Factors of Choice for Venue Transfer under 28 U.S.C. 1404(a)

Yale M. Lyman
Comment

FACTORS OF CHOICE FOR VENUE TRANSFER UNDER 28 U.S.C. § 1404 (a)

In 1948, Congress incorporated a new proviso into its revised Judicial Code by adopting § 1404(a). It states:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Its purpose is to permit transfer to a more convenient forum even where the original venue is proper. No standards for measuring convenience are

---

2 Reviser's Note, 28 U.S.C. § 1404(a) (Supp. 1951). The note also stated the need for § 1404(a): "As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kerper, 1941... 314 U.S. 44, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio."

Generally, see Kaufman, Observations on Transfers Under Section 1404(a) of the New Judicial Code, 10 F.R.D. 595 (1951); Keeffe, Venue and Removal Jokers in the New Federal Judicial Code, 38 Va. L. Rev. 569 (1952); Cameron, Forum Non Conveniens, 23 Miss. L.J. 11 (1951); Notes, 44 ILL. L. REV. 75 (1949), 35 CORNELL L.Q. 459 (1950), 48 MICH. L. REV. 366 (1950). On the effect of 1404(a) on diversity jurisdiction, see Note, 49 MICH. L. REV. 760 (1951); as applicable to anti-trust cases see Note, 50 MICH. L. REV. 345 (1951); on its effect on non-resident motorist statutes, see Notes, 4 VAND. L. REV. 698 (1951), 24 So. CALIF. L. REV.
prescribed in the statute, and the only clue found in the oft-quoted reviser's note is the statement, "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens."3

The federal courts have used 1404(a) as a device for securing to litigants that forum in the federal judiciary most convenient for the greatest number of parties and witnesses and most conducive to the full attainment of justice. Convenience to court and counsel has been shown to be immaterial; the interests of litigants and witnesses are paramount.4

Ascertainment of the proper forum is accomplished by an evaluation of the particular factors in each case, and is not the product of any rigid formula based on residence, or the location of the greatest number of witnesses, or the scene of the incident. The use of 1404(a) has not been limited to any particular causes of action; but has been extended to almost all types,5 including those for tort,6 unfair competition,7 copyright and patent infringement,8 breach of contract,9 protection of stockholders' rights,10 admiralty,11 enforcement of suretyship,12 and is available whether original venue was predicated upon diversity of citizenship13 or special venue statutes such as those applicable to suits for patent infringement,14 unfair

498 (1951), 3 STAN. L. REV. 347 (1951); in relation to the Federal Employers' Liability Act, see Hobson, Forum Non Conveniens Under the United States Judicial Code, 8 WASH. & LEE L. REV. 29 (1951), Note, 35 CORNELL L.Q. 459 (1950); as to its availability to plaintiffs, see Notes, 60 YALE L.J. 183 (1951), 63 HARV. L. REV. 708 (1950), 45 ILL. L. REV. 676 (1950); of limitations on transfer, see Note, 64 HARV. L. REV. 1347 (1951); as to judicial review of 1404(a) decisions, see Note, 39 VA. L. REV. 105 (1953). Cf. Stevens, Venue Statutes: Diagnosis and Proposed Cure, 49 MICH. L. REV. 307 (1951).

3 Supra note 2; cf. 3 MOORE'S FED. PRACTICE 2141 (2d ed. 1948): "[1404(a)] adopts the principle of forum non conveniens, but provides for a transfer, not dismissal, or any action to a proper and more convenient forum."


4 See text, Convenience to the Court, infra.

5 1404(a) does not apply to the Federal Food Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.; 28 U.S.C. § 1395 (Supp. 1951), requires condemnation actions to be brought where the article is found. Clinton Foods v. United States, 188 F.2d 289 (4th Cir. 1951).

6 E.g., Nicol v. Koscinski, 188 F.2d 537 (6th Cir. 1951); Headrick v. Atchison, T. & S.F. Ry., 182 F.2d 305 (10th Cir. 1950); Christopher v. American News Co., 176 F.2d 11 (7th Cir. 1949).


13 Cases cited notes 6, 9, 10, 12 supra.

This treatment of 1404(a) is indicative of the development of a new federal doctrine of forum non conveniens. The new doctrine was born in 1947, with the Supreme Court decision in *Gulf Oil Corporation v. Gilbert*, but until passage of 1404(a), only the remedy of dismissal was granted for cases initiated at inconvenient forums. Section 1404(a) made transfer available, but whether that is now the exclusive remedy is not clear; the question has been answered in both the negative and the affirmative by the federal courts.

