4-1-1949

Venue - Transfer to Take Effect in Possession or Enjoyment After Death

obsolete; (2) some relief measure similar to that passed after the *Hallock* case.[18] This step should be taken, in all fairness, at least in those cases where the decedent has created the trust before 1931 and has refrained from relinquishing his life estate in reliance upon Supreme Court decisions and Treasury regulations.

VENUE—EFFECT OF THE NEW JUDICIAL CODE ON THE FEDERAL EMPLOYER'S LIABILITY ACT

In a suit under the Federal Employer's Liability Act by an employee of the defendant railroad company to recover damages for injuries sustained by him during the course of his employment, the defendant moved for an order transferring the cause to the United States District Court in Ohio, where the injuries occurred, pursuant to 28 U. S. C. A. § 1404(a).[1] Venue under the FELA [2] is in the district where the defendant resides, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action. Section 1404(a) provides in essence that a district court may transfer *any* civil action to any other district where the action might have been brought, for convenience of parties or in the interest of justice. *Held*, motion denied, Section 1404(a) is not applicable to actions brought under the FELA. *Pascarella v. New York Cent. R. R.*, 81 F. Supp. 95 (E. D. N. Y. 1948).

Section 1404(a) of the new Judicial Code is similar to the doctrine of forum non conveniens [3] which is enforced in the federal courts.[4] However, as to actions brought under the FELA the doctrine has not been applied. It has been held that once the criteria of venue is satisfied, an action under the FELA should not be dismissed on the ground of forum non conveniens,[5] that venue in the FELA is an inherent part of the employer's liability,[6] that the venue right given to a plaintiff under the FELA should not be limited or abridged,[7] and that the privilege of venue conferred by the FELA is absolute.[8] In *Baltimore & Ohio R. R. v. Kepner* [9] the railroad sought in an Ohio court to enjoin Kepner from prosecuting an action in a federal court in New York.

18. See T. D. 5008 (1940); U.S. Treas. Reg. 105, § 18.17 (1934 ed).

1. Based on 36 STAT. 1103 (1911), 39 STAT. 851 (1916), 28 U. S. C., §§ 119, 163 (1940).
2. 36 STAT. 291 (1910), as amended, 36 STAT. 1167 (1911), 45 U. S. C. § 56 (1940).
3. "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." *See* Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 507 (1947).
4. Gulf Oil Corporation v. Gilbert, *supra*.
5. Butts v. Southern Pac. R. R., 69 F. Supp. 895 (S. D. N. Y. 1947).
6. Akerly v. New York Cent. R. R., 168 F.2d 812 (C. C. A. 6th 1948).
7. Stierhoff v. Chesapeake & O. R. R., 8 F. R. D. 54 (S. D. N. Y. 1947).
8. Sacco v. Baltimore & O. R. R., 56 F. Supp. 959 (E. D. N. Y. 1944).
9. 314 U. S. 44 (1941).

The cause of action arose under the FELA due to an accident in Ohio. The Supreme Court held that the FELA privilege of venue could not be frustrated. It is, therefore, definite that *before* Section 1404(a) became effective [10] hardship or inconvenience to the defendant in FELA actions played no part in determining venue under that act.

Thus, the venue right under the FELA could only be defeated by congressional action.[11] In the principal case the application of Section 1404(a) to cases under the FELA was treated as a matter of congressional intent; the court discussed at length the fact that the Jennings Bill,[12] which was designed to *limit* the power of the plaintiff to select venue under the FELA, was *also* before the 80th Congress at the same time as the new Judicial Code. The bill was passed by the House,[13] but died in committee [14] in the Senate. From this legislative history the court inferred that congressional intent, as to Section 1404(a), was *not* to disturb venue under the FELA. The difficulty with such an approach to congressional intent is the multiplicity of reasons why any particular legislation may fail to be enacted.

