is not necessary to resolve this question for present purposes. The court was satisfied that the requirements of Iowa law, and presumably of due process, had been met; its doubts as to the efficacy of the service after transfer to Illinois must therefore stem from a belief that the reference in Rule 17(b) of the Federal Rules of Civil Procedure to the "law of the state in which the district court is held" is a reference to the law of the transferee state. After transfer, the case was disposed of on this theory. The action was regarded as one against the partner who had been served, individually; being unable to amend for the purpose of naming the other partners as defendants, the plaintiffs voluntarily dismissed. Letter dated March 1, 1954, from P. S. Johnson, Esq., of Brundage & Short, Chicago, in the University of Chicago Law School Library.

On the other hand, *Wilson v. Kansas City Southern Ry. Co.*, 101 F. Supp. 56 (W.D. Mo., 1951), treats the reference in Rule 4 (f) to the "territorial limits of the state in which the district court is held" as a reference to the state of original filing. Holding that a district court has no power to transfer an action in which no valid service has been had on the defendant, the court adds that service can be perfected after removal only by resort to the process of the court to which the action is removed. Cf. *Rhodes v. Barnett*, 117 F. Supp. 312, 318 (S.D. N.Y., 1953).

¹⁹² The statute of limitations may present a somewhat different problem. Although I am deeply skeptical of such notions, we may concede for present purposes that a state may express through such statutes (1) a policy against the prosecution in its courts of claims that are stale by its standards, though still fresh by the law of their origin; (2) a policy

Conceivably, the court might seek some such other consideration in the precedents dealing with *forum non conveniens* and with injunctions against the oppressive exportation of litigation, on the theory that, unless the advantage sought in the law of the forum can be characterized as inequitable, the plaintiff has some sort of right to retain it which ought not to be impaired merely by the operation of rational principles of conflict of laws. Of course, the term "right" begs the question. There may be such a right if the plaintiff can file his action in the state court and maintain it there; but if the action is filed in, or removable to, a federal court, and is transferable to a district in another state, the existence of the right depends on what law will be applied after transfer; and the applicable law cannot be determined by assuming the right. What is really meant by this assertive talk of "right," of course, is that a certain amount of forum-shopping is tolerated by our mores, and that tactical successes scored by the plaintiff, in the jockeying between the parties for position, should not be taken away from him unless they can be authoritatively stigmatized as unfair. It is necessary, therefore, to consult the precedents as to the status of this type of advantage.

The question is whether a plaintiff's resort to a foreign forum, to take advantage of a difference of law in the general area of rules relating to the admissibility and sufficiency of evidence, burden of proof, presumptions, etc., has been regarded as such an evasion of the appropriately applicable law as to warrant the issuance of an injunction. On this question the authorities are inconclusive to about the same degree as on the similar question respecting the statute of limitations. The strongest support for regarding such forum-shopping as unfair is furnished by the case of *Weaver v. Alabama Great Southern R. Co.*,¹⁹³ in which the Alabama court enjoined a resident from suing in Georgia for injuries suffered in a grade-crossing accident in Alabama, where Alabama followed the stop, look and listen rule and Georgia would leave

which frowns on the diminution, by any means, of the time it allows a plaintiff to pursue his claim. The first of these can hardly have any application to a case transferred out of the state. As for the second, it seems that such a policy could be justified only if the state has such a relationship with the transaction or with the parties as to warrant the concern it thus displays for plaintiffs. The mere fact of trial in its courts ought not to be enough. Cf. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). A fortiori, the fact that the action is merely filed, and not tried, in its courts should not be enough. But, given a sufficient interest of the filing state, a choice between that state's policy and the law of the transaction might become necessary. It is peculiarly appropriate for such a choice to be made by the federal courts.

¹⁹³ 200 Ala. 432, 76 So. 364 (1917).

the question of contributory negligence to the jury. The court characterized its rule as one of substantive law, and did not purport to declare inequitable any advantages which might flow merely from differences of procedure in the foreign forum.¹⁹⁴ Some commentators, however, have stated the rule without such a limitation:

[I]t will be sufficient to entitle a citizen of the state to injunction preventing another citizen thereof from prosecuting an action against the former in the courts of another state to show that the purpose or necessary effect of such action is to obtain an advantage to which the plaintiff therein is not entitled in the domicile of the parties. . . .¹⁹⁵

The *Weaver* case was criticized by Dean Pound¹⁹⁶ and by another contemporary commentator.¹⁹⁷ The Tennessee court refused relief in similar circumstances.¹⁹⁸ New York has refused to enjoin a citizen from suing another in Mississippi where the motive was to take advantage of a more liberal rule on the admissibility of transactions with deceased persons.¹⁹⁹ In short, there is sharp disagreement over the answer to the specific question, not to mention the standards by which such an advantage is to be judged. Once again, if a general impression may be hazarded, it is that, except where a plain and legitimate policy of the home state is involved, the general attitude is that advantages which a plaintiff may secure by filing in a strange forum are fair game.²⁰⁰

It is clear that, if the problem with respect to the statute of limitations and matters relating to proof is approached in terms of conflict-

¹⁹⁴ See also Messner, *The Jurisdiction of a Court of Equity over Persons To Compel the Doing of Acts outside the Territorial Limits of the State*, 14 Minn. L. Rev. 494, 497 (1930); *Lancaster v. Dunn*, 153 La. 15, 95 So. 385 (1922).

¹⁹⁵ *When Transitory Causes of Action May Not Be Prosecuted in a Foreign State or Country*, 59 A.S.R. 869, 880 (1898); see also *ibid.*, at 884.