Decisions under 1404(a) indicate a marked difference between the new federal doctrine and its counterpart in the state courts. When selecting the most convenient forum, most state courts weigh convenience to the court and to the parties, and of the two many seem to consider convenience to the court the more important. This desire to lighten the burden on the courts is reflected in the rigid criteria, based primarily on residence, which justify the exercise of discretion to decline jurisdiction.

With a different attitude evident in the federal decisions under 1404(a), and in the absence of an established body of authority in the criteria appropriate to this new attitude, it is important to examine the elements which the federal courts regard as factors of choice in the exercise of discretion to transfer.

### Residence

Indicative of a clear break with the doctrine of forum non conveniens as it operates in many state courts is the fact that the legal residence of the parties, when considered independently of their actual residence and their

---

It would seem that dismissal is still available when the proper forum is in a foreign nation. See *The Balgenland*, 114 U.S. 355 (1885); *Coffey, Jurisdiction Over Foreigners in Admiralty Courts*, 13 CAlex. L. Rev. 93 (1925); Bickel, *supra* note 3.
21 For complete coverage of the doctrine of forum non conveniens in the state courts see *Barrett, supra* note 3.
22 Barrett, *supra* note 3 at 48.
availability as witnesses, does not determine the most convenient forum under 1404(a).

The fact that neither the cases retained or transferred conform to any particular residence pattern appears to substantiate this view. Where the location of evidentiary factors, e.g., witnesses and records, indicated that the original forum was best suited for trial of the merits, jurisdiction has been retained, regardless of whether plaintiff, defendant, or neither litigant was a resident. (Many state courts dismiss automatically when neither litigant is a resident.) Where transfer has been desirable, it has been ordered to any district of proper venue where D was subject to or consents to service of process, without regard to legal residence.

See text, Availability of Witnesses, infra.

Compare the residence pattern developed by the New York courts. See Barrett, supra note 3 at 410; cf. Braucher, supra note 3 at 916.


See Barrett, supra note 3, at 410.


However, D can obtain a transfer to a forum where he was not subject to service of process, under the theory that his motion to transfer is a waiver of venue. Paramount Pictures v. Rodney, supra note 7; Tivoli Realty v. Paramount Pictures, 103 F. Supp. 174 (D. Del. 1951).


Transfers to D's residence from forum where neither litigant was a resident: Anthony v. Kaufman, 193 F.2d 83 (2d Cir. 1951), cert. denied, 342 U.S. 955 (1952); Ortiz v. Union Oil Co. of California, supra note 17.

Transfers to forum where neither litigant was legal resident from forum where neither litigant was a legal resident: Arrowhead Co. v. The Aimee Lykes, supra note 9; Aircraft Marine Products v. Burndy Engineering Co., supra note 8.
The assignment of minimal significance to legal residence is a logical result of the purposes for which 1404(a) was adopted, for legal residence, independent of actual residence and the location of evidentiary material, has little relation to the convenience of parties and witnesses. Actual residence, however, is a significant element of choice. It provides an apparent standard for measuring “convenience of the parties,” but is applied in practice in terms of expediting the trial on the merits. Thus where a party was a key witness, or had in his possession important records and documents, or was required personally to direct the litigation, his physical location has been an important, and sometimes determinative, element of choice.

Availability of Witnesses

The availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses are very important, and often determinative, in the exercise of discretion to transfer. However, an extremely difficult problem is presented in the application of a common standard to the availability of witnesses.

During the early history of the statute, litigants seemed to think that the one boasting the largest docket of prospective witnesses would triumph, but this theory was quickly squelched. “District judges must be able to slice through the mass of affidavits presented and identify key witnesses in determining the most convenient forum.”

The present practice is for each party to present affidavits in which he lists his prospective witnesses by name and residence, specifies his key witnesses, indicates why he so regards them and gives a capsule account of the testimony of each. The district judge then evaluates the affidavits, and de-

---

36 See Gulf Oil Corp. v. Gilbert, supra note 18 at 508.
38 “Opponents strive mightily to outdo each other in the total number of indispensable witnesses they must call in the desired district.” Federal Electric Products Co. v. Frank Adam Electric Co., supra note 32 at 12; In Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., supra note 8; P pitted “over 250” witnesses against D’s 106. See Kaufman, supra note 2.
termines which witnesses are redundant\textsuperscript{41} or unimportant,\textsuperscript{42} which could just as effectively testify by deposition,\textsuperscript{43} and which are crucial.\textsuperscript{44} Obviously the facts disclosed by the affidavits control the decision, and a litigant who fails to submit sufficient detailed information is very apt to find himself in what he considers an unfortunate forum.\textsuperscript{45}