Section 1404(a) is recent,[15] and in prior cases congressional intent has been construed to require its application to venue under the FELA. While a recent case denied the motion of the defendant to transfer an FELA cause to another district, the court indicated that it *would* transfer such a cause upon *timely* motion where retention would work an injustice on the defendant, this type motion being directed to the discretion of the court.[16] It has been determined that under Section 1404(a) the fact that the defendant would have to bring witnesses some 400 miles is enough to remove the cause to another district in which it could originally have been brought.[17] The same conclusion has been reached on the ground that the words "any civil action" in Section 1404(a) include an action under the FELA, and the suggestion that 1404(a) is merely a statutory enactment of the doctrine of forum non conveniens has been rejected.[18] In *White v. Thompson* [19] and *Nunn v. Chicago, Milwaukee, St. P. & P. R. R.*[20] it was held that congress intended Section 1404(a) to apply since the reviser's notes [21] to that section stated that it was drafted in accordance with the doctrine of forum non conveniens, to allow a transfer to a more convenient forum even though the venue is proper. As an example of the need

10. Sept. 1, 1948.
11. Leet v. Union Pac. R. R., 25 Cal.2d 605, 155 P.2d 42 (1945), *cert. denied*, 325 U. S. 866 (1945).
12. 93 CONG. REC. 7348 (1947) (H. R. 1639).
13. 93 CONG. REC. 9193 (1947).
14. 93 CONG. REC. 9249 (1947).
15. Approved June 25, 1948.
16. Brainard v. Atchison, T. & S. F. R. R., 81 F. Supp. 211 (N. D. Ill. 1948).
17. Chaffin v. Chesapeake & O. R. R., 80 F. Supp. 957 (E. D. N. Y. 1948).
18. Hayes v. Chicago, R. I. & P. R. R., 79 F. Supp. 821 (D. Minn. 1948).
19. 80 F. Supp. 411 (N. D. Ill. 1948).
20. 80 F. Supp. 745 (S. D. N. Y. 1948).
21. Tit. 28, U. S. C., Cong. Serv., P. 1853 (1948).

for such a provision the reviser's notes cited the *Kepner* case, mentioning that it was brought under the FELA and prosecuted in New York although the accident occurred in Ohio. The use of the *Kepner* case to illustrate the *need* of Section 1404 (a) is of great importance in determining congressional intent since the reviser's notes were considered by the congress.[22]

Since the FELA merely provides where an action *may* be brought and does not provide that the action must remain, it is possible to construe Section 1404(a) and the FELA as being consistent.[23] There is no particular reason why FELA cases should now be treated differently from other cases.[24] The court apparently placed too much weight on the fact that the Jennings Bill, a separate piece of legislation, failed to be enacted by congress. The reviser's notes would seem a more appropriate source for ascertaining congressional intent as to the application of Section 1404(a).

WILLS — "OR HIS ESTATE" AS WORDS OF SUBSTITUTION PREVENTING LAPSE OF BEQUEST

Testator executed a holographic will devising certain property to Specter "or his estate." The donee, who was unrelated to the testator, predeceased him. The bequeathed property was sold; and by decree of the lower court the proceeds were awarded to the heirs of deceased donee Specter. From this decree, the executors of testator appealed. *Held*, since the words "or his estate" did not indicate that the testator intended to substitute the donee's heirs in his place and thus prevent lapse of the bequest, the testamentary gift to the donee lapsed upon his death. Decree reversed. In re *Brunet's Estate*, 200 P.2d 59 (Cal. 1949).

In the absence of statute, a testamentary gift lapses if the beneficiary thereof predeceases the testator unless the bequest manifests the testator's intent to substitute another in place of the deceased donee.[1] Recent statutes modify this common law rule in order to prevent lapse and permit devolution of the gift to the heirs of the donee even though the bequest does not expressly substitute them in his place if the deceased donee was within a specified degree of relationship to the testator.[2] But where the donee was a stranger in blood,

22. See H. R. REP. No. 308, 80th Cong., 1st Sess. A132 (1948).
23. White v. Thompson, *supra*.
24. Nunn v. Chicago, Milwaukee, St. P. & P. R. R., *supra*.

1. *In re* Simpson's Estate, 304 Pa. 396, 156 Atl. 91 (1931); Equitable Trust Co. v. Banning, 17 Del. Ch. 95, 149 Atl. 432 (1930); Bryson v. Holbrook, 159 Mass. 280, 34 N. E. 270 (1893); *see* Nelson v. Meade, 120 Me. 61, 149 Atl. 626, 628 (1930).

2. "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, . . . such descendants take the estate so given by the will in the same manner as the devisee or legatee would have