¹⁹⁶ *The Progress of the Law, 1918-19: Equity*, 33 Harv. L. Rev. 420, 425 et seq. (1920).

¹⁹⁷ *Injunctions to Restrain Foreign Proceedings*, 33 Harv. L. Rev. 92, 94 (1919): "The state cannot properly be said to have a vital interest in having litigation between its citizens determined solely by the common law of the state."

¹⁹⁸ *American Express Co. v. Fox*, 135 Tenn. 489, 187 S.W. 1117 (1946).

¹⁹⁹ *Edgell v. Clarke*, 45 N.Y. Supp. 979 (App. Div., 1st Dep't, 1897). Cf. the dictum in the *Weaver* case [200 Ala. 432, 76 So. 364 (1917)], to the effect that Alabama would enjoin suit in Georgia if the latter state disqualified the only witness by whom a defense could be established.

²⁰⁰ See generally the cases collected in the following annotations: 25 L.R.A. (N.S.) 267 (1910); 32 A.L.R. 6, 67 et seq. (1924); 69 A.L.R. 591 (1930). See also *Wabash Ry. Co. v. Lindsey*, 269 Ill. App. 152 (1933) (fact that verdict may be based on concurrence of nine jurors in foreign state, as opposed to requirement of unanimity in home forum, does not warrant injunction); *Foster, Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217, 1244 (1930).

of-laws principles, the results will tend to be quite different from those that will be reached if it is approached in terms of "inequitable" advantage. The question then is: How are the federal courts to choose between the two techniques? At first blush, it may seem that, since the whole argument (that a change of venue may entail a change in the applicable law) is predicated on the origin of Section 1404(a) in the doctrine of *forum non conveniens*, no change should operate to deprive the plaintiff of an advantage unless it can be shown that, under that doctrine, the advantage was a ground for denying access to the forum. A major objection to this position is that much of the policy embodied in the doctrine of *forum non conveniens* is reflected simply in the results of its application, rather than in express determinations that the invocation of some rule of law of the forum would lead to inequitable advantage. In any case in which a court unconditionally dismisses an action on the basis of the doctrine, although it may consider only factors bearing on the convenience of parties and witnesses, without reference to differences of law, the result is that the plaintiff is deprived of any benefit he might have found in the law of the forum. In *Canada Malting Co. v. Paterson Steamships, Ltd.*,²⁰¹ the libelant's motive for invoking the jurisdiction of the American court was a supposed difference in law. The Court did not even determine whether the supposed difference actually existed, much less whether the advantage which the libelant sought therein was inequitable. The result of the dismissal, however, was to deprive the plaintiff of the advantage if it existed; and the decision must mean not only that the libelant was not entitled to the facilities of an American court, but also that, in the light of all the facts that were shown concerning the parties and the transaction, the libelant had no entitlement to any rule of law which the American court might distinctively apply. This means that failure to find in the lore of *forum non conveniens* an express denunciation of a legal advantage as inequitable is inconclusive: the courts may have considered it inequitable without having had occasion to say so. More significantly, it means that it is probably erroneous to draw so sharp a line between the conflict-of-laws approach to the problem and the *forum non conveniens* approach, and to state the latter in terms of "inequitable advantage." Is not a dismissal on *forum non conveniens* grounds itself a choice of law on conflict-of-laws principles? May we not read the *Canada Malting* case as holding that, where the only cir-

²⁰¹ 285 U.S. 413, 418 (1932).

cumstance relating the parties or the transaction to the United States was the inadvertent presence of the ships in American waters at the moment of collision, the connection with this country was too slight to justify the application of any of its laws? The fact that the choice is negative only does not make it any the less a choice.

The language of inequitable advantage comes, naturally enough, from the injunction cases. On the interstate level, in the absence of a paramount authority to determine questions relating to place of trial and choice of law, the courts dealt with those problems as best they could. In the doctrine of *forum non conveniens* the foreign court had a handy device for dealing—partially, but effectively so far as it was concerned—with both problems; it had only to decline to act. The home forum, on the other hand, could exercise a degree of control over such matters only by taking preventive action. For historical and doctrinal reasons relating to the exercise of equity powers, the instrument of intervention—the injunction—was available only when a very strong case could be made.²⁰² In addition, such action involved considerations of deference to the foreign court, and the chancellor's ancient fear of making himself ridiculous by the issuance of ineffectual orders. Consequently, the courts did not speak of choice of law, but used stronger terms; and they never issued injunctions except when they were very strongly convinced that only the local law, and not that of the foreign forum, was properly applicable. If opinions could reasonably differ, and especially if the anticipated action by the foreign court was in line with accepted conflict-of-laws ideas—as, for example, if the anticipated ruling related to procedural matters, traditionally governed by the law of the forum—ordinarily no injunction issued. But whenever one did issue on the ground of avoidance of local law or policy, the court was making, within the limits of its power, a choice of law. Its action could mean nothing else.

This significance of the injunction against prosecuting claims abroad is interestingly reflected in the language of Turner, L. J., quoted by Dean Pound in his criticism of the American injunction cases:²⁰³

If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the Courts in which parties should bring their suits, without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained, and thus we should be bringing under the de-

²⁰² See *Bigelow v. Old Dominion Copper Co.*, 74 N.J. Eq. 457, 473-74 (1908).