The key witnesses are usually determined by the nature of the case as disclosed by the pleadings, for they are those whose personal testimony and subjection to cross examination on the central issue are essential in order that justice be done.\textsuperscript{46}

To identify key witnesses, the courts presume correlations to exist between particular issues and particular types of witnesses: Patent infringement with witnesses as to design, testing, manufacturing and sales;\textsuperscript{47} trademark litigation with witnesses on use, marketing, and demonstration;\textsuperscript{48} negligence with eye witnesses,\textsuperscript{49} though some recognition has been granted assessors of damages;\textsuperscript{50} libel with author and publisher;\textsuperscript{51} breach of contract with those who were to perform;\textsuperscript{52} antitrust suits with intimates of business structure and conditions;\textsuperscript{53} stockholders’ derivative actions with corporate

\footnotesize


\textsuperscript{42} An example is Goodman v. Southern R., supra note 28, in which D listed an entire train crew as prospective witnesses. The court concluded that only the engineer could have seen the accident; the others could only testify to collateral events which were also known to the engineer.

\textsuperscript{43} Medical testimony is often regarded as susceptible to rendition by deposition. Nicol v. J. C. Penney, supra note 31; Cullinan v. N. Y. Cent. R., supra note 27; Chaffin v. Chesapeake & O. Ry., supra note 31; Richer v. Chicago, R. I. & Pac. R., supra note 31.

\textsuperscript{44} Generally, see Kaufman, supra note 2 at 607.

\textsuperscript{45} See the opinion in Jenkins v. Wilson Freight Forwarding Co., supra note 26, denying transfer to D who had merely turned in a list of possible witnesses. In First Nat. Bank of Boston v. Fidelity & Deposit Co. of Maryland, supra note 12, D desired to transfer to forum where it could obtain testimony on a set-off. The court refused, stating that D's affidavits had failed to set forth any details by which the importance of the set-off could be evaluated.

\textsuperscript{46} See the detailed analysis in Reade Shirts v. Commonwealth Ins. Co. of New York, supra note 32. See Atlantic Coast Line R. v. Davis, 185 F.2d 766 (5th Cir. 1950); Anthony v. RKO Radio Pictures, supra note 31.


\textsuperscript{48} Jerclaydon v. Hasid Products, supra note 1.


\textsuperscript{51} Christopher v. American News Co., supra note 6. Plagiarism, however, seems to require both the alleged authors and those who can verify their writings. Anthony v. RKO Radio Pictures, supra note 31.

\textsuperscript{52} Lehman v. Napier, supra note 9.

However, the presumptions are not conclusive, and a litigant is free to show in the affidavit supporting his choice of forum that the crucial issues and hence the key witnesses will differ from the usual pattern.

There are certain special considerations. Expert witnesses are accorded little weight, on the grounds that their testimony may be taken by deposition, or that they are presumed willing to travel as part of their employment, or that their technical knowledge can be found in other experts in other areas. Employees are presumed willing to testify without the necessity of subpoena, but attention will be given to allegations that their transportation would entail unreasonable hardship or expense. Specificity in his affidavit will enable the litigant to take advantage of the general presumptions or the special considerations.

Locations of Records and Documents

Where business records and documents are necessary as evidence, their location is sometimes an important factor in determining the most convenient forum. The protracted absence at a distant court of books in current use would produce a substantial hardship on a business. The transportation problem created by litigation, such as anti-trust actions, requiring voluminous records would be quite serious. Where removal of the records


65 In Brown v. Insurograph, supra note 27, D alleged that equitable estoppel and clean hands would be raised as affirmative defenses, and urged a transfer to the area where witnesses on these issues were available. The court included these witnesses as elements of choice, even though the affirmative defenses were not authorized by the pleadings. Similarly, another case indicated that witnesses on a set-off would be considered, provided that the relevance of this defense was demonstrated with sufficient detail in D's affidavit. See First National Bank of Boston v. Fidelity & Deposit Co. of Maryland, supra note 12.

66 Kaufman, supra note 2 at 606, agrees, but recommends that expert witnesses be accorded more weight where they have personal knowledge of the facts at issue.

67 This is often said of medical testimony. Illustrative are Cullinan v. N.Y. Cent. Ry., supra note 27; Scott v. New York Cent. R., supra note 31; Richer v. Chicago, R. I. & Pac. R., supra note 31.