²⁰³ *The Progress of the Law, 1918-19: Equity*, 33 Harv. L. Rev. 420, 428 n. 42 (1920).

cision of this Court the question whether suits in other Courts could be maintained—a question which it is for those Courts, and not for this Court, to decide. To assume such a jurisdiction would, I think, be to exercise a legislative, and not merely a judicial power.²⁰⁴

Note that His Lordship did not conceive of the foreign court's invocation of *forum non conveniens* as a usurpation of legislative power. He declined, however, to use the powers of equity to fill the gap where venue rules would be if there were an international power to prescribe those rules; and by the same token, he declined to use those powers in an attempt to resolve conflicting attitudes as to the appropriate law, as a sovereign lawmaker might do. We are forced to agree that there is nothing unconscionable about the plaintiff's resort to a court which is open to him, even though he thereby gains some legal advantage. When a court does enjoin prosecution of a claim abroad it is in fact determining the proper venue and the applicable law within the limits of its ability to do so, and is not dealing with matters of equity or conscience at all, except insofar as venue and choice-of-law rules subsume such matters. That is why it is so difficult to find in the cases any standard whereby the inequitable character of an advantage so obtained is to be judged.

If this interpretation is sound, it offers a powerful reason for rejecting the suggestion that the federal courts might decide questions relating to the effect of transfer by reference to the notion of inequitable advantage as developed in the *forum non conveniens* and injunction cases. Let it be emphasized once again that in the federal courts we have a unitary system;²⁰⁵ there is no defect of power to provide a complete solution to these problems. In Section 1404(a) Congress has provided the effective means for dealing with place of trial, supplanting the awkward expedient of *forum non conveniens*. In that section it has also, I believe, empowered the federal courts, as a necessary incident of determining the place of trial, to deal completely and effectively with choice of law. There is no room, in such a system and with such implementing legislation, for makeshifts and partial solutions, nor for

²⁰⁴ Pennell v. Roy, 3 De G. M. & G. 126, 139, 43 Eng. Rep. 50, 55-56 (1853).

²⁰⁵ Prior to the enactment of Section 1404(a), the Court of Appeals for the Fifth Circuit, reversing the decision of a district court in Texas which enjoined the prosecution of an action in a district court in Delaware, said: "State courts have enjoined parties from litigating in another state in order to evade the laws of the first state; but federal district courts are within a single judicial system in which the error of one may be corrected by the ordinary processes of appeal to the United States Supreme Court." Tivoli Realty, Inc. v. Interstate Circuit, Inc., 167 F. 2d 155, 156 (C.A. 5th, 1948).

the slogans which were invented to justify them. In the interstate situation, where there is no supreme authority to determine the appropriate forum or the properly applicable law, defendants may seek to shelter themselves from suit except in favorable forums, and plaintiffs may counter by maneuvering actions into forums favorable to them; and who is to say that success on either hand is inequitable or unconscionable? Courts may invoke the language of chancery to justify their halting efforts to deal with a problem which they have no power to deal with directly and comprehensively; but when they are given full power to deal with the problem, it would be absurd to construct, from the discarded pieces of the makeshift apparatus, a "right" of the plaintiff to the law of a forum which he could not formerly have been prevented from choosing. The question always has been: Where should the case be tried, and what law should govern? Where there is power to give a direct answer, a direct answer should be given. An argument which deduces from the "right" of the plaintiff to file suit in a particular forum a right to retain the advantages offered by that forum's law can find support only in a sentimental bias for plaintiffs in the struggle between the parties for position. Aside from the fact that such a bias is proscribed by Section 1404(a), it is strangely out of place in the context of recent developments which greatly improve the tactical position of plaintiffs.²⁰⁶ The only unbiased solution is to be found in rational principles of conflict of laws, just as the solution concerning the geographical convenience of the place of trial is found in the exercise of a just discretion.²⁰⁷

3. *Interpleader*. If we consider how Section 1404(a) will operate in

²⁰⁶ For a summary which is by no means complete, see Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217, 1220 et seq. (1930). Among the more recent developments which might be added, two which have special relevance are: (1) the 1948 revision of the general venue statute as it relates to corporations, 28 U.S.C.A. § 1391(c) (1950); and (2) Section 1406(a), which apparently enables a plaintiff, who cannot serve process in a district where venue is proper, to sue where he can get service, whereupon the case may be transferred to the proper venue for trial.

²⁰⁷ In *Reynolds v. Baltimore & Ohio R. Co.*, 185 F. 2d 27 (C.A. 7th, 1950), an action arising out of a grade-crossing collision in Indiana had been transferred from Illinois to Indiana. The court of appeals said: "Since federal jurisdiction in this case depends on diversity of citizenship, we must decide it in accordance with the law of Indiana. Under that law, plaintiff as a prerequisite to recovery is required to show that at the time and place of the accident he was in the exercise of due care and caution for his own safety, or in other words, that he was free from negligence which contributed to cause the accident." The implication that the law of the transferee state applies after transfer is weak, since there is nothing to indicate that the Illinois conflict-of-laws rule would not similarly have pointed to Indiana law.

statutory interpleader cases,²⁰⁸ we shall put all theories as to the effect of transfer upon the applicable law to a severe test. In *Griffin v. McCoach*,²⁰⁹ the administrator of a deceased citizen of Texas sued in a district court in that state to recover the proceeds of a New York contract of insurance on the life of the decedent. Because of the claims of the beneficiaries and their assignees, the insurance company countered with a bill of interpleader, making these adverse claimants parties. Under the law of Texas, the holder of a life insurance policy could recover only if he had an insurable interest; and the assignees of the beneficiaries here had no interest in the life of the deceased. The Texas rule had been elevated by the courts of that state to the level of a public policy which prohibited recovery, at least where the deceased was a citizen of Texas, even though the contract of insurance might be valid according to a foreign law which would otherwise govern. The Supreme Court's decision was that the district court in Texas must follow the conflict-of-laws rules of that state, so long as they do not operate unconstitutionally, and that there was nothing unconstitutional in the application of the Texas policy to this New York contract. The result was that the administrator recovered the share of the assignees in the proceeds.²¹⁰

The decision has been roundly criticized.²¹¹ The circumstance which has stimulated the sharpest criticism is the peculiarly fortuitous effect of the place of trial on the result: the administrator having seized the initiative by suing in Texas, the company responded by filing its bill

²⁰⁸ 28 U.S.C.A. §§ 1335, 1397 (1950).