68 Cases cited, supra note 8.


71 Kasper v. Union Pac. R., supra note 31; Nicol v. J. C. Penney Co., supra note 31; U.S. v. E. I. Du Pont De Nemours & Co., supra note 31; Johnson v. Baker, supra note 10. But cf. Ford Motor Co. v. Ryan, supra note 26 at 330, in which the court said, "We think there will be no great interference with the Ford business if Ford officials must come to New York from Detroit to testify...[T]he expense of telephoning and traveling will not be a very ponderable element in litigation of this magnitude." Compare Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., supra note 8, where the inconvenience of transporting 96 witnesses was not enough to induce transfer, with Nunn v. Chicago, Milwaukee, St. P. & P. R., supra note 31, in which D obtained a transfer by showing that it lacked direct rail lines to New York, and hence could not transport necessary witnesses to New York without assuming an unreasonable financial burden.

72 E.g., Ortiz v. Union Oil Co. of California, supra note 17; James v. American Pac. S.S. Co., supra note 17. In Dolly Toy Co. v. Bancroft-Rellim Corp., supra note 7 at 534, is an implication that D might have won a transfer had he mentioned in his affidavits the location and relevancy of his business records.
would have created an undue burden, for one reason or another, the situs of the records has been held the most convenient forum. However, the location of the records is not important unless transporting them would produce substantial hardship. Thus, transfer to the records was denied where the records had been copied (thereby avoiding their absence from the business), and where the distance between the original forum and their situs was short (allowing an inference that no substantial hardship would occur).

Financial Ability to Maintain Suit in Another Forum

The financial ability of each litigant to prosecute or defend his suit in another forum is a factor of some weight in the balancing of forums. In Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., P showed that its liquid asset position was weak, that transfer would impose a heavy financial burden upon it, and alleged that the increased costs would make litigation prohibitive. The court denied transfer, relying heavily on this factor. In another case, a transfer was ordered by a court which pointed out that forcing D to transport witnesses from New York to California was not necessary to P's right to pursue his remedy, and that though the cost of transport might not concern P, it did concern D.

However, the mere fact that one forum is financially more convenient than another will not carry the decision. The courts seem to require a showing by P that the additional costs occasioned by a distant forum would preclude further prosecution of the case, while Ds in similar circumstances must show substantial hindrance to a proper defense.

Transfers have been ordered in spite of alleged financial inability to litigate in a distant forum, the reasons seem to be based on failure adequately to support claims of insuperable financial obstacles. A litigant must clearly indicate both the increased cost a distant forum would impose, and the fact that he could not possibly meet this burden.

---

64 Ford Motor Co. v. Ryan, supra note 26.
65 In Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., supra note 8, the court said that the difficulties imposed were not out of proportion to the magnitude of the litigation.
66 Supra note 8.
67 Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., supra note 8, at 866.
69 In Kasper v. Union Pac. R., supra note 31, P sued in a district court of Pennsylvania on a California tort. They took the precaution of filing a complaint in California, but opposed transfer there, alleging financial inability to prosecute in such a distant forum. The court declared that the filing of the complaint in California indicated that P were able and willing to litigate there if necessary, and ordered a transfer.
72 In Scott v. New York Cent. R., supra note 31, P opposing transfer alleged that his union would investigate and prosecute his claim without charge in Chicago. The court nevertheless ordered a transfer stating that P had not proved that union representation would not be forthcoming in the transferee forum.
Consolidation of Actions in a Single Forum

D's desire to consolidate P's action with litigation on the same subject matter initiated by D in another forum will not of itself justify a transfer, nor is it a very strong argument for transfer. In the several cases in which the defendants have made such a contention, the courts have rejected consolidation per se as a substantial element of choice, and have proceeded to examine the relative convenience of the original and proposed forums in terms of location of witnesses, relative financial ability to litigate in a distant forum, and other evidentiary factors.73

However, D's argument for transfer is appreciably strengthened if P has, at the time of D's motion to transfer, already filed a complaint on the same subject matter in the transferee forum. P's action is interpreted to be an implicit recognition of the superiority of the transferee forum for a fair and just trial of the merits,74 and an indication that he is able and willing to try the case there if necessary.75

D's desire to transfer to a forum where it could join potential indemnifiers as third party defendants has been recognized as a factor of weight in one case.76

To allow the location of D's indemnifiers to become a significant element of choice would substantially increase the burden on plaintiffs attempting to sustain their choices of forum, for they would have to prove relative convenience not only between themselves and defendants, but also between themselves and defendants' indemnifiers. On the other hand, an attempt by D to transfer to a district where a set-off is available against P seems to be within the purposes of 1404(a), and has been recognized as a legitimate reason for a motion to transfer.77