²⁰⁹ 313 U.S. 498 (1941), rev'g *Griffin v. McCoach*, 116 F. 2d 261 (C.A. 5th, 1941).

²¹⁰ *Griffin v. McCoach*, 123 F. 2d 550 (C.A. 5th, 1941); cert. denied, 316 U.S. 683 (1942).

²¹¹ Professor Crosskey's criticism [2 Crosskey, *Politics and the Constitution in the History of the United States* 930 et seq. (1953)] is based ultimately on his theory of the supremacy of the federal courts, which rejects the Erie decision; but he notes that *Griffin* does not necessarily result from Erie, nor even from *Klaxon*. Professor Cook's position was that Erie, which he did not reject, should not have been extended to conflict-of-laws rules; he also recognized that the interpleader problem was a special case. Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. V (1949). Judge Clark, no enthusiast for the Erie doctrine, especially regretted the extension of the doctrine to questions of conflict of laws, and used *Griffin* to illustrate his point. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267, 285 et seq. (1946). Professor Hart, who opposes the extension of Erie to conflict-of-laws rules [Hart, *The Relations between State and Federal Law*, 54 Col. L. Rev. 489 (1954)], appears to agree with Professor Freund [Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1236 n. 62 (1946)], that the interpleader case may be one for independent federal choice of law even if *Klaxon* is accepted. Hart & Wechsler, *The Federal Courts and the Federal System* 636 (1953).

of interpleader in the same court; if the assignees had sued first, and in New York, the company presumably would have responded similarly there, and the result would have been in their favor. It is not even the initiative of the adverse claimants, but the action taken by the company—a presumably disinterested stakeholder—which is determinative; for, of course, the company could have instituted its bill in either district, in the absence of actions filed by the claimants, or notwithstanding them.²¹² Section 1404(a) is certain to revive and strengthen discontent with such a situation. When there is no help for it, we perforce accept the fact that the law governing the rights of the adverse claimants among themselves is determined by the heedless, or biased, or possibly collusive choice of the forum by a third person, having no interest in the place of trial proper nor in the result. What shall we say, however, now that Congress has provided that any civil action may be transferred to any other district in which it might have been brought, for the convenience of parties and witnesses, and in the interest of justice?

On the premise that the law of the transferee forum applies after transfer, Texas policy would be defeated by transfer to New York, despite intimations that in the eyes of the Texas courts the policy is one of safeguarding the lives of Texas citizens.²¹³ If the action is filed in New York and transferred to Texas, the consequent submission to that state's "universal cynic fear"²¹⁴ would be harder to suffer than the well-nigh insufferable submission to it in the actual case.

On the premise that transfer has no effect on the applicable law, Texas policy would continue to rule the case after transfer to New York, despite Professor Cook's argument that that policy is, or can reasonably be, only one of refusing the aid of the courts of Texas in the enforcement of the contract.²¹⁵ Such a result would mean that Texas policy closes the doors not only of federal courts in Texas but also of federal courts in New York; and this in the face of the fact that the assignees not only did not seek the Texas forum, but by hypothesis have actually succeeded in showing that that forum is inappropriate. On the other hand, if the action is begun in New York and transferred

²¹² 62 Stat. 931 (1948), 28 U.S.C.A. § 1335 (1950); 62 Stat. 936 (1948), 28 U.S.C.A. § 1397 (1950).

²¹³ *Griffin v. McCoach*, 123 F. 2d 550, 551 (C.A. 5th, 1941).

²¹⁴ *Grigsby v. Russell*, 222 U.S. 149, 155-56 (1911).

²¹⁵ Cook, *op. cit. supra* note 211, at 129-30. See also Morgan, *The Choice of Law Governing Proof*, 58 Harv. L. Rev. 153, 157 n. 8 (1944).

to Texas, this premise yields a result which frustrates the minimum Texas policy, if we accept and apply the principle of *Griffin v. McCoach* and *Angel v. Bullington*,²¹⁶ that such state policies extend to the federal courts sitting in the state.

The third tentative solution is helpless in this situation. The formula offered by that solution is: Look to the rule of the state of filing on *forum non conveniens*; if under that rule the state court would dismiss, the law of the transferee state will govern; if not, the law of the state of original filing continues to control. But it may safely be said that no state would dismiss, on grounds of *forum non conveniens*, an action such as might be brought in either of the two states involved by either of the adverse claimants.²¹⁷ In the end, therefore, the third approach produces the same results as the second: continued application of the law of the state of filing. The basic difficulty, however, is that the desire for scrupulous conformity to the result which the state court would reach is completely incongruous in the interpleader situation. As Professor Crosskey has pointed out,²¹⁸ the ideal of conformity to the state result is illusory, because the interpleader action could not, apart from unforeseeable accident, be maintained in a state court at all. But the matter may be put more strongly: the statutory interpleader scheme unmistakably proclaims a deliberate congressional purpose to bring about a result *different* from that which would be reached in the courts of the states. The purpose was to avoid results like that in *New York Life Ins. Co. v. Dunlevy*,²¹⁹ in which the insurance company suffered double liability in consequence of successful actions by adverse claimants in the courts of Pennsylvania and California, respectively. But for the interpleader act, the administrator in the *Griffin* case would presumably have recovered in Texas; and the assignees would also have recovered in New York. Nothing in federal law requires conformity to that total result; on the contrary, the interpleader act recognizes the evil and invokes national power to uproot it. Such a result would have been possible for two reasons: (1) lack of power in the state court to

²¹⁶ 330 U.S. 183 (1947).