View of the Locale

The contention that transfer should be ordered because a view of the area would be available to the jury in the proposed transferee forum has met with varied success in the district courts. Although two anti-trust actions under the Clayton and Sherman Acts were transferred by courts rely-

---

73 See Mazinski v. Dight, supra note 28 (transfer denied); Levenson v. Little, supra note 10 (transfer denied).
74 See Christopher v. American News Co., supra note 6, affirming transfer of a libel action to a forum where P already had a similar action pending against other Ds on the grounds that the other Ds would be the principal defendants in any trial of the action.
75 Kasper v. Union Pac. R., supra note 31; see Chaffin v. Chesapeake & O. Ry., supra note 31.
76 Nicol v. J. C. Penney Co., supra note 31; aff'd sub. nom, Nicol v. Koscinski, supra note 6. A defendant in a negligence action contended that transfer was desirable, inter alia, to enable it to bring in three other companies, against which it would have indemnity of lawsuits. Over P's objection that she was financially unable to prosecute the combined action in the transferee forum, the district court ordered a transfer, "convincing that the greater hardship would result to the defendant, under all the circumstances, if it be compelled to have the case tried here." Supra note 31 at 86.
77 See First National Bank of Boston v. Fidelity & Deposit Co. of Maryland, supra note 12 (transfer denied; D's affidavits set forth no details by which the importance of the set-off could be evaluated).
ing heavily on the fact that a view of the premises would be available, the general opinion seems to be that a view of the premises is usually of small import in ascertainment of the most convenient forum. Even in tort cases, 1404(a) decisions do not mention the factor, though a few courts have listed it among the elements considered in granting or denying transfer. In Mazinsky v. Dight, the court stated:

"This court has tried innumerable negligence cases, and it is the rare and unusual circumstance that such viewing is required. The introduction of photographs into evidence is generally sufficient to acquaint the jury with the locale of the accident."

The Public Interest

Section 1404(a) lists the "interest of justice," along with "the convenience of parties and witnesses," as a reason for which a district court may transfer any civil action to any other district or division where it might have been brought. One court has made an attempt to apply a substantive meaning to this phrase by defining the "interest of justice" as the public interest.

In two anti-trust actions under the Clayton and Sherman Acts, the District Court of Delaware found a public interest, "the interest of justice," in the litigation. In both actions, the gist of the complaints was that a conspiracy in restraint of trade prevented the Ps' theaters from obtaining quality first run films. Both decisions, by the same judge, ordered transfer. Both decisions were partially based on the belief that the interest of justice could be separated from the interests of parties and witnesses, and that in these cases the interest of justice was in some measure equivalent to the public interest of the community in the suitability and desirability of first run theaters. Thus "the interest of justice" was held in these cases to be most audible at the situs of the public interest which was its equivalent. On the other hand, the same district court was unable to find a separate "interest of justice," or public interest, in an action for a declaratory judgment on the validity of certain patents. The court found that federal law, rather than local, would control, and that no local coloring or question was involved.

It seems that until there is more extensive exploration of what constitutes that type of local controversy in which there is a local interest to have

---

78 Tivoli Realty Co. v. Paramount Pictures, supra note 30; Cinema Amusements v. Loew's, Inc., supra note 60. In both actions Ps alleged that their theaters were being deprived of first run quality films as part of a conspiracy in restraint of trade. The Ds contended that Ps theaters were of inferior quality and location. Both decisions, by the same judge, stated that a view of the theaters would help determine whether they had suitable equipment, appointments, convenience and desirability to be first run theaters.


80 Supra note 28 at 194.

81 Tivoli Realty Co. v. Paramount Pictures, supra note 30; Cinema Amusements v. Loew's Inc., supra note 60.

82 Brown v. Insurograph, supra note 27.
it decided at home, or of what constitutes the public interest, or of when the courts should become the arbiters of public interest, the "interest of justice" aspect of 1404(a) will remain, at most, a standard by which to evaluate evidentiary factors.\footnote{See text, Convenience to the Courts, infra, indicating that these words do not make the convenience of the court an element of choice.}