²¹⁷ Of course, a state normally lacks power to provide relief by interpleader when one of the claimants is a nonresident; so the state law on the application of *forum non conveniens* to such an action is likely to be hard to find. But the doctrine would hardly be applied to any procedural device for the enforcement of a contract claim against an insurance company doing business in the state, as against the adverse claim of a non-resident.

²¹⁸ 2 Crosskey, *op. cit.* *supra* note 211, at 931.

²¹⁹ 241 U.S. 518 (1916).

bind the nonresident claimant, stemming from limitations on the reach of its process; and (2) the difference between the law of New York and that of Texas.²²⁰ No one will argue with the obvious proposition that Congress intended to remove the first condition by making nationwide process available. One would have supposed that Congress might have intended, while it was about it, to deal with the problem comprehensively, and to enable the federal courts to determine also the law which should govern the rights of the claimants. But *Griffin v. McCoach* tells us that this was not the case; Congress did no more than the minimum which was required to avoid double liability, and was content to leave the applicable law to be determined by the chances of venue.²²¹ To many, this has seemed an unsatisfactory interpretation. Now, Congress has acted again, and has empowered the federal courts to change the venue for convenience and in the interest of justice. The courts now have complete power to deal with the problem comprehensively, from the standpoint of the reach of process and from the standpoint of the governing law as well. Now that the power exists, can there be any further excuse for failing to use it in the most intelligent and effective manner?

Under the solution proposed in this paper, an important question is whether the federal court's independent choice of the governing law is to be made on conflict-of-laws principles or in terms of the language of "inequitable advantage" drawn from *forum non conveniens* precedents. The answer in this case is clear. Since the forum is chosen by the stakeholder, who is disinterested so far as the rights of the claimants as between themselves are concerned, the concept of a "venue privilege" as giving a preferred position to one of the adversaries loses whatever meaning it may have in other contexts. There can be no possible basis for determining that one claimant has a better right to the

²²⁰ In the generalized case, double liability could result without a difference of law, as where there is a failure of proof in one state. But the difference in law makes double liability inevitable if the facts are fully proved.

²²¹ This is a somewhat inaccurate way of putting it; but the mode of expression serves to emphasize the incongruity of the Court's position. Since the Interpleader Act [49 Stat. 1096 (1936)] was passed before the *Erie* case was decided, Congress presumably contemplated that questions of general jurisprudence would be determined according to federal common law. Perhaps it was necessary to hold that this congressional intention must yield to the supervening logic of the *Erie* case, for the sake of consistency in establishing the states as the sources of municipal law. But when the Court went farther, and deprived the federal courts of the power to determine *which* state law should apply, it disabled them to deal with the second of the two conditions which gave rise to the act, and thus frustrated what amounted to a comprehensive congressional plan for dealing with both conditions.

law of Texas than his opponent has to the law of New York—except in terms of conflict-of-laws principles. The remaining question, with which we need not be concerned, is what answer would result from the application of such principles. It is necessary here only to observe that the question is whether Texas policy must yield to the law of New York, which concededly is the proper law apart from the policy question. Nothing would be more appropriate than to have that question resolved by the federal courts.

Before Section 1404(a) was enacted, Professor Braucher foresaw that it would force the federal courts to make an independent choice of law in the interpleader case:

A more sympathetic interpretation of the proposed statute would start with recognition that one of the legitimate objectives of the doctrine of *forum non conveniens* is to avoid the need to "untangle problems in conflict of laws." Then, when other factors pointed to the propriety of a transfer, it would be frankly recognized that "the interest of justice" should be determined by federal standards, which would include an independent judgment concerning the propriety of defeating one state's policy and applying another's. . . . [T]he federal courts might be established as arbiters of conflicting state interests to an extent that would do much to bring order out of present chaos in the field of conflict of laws.²²²

Essentially, the Supreme Court's position in the *Griffin* case is one of aloof detachment: if it so happens, by the choice of one party or another, that the case arises in Texas, the Court will not prevent the application of Texas law; or, if it happens to arise in New York, the Court will not prevent the application of New York law. It will not say affirmatively which should govern. Such an attitude can hardly survive the impact of Section 1404(a), which makes the federal court itself the final arbiter of the choice of forum. The question which the Constitution does not answer as between the two systems of state courts must be answered when an order of a federal court itself is among the conditions of the problem. Section 1404(a) will inevitably force a reconsideration of *Griffin v. McCoach*, with the probable result

²²² Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 937 (1947). However, Professor Braucher seems to have assumed that transfer necessarily entails the application of the transferee state's law, so that the court's determination must be implemented solely by a decision to transfer or not: "Thus, in our hypothetical case, the federal court might properly decide that the connection of New York with the insurance policy in dispute made the application of New York law at least as appropriate as that of Texas law, and hence that the frustration of Texas law was an insufficient reason for refusing to transfer." *Ibid.* (italics supplied). This explains the otherwise puzzling reference to avoiding conflict-of-laws problems. Of course, the solution proposed in this paper will require federal courts to enlarge their contribution to the development of conflict-of-laws principles.

that, at least in connection with transfers, the federal courts will determine the applicable law for themselves. Such a development will not necessarily, of itself, demonstrate the soundness of the general solution advanced in this paper; it could take the form simply of a modification of the *Griffin* case, leaving the doctrine of *Klaxon*²²³ intact for cases other than interpleader. But the impregnable line of "conformity" will have been breached, and the necessity for similar independence in less dramatic situations will show itself in due course.

4. *Change of venue and full faith and credit.* The *Gulf* decision announced a national policy confirming and approving the discretionary power of a district court to decline jurisdiction of an action which might more appropriately be brought elsewhere. Section 1404(a) gave this policy congressional sanction while moderating its effect through the substitution of transfer for dismissal. During the preceding decade, the Supreme Court had been diligently building a policy directed to uniformity of result as between the courts of a state and the federal courts within the state. Full and effective administration of the new policy of flexibility with respect to the place of trial involves a degree of conflict with the older policy; hence the problems which we have been discussing. The thesis of this paper is that those problems should be resolved in favor of full and effective administration of the new policy, with the result that there must be some sacrifice of the ideal of uniformity within the state. Another characteristic of the setting into which the new policy has been injected is the ideal of uniformity of result from state to state, adumbrated in the full faith and credit clause, and recently given new recognition by the Supreme Court. This ideal has been expressed in the specific form of an obligation resting upon the courts of a state, and extending to the federal courts therein, to entertain certain foreign statutory causes of action notwithstanding the conviction that the case might be more appropriately brought elsewhere. When all of these elements are brought together in a single case, conflicts are bound to arise, and the situation will provide a further critical test for any theory as to the effect of transfer on the law to be applied.

In October 1947, a United Air Lines plane crashed at Bryce Canyon, Utah, bringing death to John Louis Nelson, of Chicago. His executor, a Chicago bank, sued in the United States District Court for the Northern District of Illinois (the defendant being a Delaware corpo-

²²³ *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

ration with its principal office in Chicago), claiming damages under the Utah wrongful death statute. An Illinois statute provided

. . . that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of the State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.²²⁴

United had registered process agents in Utah. The district court held that the Illinois statute deprived it of jurisdiction. The court of appeals affirmed.²²⁵ The Supreme Court reversed, holding that its earlier decision in *Hughes v. Fetter*²²⁶ was indistinguishable,²²⁷ and that the full faith and credit clause invalidated the Illinois statute. By force of the Constitution, Illinois courts must entertain the action, and so, by force of the implementing statute²²⁸ and the *Erie* doctrine, must the federal courts in Illinois.

Now suppose that, upon remand to the district court, the defendant moves under Section 1404(a) for transfer to the district court in Utah.²²⁹ The problem has many facets, but the one most pertinent to the present discussion has to do with the implications of this operation of the full faith and credit clause for the question of the law to be applied after transfer. As we have seen, arguments that the plaintiff should be permitted to retain advantages found in the law of the chosen forum, predicated on his "right" to sue in that forum, ordinarily break down because the supposed right turns out to be a mere self-serving assumption. Here, however, the plaintiff can cite the Supreme Court's decision in support of the proposition that he has a *constitutional* right to an Illinois forum. If we assume that the action is subject to transfer,²³⁰ does this mean that the Utah district court

²²⁴ Ill. Rev. Stat. (1953) c. 70, § 2.

²²⁵ *First National Bank of Chicago v. United Air Lines*, 190 F. 2d 493 (C.A. 7th, 1951).
²²⁶ 341 U.S. 609 (1951).

²²⁷ *First National Bank v. United Air Lines*, 342 U.S. 396 (1952).

²²⁸ 28 U.S.C.A. § 1738 (1950).

²²⁹ In fact, a motion for transfer had been made on the original appearance of the case in the district court. It was made by the plaintiff, in reliance on Section 1406(a); it was denied in part because that section applies only where venue is wrongly laid (there being nothing wrong with the venue in this action), but primarily because lack of power to transfer was a consequence of the court's holding that it had no jurisdiction. *First National Bank of Chicago v. United Air Lines*, 190 F. 2d 493, 496 (C.A. 7th, 1951). After the Supreme Court's decision, no motion for transfer was made; the case was settled. Letter dated August 20, 1954, from Charles M. Rush, Esq., of Kirkland, Fleming, Green, Martin & Ellis, Chicago, in the University of Chicago Law School Library.

²³⁰ Conceivably, this collision of policies might be avoided by a decision that such a case is not transferable. This could take the form of a holding that the case would not

must apply the law which would have been applied by the district court in Illinois? That would be an absurdly incongruous result. The very basis of the *United Air Lines* decision is "the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states. . . ." ²³¹ Can a national policy designed to make the result in Illinois conform as nearly as may be to that which would be reached in Utah become an instrument for changing the result which Utah would reach, even when the action is tried in Utah?

Yet it is reasonable to ask whether a transfer to Utah, on such

have been an appropriate one for dismissal under the doctrine of *forum non conveniens*, and hence is not within the scope of Section 1404(a). In *Hughes v. Fetter* the Court, expressly noncommittal about the effect of its decision on the doctrine, held that the facts of that case did not bring it within the doctrine. 341 U.S. 609, 612-13 (1951). The doctrine was not mentioned in the *United Air Lines* case; but it may be conceded that the contacts with Illinois made that somewhat less than a typical case for dismissal under the general doctrine. However, a limitation of Section 1404(a) to cases to which the doctrine would have been applicable would strip the new procedure of much of its usefulness; and the cases cited in note 124 *supra* give promise that no such narrow interpretation will be adopted.