\section*{Attitude and Viewpoint of the District Court}

An argument in favor of a desired forum cannot be based on the grounds that differences in judicial attitude and viewpoint would cause different results in trial of the merits, for all federal district courts are assumed to be equally competent and just.\footnote{The impact of 1404(a) on the doctrine of Erie Railroad v. Tompkins, 304 U.S. 64 (1938), is not within the scope of this comment. See Headrick v. Atchison, T. & S.F. Ry., supra note 6; Kaufman, supra note 2 at 598; Keefe, supra note 2.} For example, in one case transfer was ordered after two mistrials because of the court's belief that a third trial would not result in a proper verdict. The Court of Appeals reversed, stating that the reasons given to support the order were wholly inadequate and insufficient to bring the order within § 1404(a).\footnote{Atlantic Coast Line R. v. Davis, supra note 46. See Aircraft Marine Products v. Burndy Engineering Co., supra note 8, (rejection of contention that attitude toward patents of New York and California Federal courts differed). See also Henderson v. America Airlines, 91 F. Supp. 191 (S.D.N.Y.1950), which was transferred to Kentucky on the assumption that federal judges, wherever sitting, would try the case in an unbiased and objective manner. See Kaufman, supra note 2 at 507.}

\section*{Plaintiff's Venue Privilege}

Plaintiff's venue privilege may be defined as the weight which is given in a 1404(a) decision to \(P\)'s choice of forum, independently of evidentiary factors.\footnote{See Ronson Art Metal Works v. Brown & Bigelow, supra note 20; Federal Electric Products Co. v. Frank Adam Electric Co., supra note 32; Mazinski v. Dight, supra note 23.} It is the answer to how much relative inconvenience \(D\) must show in order to obtain a transfer, and to how great a demonstration of convenience \(P\) must make to retain his original forum.

The language found in some opinions would seem to indicate that to obtain a transfer \(D\) must make a showing of substantial hardship. An oft-quoted statement from \textit{Gulf Oil Corp. v. Gilbert} is:\footnote{Supra note 18 at 508. More extreme statements are also found: "The doctrine of forum non conveniens requires the moving party to show a great deal more than merely that it would be more convenient to try the case in a different jurisdiction, but there must be a showing that the inconvenience amounts to actual hardship." Mazinski v. Dight, supra note 28 at 194.} "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

However, there have been far too many decisions ordering transfers after detailed argument as to location of witnesses and records, financial ability, etc., for \(P\) to simply rely upon judicial recognition of his prior choice of forum. The holdings of the cases appear to indicate that once evidentiary elements of choice are submitted to the courts, \(P\)'s choice of forum is usually accorded relatively little, if any, independent weight.\footnote{See text at notes 56-72, supra. But cf. Ronson Art. Metal Works v. Brown & Bigelow, supra note 20 (\(P\)'s time priority the determining factor).} "The ulti-
mate inquiry is where trial will best serve the convenience of the parties and the ends of justice. 89

Hence plaintiff's venue privilege operates as a rule of procedure and for allocation of the burden of proof. 90 The obligation is upon D to come forward with the initial demonstration of inconvenience. To retain his original forum, P must make a positive showing of convenience. If P can demonstrate that his chosen forum is at least equally as convenient as D's proposed transferee forum, transfer will be denied. 91

While there is no presumption that P's choice of forum is the more convenient, it is presumed that he made his choice in good faith. 92 It has always been recognized that forums selected with a design to "vex, harass, or oppress" the defendant will be vacated, 93 but such intent must be indicated with reasonable certainty by the defendant. 94 Whenever P's choice of forum has been distant from D, witnesses, records, and the scene of the transaction or incident, the defendant has been able to make a strong implication of bad faith on P's part, and obtain a transfer. 95

Convenience to the Court

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." 96

Thus spoke the Supreme Court immediately prior to 1404(a) on the relation of convenience to the court and the doctrine of forum non conveniens. 97

However, a striking demonstration of the novelty in the new federal doctrine of forum non conveniens based on 1404(a) is that inconvenience to the court appears to play no part in the exercise of discretion to transfer. 98 The most crowded district court in the nation, that of the Southern

90 "The principles and conclusions expressed in this opinion will not give the defendants a right to choose their forum, a privilege heretofore exercised at least to some degree by plaintiffs. On the contrary our decision puts in the hands of an impartial federal tribunal the determination as to where the suits can best be tried." Paramount Pictures v. Redney, supra note 7 at 116.
91 Compare the concurring opinion of Swan, J., with that of the court, per Frank, J., in Ford Motor Co. v. Ryan, supra note 26. Similarly, contrast the concurring opinion of Hicks, C. J., with that of the court in Nicol v. Koscinski, supra note 6.
93 See Dolly Toy Co. v. Bancroft-Rellim Corp., supra note 7; and Auburn Capitol Theatre Corp. v. Schine Chain Theatres, supra note 28.
94 Gulf Oil Corp. v. Gilbert, supra note 18 at 508.
95 D was successful in such a demonstration in Johnson v. Baker, supra note 10, in which a stockholders' derivative action for receivership of a Florida corporation brought in New York was shown to be part of an attempt to force favorable settlements of a labor dispute.
96 E.g., Aircraft Marine Products v. Burndy Engineering Co., supra note 8; Ortiz v. Union Oil Co. of California, supra note 17.
97 The federal view today is quite similar to that of the Scotch, as expressed by Lord Sumner in La Societe du Gaz de Paris v. La Societe Anonyme de Navigation "Les Armateurs francais," (1925) Sess. Cas. 332, (1926) Sess. Cas. H.L. 13, at 21, 22: "Obviously the Court
District of New York, \(^{98}\) has retained cases (some of which promised large expenditures of time and effort) \(^{99}\) without considering its own convenience in its ascertainment of the most suitable forum. \(^{100}\) A similar course has been followed by other burdened courts. \(^{101}\) On the other hand, cases have been transferred from current or relatively uncrowded dockets to overburdened courts which were more convenient for litigants and witnesses. \(^{102}\)