On the other hand, such a decision might take the form of a holding that no case is transferable if, under the rule of the *Hughes* and *United Air Lines* cases, the state of filing must provide a forum. Such a holding would require that Section 1404(a) be qualified where it speaks with emphatic generality. Cf. *Ex parte Collett*, 337 U.S. 55 (1949). The scope of full faith and credit to foreign causes of action being spectacularly unsettled, the resulting problems of interpretation would throw administration of the section into hopeless confusion. If the question were of constitutional proportions, those problems could not be avoided. But the obligation of a federal court to extend faith and credit to the public acts, records and judicial proceedings of another state stems not from the Constitution but from the act of Congress [62 Stat. 947 (1948), 28 U.S.C.A. § 1738 (1950); see *Davis v. Davis*, 305 U.S. 32, 40 (1938); *Moore & Oglebay*, *The Supreme Court and Full Faith and Credit*, 29 Va. L. Rev. 557, 561 et seq. (1943)]; moreover, Congress has power to prescribe the effect of recognition. U. S. Const. Art. IV, § 1. The problem, therefore, is at most one of conflict between Section 1404(a) and Section 1738 of the Judicial Code. That conflict should be resolved by giving Section 1404(a) its unrestricted meaning, thus preserving its intended generality and avoiding quagmires in its administration.

²³¹ *Hughes v. Fetter*, 341 U.S. 609, 612 (1951). A thorny problem lurks here, witnessed by the tenth footnote to the majority opinion, which disclaims any purpose on the part of the Court to inject itself into problems of choice of law. See Reese, *Full Faith and Credit to Statutes*, 19 U. of Chi. L. Rev. 339, 345 (1952). But how can Illinois give full faith and credit to the public acts of Utah if it refuses to apply them? "The requirement of full faith and credit to 'public acts,' *i.e.*, statutes, means full faith and credit to private rights arising from them." Cheatham, *Federal Control of Conflict of Laws*, 6 Vand. L. Rev. 581, 585 (1953). That the command of the full faith and credit clause is a command to apply the law of the foreign state, at least where there is no legitimate basis for a claim that some other law should control, is implicit in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), holding that the command does not extend to parts of the foreign law which have been traditionally treated as "procedural."

terms that Utah law would thereafter govern in all respects, would not take away from the plaintiff the victory he won in *United Air Lines*. If such a transfer is possible, what is the meaning of the holding that Illinois, and the district court in Illinois, may not disclaim jurisdiction? The direct answer is that Section 1404(a) was not before the court in this context, and its interaction with the principle of full faith and credit was not considered. The judgment reversed was a judgment of dismissal, not an order of transfer. But when the question is squarely presented, the answer must be, I think, that the obligation of the district court in Illinois to entertain the action, established by Section 1738 of the Judicial Code, is modified by Section 1404(a) of the same Code. Even so, the principle of full faith and credit enunciated in the *United Air Lines* case remains meaningful. It means:

(1) That a state court may not refuse to take jurisdiction, but must provide a forum;

(2) That a United States district court may not refuse to take jurisdiction; but it need not provide a forum for trial, if transfer to another district is appropriate.

The result, in cases which are filed in the state court and are not removed, is that the plaintiff is not only protected against the harsh consequences of a wrong choice of forum, but is secured in the advantages he sought by filing there—including advantages of location and incidental benefits afforded by the *lex fori*. In the district court, the plaintiff is also protected against the consequences of a wrong choice of forum—a substantial consideration, in view of the differences between dismissal and transfer—but the appropriate place of trial will be determined by a consideration of all the factors rather than by his initiative, and the applicable law will be determined by reference to basic principles rather than by supposed necessities of the initial forum.

If this analysis is sound, it inexorably supports the view that Section 1404(a) cannot be administered on the principle of securing uniformity between the result in the district court and that which would have been reached in the courts of the state of filing.²³² The contem-

²³² Thus, if the action in the Wells case, barred in Pennsylvania, were transferred to Alabama, the *locus delicti*, it would not be barred. The fact that this result differs from that which a state court in Pennsylvania would reach does not impair its soundness. [Whether a plaintiff may move for transfer under Section 1404(a) is a question beyond the scope of this paper; but see *Quinn v. Simonds Abrasive Co.*, 199 F. 2d 416 (C.A. 3d, 1952).]

plated result in the district court satisfies the policy of full faith and credit, and at the same time serves the further policies of locating the place of trial most conveniently and of applying the most appropriate law, free from aberrations introduced by supposed exigencies of the initial forum. Such an arrangement might well satisfy also the requirements of full faith and credit as applied to state courts, but for the lack of power in those courts to transfer to another state. So long as that jurisdictional difference exists, conformity of result can be achieved only by yoking the courts with power to effect procedural reforms to those which lack the necessary power.

5. *Conclusion.* There remains to be considered a problem which has, with some difficulty, been suppressed until this point. The argument has been that problems relating to the law which will apply after transfer require that the federal courts exercise an independent judgment according to conflict-of-laws principles *in ordering a transfer*. Are these courts to have no control over choice of law where the motion to transfer is denied? It is not easy to argue that Section 1404(a) "requires" rejection of the state law as a rule of decision in such a case. That section comes into operation only when the court can make two distinct findings: (1) that a transfer is necessary for the convenience of parties and witnesses, and (2) that it is in the interest of justice.²³³ If the conditions for transfer do not exist, the question of its effect hardly arises. The argument for independent federal determination of the governing law rests largely on the necessity of finding a workable solution to the question of what law should apply after transfer, especially in view of the necessity to determine that transfer would be in the interest of justice. When there is to be no transfer, such questions do not, in strict logic, arise.