The language of some opinions seems to indicate that convenience to the court is indeed an important factor under 1404(a), but an analysis of the facts meriting transfer in these cases indicates that convenience to the court was really unimportant. One such decision was that of *Ortiz v. Union Oil Co. of California*, \(^{103}\) which has been criticized for laying great stress on the convenience of the court. \(^{104}\) The action was brought in New York under the Jones Act to recover damages for illness which *P* had suffered while a seaman on *D's* steamship. *P* had been a resident of California, and had joined and left the ship in San Francisco. The defendant was a California corporation, with its principal office in San Francisco. All special witnesses, including all the crew members and officers, \(^{105}\) were residents of Pacific Coast states. All pertinent records, logs, and documents were in San Francisco. *P's* only visible tie to New York appeared to be the fact that his attorney was located there. Clearly the most convenient forum for the presentation of evidence was the district court at San Francisco, and transfer was ordered. In its decision, the court made a detailed analysis of the burden.

cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French, as a ground for refusal, . . . The object under the words 'forum non conveniens' is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends." Cited in Barrett, supra note 3 at 407.

\(^{98}\) Of 60,362 cases pending in all districts on June 30, 1952, the Southern District of New York had 11,428. Of 1,072 cases which took more than two years from filing to disposition by trial, 213 were in the Southern District of New York (a greater concentration than any single circuit). The median interval for disposition of cases by trial there was 41.2 months, compared with 12.1 months for the other 86 districts. *Annual Report of the Director of the Administrative Office of the United States Courts* 122, Table C1 (1952).

\(^{99}\) See, e.g., *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, supra note 8 (litigants promised to present over 356 witnesses and court estimated they would take more than 6 months to try the case); *Auburn Capitol Theatre v. Schine Chain Theatres*, supra note 28 (large number of witnesses; great expenditure of time).


\(^{103}\) supra note 17.


\(^{105}\) Except one crewman from Minnesota.
den of cases at the two courts, but similar cases indicate that transfer would have been ordered on the basis of the evidential factors alone.\footnote{Transfers were ordered on the basis of similar evidentiary facts in Lynch v. Luchenbach S.S. Co., supra note 37; Arrowhead Co. v. The Aimee Lykes, supra note 11; James v. American Pac. S.S. Co., supra note 17; Le Mee v. Streckfus Steamers, supra note 17; Richer v. Chicago, R. I. & Pac. R., supra note 31; Chaffin v. Chesapeake & O. R., supra note 31; Scott v. New York Cent. R., supra note 31.}

A similar opinion was written in an anti-trust case, but again the quantitative and qualitative bulk of the witnesses, as well as all pertinent business records, were located in the transferee district.\footnote{United States v. E. I. Du Pont De Nemours & Co., supra note 31.} On similar facts, other anti-trust cases have been transferred without mentioning the convenience of the court.\footnote{See Tivoli Realty Co. v. Paramount Pictures, supra note 30; Cinema Amusements v. Loew's, Inc., supra note 60.} It can be safely assumed that the controlling factors in the decisions to retain or transfer are those relating to the full presentation of evidence.