Situations may arise, however, which will subject such logic to great stress. Suppose a case in which the geographical elements of *forum non conveniens* are almost nonexistent, but in which the element of "inequitable" advantage in the law of the forum is very strong. Proceedings brought in order to evade the exemption laws of the debtor's domicile furnish a convenient illustration. Such proceedings are brought, ordinarily, at no great distance; the forum closest to home is, in fact, the preferable one, so long as a state line intervenes. At the same time, they constitute the most universally condemned kind of shopping for legal advantage. Injunction will usually issue to

²³³ Reviser's Note following 28 U.S.C.A. § 1404 (1950).

restrain the creditor, and his maintenance of the proceedings may subject him to liability for damages.²³⁴ We are to assume, on the basis of the foregoing argument, that if such proceedings were brought at a sufficient distance, the district court in which they were pending could transfer them to the home forum or elsewhere, on terms which would frustrate the inequitable purpose, irrespective of whether the local state courts would entertain the action. But what if the court in which the action is pending is just across a river from the home district? Already there are decisions holding that Section 1404(a) does not authorize transfers between points so located that the place of trial, from the standpoint of convenience, is a matter of indifference.²³⁵ If the federal courts develop a body of law and practice which deprives the plaintiff of an unconscionable advantage when the action is brought at such a distance as to warrant transfer, will they be content to let him keep that advantage when he sues conveniently close to home? If it is established that it is possible to avoid the result of *Griffin v. McCoach* in conjunction with a change of venue, will they be content to let that result stand merely because the place of trial is not geographically inconvenient? At the least, one may suspect that the courts will be tempted to search for an improbable burden on parties and witnesses in such situations, in order to justify the transfer by which alone they could effect the desired change of law.

Surely, if we do go so far as to concede to the federal courts power to make an independent choice of law in conjunction with transfer, it would be desirable to have that power extend to the case in which the motion to transfer is denied—and, indeed, to the case in which no motion for transfer is made. In short, this consideration of the problems of administering Section 1404(a) foreshadows the possibility that the rule of the *Klaxon* case may not survive, and that the federal courts will be freed of compulsion to follow state rules of conflict of laws.²³⁶ The results might well be salutary beyond any expectations

²³⁴ *Sweeney v. Hunter*, 145 Pa. 363 (1891). See also *Cole v. Cunningham*, 133 U.S. 107 (1890); Annotation, 122 A.S.R. 451 (1908); Pound, *The Progress of the Law*, 1918-19: Equity, 33 Harv. L. Rev. 420, 426-27 (1920).

²³⁵ *Jenkins v. Wilson Freight Forwarding Co.*, 104 F. Supp. 422 (S.D. N.Y., 1952); *Sherman v. Baltimore & Ohio R. Co.*, 122 F. Supp. 492 (W.D. Pa., 1954). Cf. *Amalgamated Ass'n v. Southern Bus Lines*, 172 F. 2d 946 (C.A. 5th, 1949); *Banachowski v. Atlantic Ref. Co.*, 84 F. Supp. 444 (S.D. N.Y., 1949); *Petition of Backman*, 122 F. Supp. 896 (D. Del., 1954). No question of difference of law was apparent in these cases.

²³⁶ Such a development would enable us to regard as merely transitional a cumbersome mechanical feature of the solution proposed in Part IV of this paper—the requirement that the judge passing on the motion determine the law which is to be applied after

arising from a modest provision for change of venue. There would be, in the view of some of the most thoughtful students of the subject, no violence done to the essential values of the *Erie* doctrine.²³⁷ Some disuniformity would be produced as between the district courts and the courts of the states in which they sit; but this would be compensated for by increased uniformity from state to state. And, in the end, the disparity of result within the state may be reduced to minor proportions, as the development of choice-of-law rules on federal principles tends to "a further constitutionalizing of conflict of laws doctrines."²³⁸ It is undoubtedly true that in the field of conflict of laws we are "hardly ready for a set of precepts imposed in the process of Supreme Court decision as fixed canons of constitutional law."²³⁹ However, the possibilities which are opened, quite surprisingly, by the implications of Section 1404(a) provide an opportunity for gradual development; and, if the federal judiciary, in fulfillment of our reasonable expectations, does gradually evolve more enlightened rules for choice of law, the prospect that those rules may attain constitutional status gives promise that progress toward the objectives of a rational system of conflict of laws will be given its maximum effect.

transfer. That provision is thought to be necessary, against the present background of the Klaxon rule, in order to prevent surprise resulting from unanticipated changes of law resulting from transfer, in order to enable the judge to determine whether transfer would be "in the interest of justice," and in order to enable the judge to know what the issues will be—for otherwise he cannot intelligently make a determination as to convenience of parties and witnesses. But against the background of a federal law of conflict of laws, these matters would diminish in importance, and the applicable law could be determined at the most appropriate stage of the litigation.

Professor Barrett has recently suggested that the exigencies of administering Section 1404(a) will require statutory abrogation of the Klaxon rule. *Venue and Service of Process in the Federal Courts*, 7 Vand. L. Rev. 608, 632 (1954).

²³⁷ Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 26-27 (1945); Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. V (1949); Hart, *The Relations between State and Federal Law*, 54 Col. L. Rev. 489, 513 (1954).

²³⁸ Hart, *op. cit. supra* note 237, at 541-42.

²³⁹ Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1236 (1946).