However, the possibility of early trial as related to the convenience of litigants, witnesses, and other directly interested parties (and as differentiated from convenience to the court) is a factor of some weight in the exercise of discretion under § 1404(a).\footnote{E.g., in Levenson v. Little, supra note 10, the court had before it a motion to transfer a stockholders' derivative action to a forum where long delay would be encountered. The court stated that such litigation undermined faith in the management and injured the business, and should be speedily tried, and denied transfer.} Where P has shown that delay would be a hardship, and where rapid disposition of the case is available in the original forum, transfer has been denied.\footnote{See First Nat. Bank of Boston v. Fidelity & Deposit Co. of Maryland, supra note 12; Levenson v. Little, supra note 10; Brainard v. Atchison, T. & S.F. R., supra note 28.} Similarly, Ds have associated their convenience with quick dispatch of the case, and have obtained transfer to forums which offered a relatively current docket as well as other conveniences to parties and witnesses.\footnote{See Johnson v. Baker, supra note 10; Nunn v. Chicago, Milwaukee, St. P. & P. R., supra note 31; see also cases cited note 106 supra.}

Convenience of Counsel

The convenience of counsel has been held to be a factor without weight in selection of a convenient forum. His residence in the original forum has not prevented transfer,\footnote{See James v. American Pac. S.S. Co., supra note 17; Cinema Amusements v. Loew's, Inc., supra note 60; Scott v. New York Cent. R., supra note 31. In Henderson v. American Airlines, supra note 85 at 193, the court said: "Plaintiffs contend also that their counsel will be inconvenienced if the action is transferred. As this court has stated before, Section 1404(a) makes no provision for the convenience of counsel."} and the burden distant litigation would impose upon him has not induced transfer to a closer court.\footnote{See Mazinski v. Dight, supra note 28; Jenkins v. Wilson Freight Forwarding Co., supra note 26.} Even the hardship of obtaining new counsel in a distant forum does not influence a litigant's position.\footnote{Ibid.}
Limitations on Moving to Transfer Under 1404(a)

Lest motions to transfer under 1404(a) become a powerful weapon in the hands of defendants seeking to delay and thereby weaken their opponent's case, some limitations on raising the motion seem in order. But the statute provides none, and the courts have thus far failed to impose any. Only one case seems to have rested a denial of transfer squarely on the ground that the motion, made on the eve of trial, came too late.

An example of the possibilities for delay afforded by 1404(a) was demonstrated in the multiple defendant anti-trust action which culminated (as far as 1404(a) is concerned) in Tivoli Realty Co. v. Paramount Pictures. After plaintiff had commenced suit in Delaware, and had successfully parried an injunction against prosecution from a Texas District Court, he was met by a motion under 1404(a) to transfer to Texas. The District Court of Delaware denied the motion on the theory that defendants could not move to transfer to where they were not subject to service of process. The Third Circuit Court reversed on defendants' motion for a writ of mandamus, and ordered the district court to rehear the motion and exercise its discretion. The subsequent proceeding resulted in an order to transfer. More than four years after plaintiff had initiated suit he was entitled to prosecute the merits of his claim in a forum where originally he could not have served process on a number of the defendants.

It is universally agreed that transfer will not be ordered to a district where a judgment, if obtained, would be unenforceable. The logical corollary to this rule is found in Lehman v. Napier, where transfer was ordered to assure the enforceability of any judgment which might be rendered against the defendant partnership.

No limitation has been made against transfers to forums where affirmative defenses such as equitable estoppel and unclean hands are available. It would seem that the availability of such defenses constitute a positive factor in favor of a forum rather than a negative argument against it.

CONCLUSIONS

1404(a) has provided a means to facilitate disposition of cases on their merits. Properly applied, it will provide a federal forum which affords the
maximum convenience for the presentation of evidence. One element of strike suits and forced settlements can be eliminated, for no longer should it be possible for a plaintiff to bring suit in a distant, inconvenient, and vexatious forum. On the other hand, care must be exercised to prevent 1404(a) from becoming a tool of defendants attempting to delay or avoid payment of their obligations.

Refusal of the federal courts to make a fetish out of legal residence has opened the doors to the federal forum most convenient to the trial of the action, and has eliminated the rationale by which many state courts are able to make their own convenience the determining factor under forum non conveniens. The convenience sought under Section 1404(a) should be that between the parties to the litigation at hand. The measurement of the convenience should be in terms of facilitating introduction of evidence as to the merits of the case. Therefore emphasis should be placed upon the location of witnesses and records, financial ability to litigate in a distant forum, the state of the docket where rapid disposition is important to the parties, and possible affirmative defenses.

Collateral interests of the defendant, such as possible indemnifiers, usually do not concern the issue to be litigated between plaintiff and defendant, and should be given little weight. Use of 1404(a) as a delaying tactic should be prevented by denial of motions to transfer after preparation for trial has progressed to any marked degree in the original forum. The district and appellate courts should apply a rule of reason to prevent Section 1404(a) from becoming the means of a game of tag among the federal courts, marked by motions for transfer and retransfer and interspersed with applications for writs of mandamus.

Yale M. Lyman*