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The Problems Regarding the Federal Transfer Statute--Much Ado About Nothing

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reaffirmation in *Macey,* the orderly development of the *Babcock* process to the point of narrowing the significant contacts down to those of domicile and insurance would be clear. Notwithstanding the above-mentioned factors of ambiguity, it appears at least likely that, with further litigation in this area, the position of Judges Desmond and Fuld in *Dym* and that of Judge Keating in *Macey* will become the controlling law and, it is contended, there is ample basis in logic and law for considering such a development as progressive and welcome. To the possible argument that such an approach would be as arbitrary and inflexible as the now displaced *lex loci* approach, the very clear response is that this approach negatives the arbitrariness of the latter precisely because it involves a reasoned examination of the reason for the choice of law, rather than merely pointing out the law to be applied and thereby avoiding a choice in the first instance. In a very real sense, the suggested approach indicates progress by the mere fact that it requires a carefully weighed choice and this is a sharp differentiation from the prior process of merely articulating a foregone conclusion in terms of a two-word formula.

THE PROBLEMS REGARDING THE FEDERAL TRANSFER STATUTE —MUCH ADO ABOUT NOTHING

Very often the proposed solution to a problem, upon adoption, becomes more of a burden than the problem which it was intended to resolve. The transfer statute set forth in the Judicial Code [hereinafter referred to as section 1404 (a)] enables a district court, once jurisdiction and proper venue have been established, to *transfer* any civil action to another district where it "might have been brought" for the convenience of litigants and witnesses, or in the interest of justice.[1] Enacted in 1948, it substantially replaces, in the federal courts, the common-law doctrine of *forum non conveniens*[2] which provided for the *dismissal,* without prejudice, of an action even where the jurisdiction and venue requirements were satisfied, when it was for the convenience of the

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[1] 28 U.S.C. § 1404(a) (1964).

[2] *Forum non conveniens* still finds some life in the federal courts: it is available when there is no alternative federal forum to which the action may be transferred. Menendez Rodriguez v. Pan Am. Life Ins. Co., 311 F.2d 429 (5th Cir. 1962). But examination of the doctrine after the adoption of the transfer statute is without the scope of this note.

parties and witnesses that the action be litigated in another forum.[3] While it was hailed by some as "an exciting experiment in judicial administration,"[4] several comments concerning the statute have not been as favorable, one writer remarking that "the cure is itself a serious disease."[5]

This note will treat the history of the doctrine of *forum non conveniens* and the difficulties which emanated from it and led to the adoption of the federal transfer statute. The note will then analyze section 1404(a) and the conflicting applications given it by the courts.

Forum Non Conveniens

The doctrine of *forum non conveniens* involves a refusal by a court to consider an action even though proper jurisdiction and venue have been established.[6] The doctrine can be found in early Scottish cases which contained the plea of *"forum competens,"* implying that the issue was one of lack of jurisdiction rather than a discretionary exercise of jurisdiction.[7] However, the concept as developed in the later 1800's indicated that a court, already having original jurisdiction, could refuse to exercise it when circumstances warranted.[8] The doctrine involved a consideration of the interests of all parties and the ends to be served by justice.[9] However, there had to be a showing of real unfairness.[10] Factors considered by the Scottish courts were convenience of trial and the residence of counsel or parties.[11] Discarded as factors were: the court's own convenience, the amount of litigation on its docket, and the court's dislike for hearing cases in which evidence would be given in a foreign language.[12] An approach to *forum non conveniens* akin to that espoused by the Scottish courts was adopted

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[3] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

[4] 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.8 (Wright ed. 1960).

[5] Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L. J. 99, 101 (1965).

[6] *Supra* note 3, at 507.

[7] See, *e.g.*, Macmaster v. Macmaster, [1833] 11 Sess. Cas. 685 (Scot. 2d Div.); Brown's Trustees v. Palmer, [1830] 9 Sess. Cas. 224 (Scot. 2d Div.).

[8] Macadam v. Macadam, [1873] 11 Sess. Cas. 860 (Scot. 2d Div.); Clements v. Macaulay, [1866] 4 Sess. Cas. 583 (Scot. 2d Div.); Longworth v. Hope, [1865] 3 Sess. Cas. 1049 (Scot. 1st Div.); Tulloch v. Williams, [1846] 8 Sess. Cas. 657 (Scot. 1st Div.).

[9] La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs francais," [1926] Sess. Cas. 13, 16 (Scot.).

[10] *Id.* at 20.

[11] *Ibid.*

[12] *Id.* at 21.

in England.[13] Thus, it is seen that in both Scotland and England the courts weighed solely private interests in applying *forum non conveniens*. This may be distinguished from the American concept of the doctrine which not only weighed the convenience of the individuals involved in litigation, but also weighed the convenience to the public, *i.e.*, to courts and juries.[14]

The phrase *forum non conveniens* did not find its way into American law until 1929, when it was introduced in an article by Paxton Blair.[15] Subsequent to the Blair article, the doctrine found increasing use in the federal courts, to the extent that just a few years later it was referred to by Mr. Justice Frankfurter as "the familiar doctrine of forum non conveniens." [16] In *Canada Malting Co. v. Paterson S.S. Ltd.*,[17] the Supreme Court held that it lay within the discretion of the district court to refuse jurisdiction over a cause of action in admiralty between foreign parties even though the cause of an action arose within the United States. Mandatory exercise of jurisdiction, as the universal rule, was denied by the Court, which pointed to the occasional refusals to exercise jurisdiction by courts of law and equity "in the interests of justice." [18] The Court stated that it was proper for the lower court to consider, *inter alia*, the residence of the parties, crew members, and witnesses, and the place of the collision in rendering its decision. Admiralty, however, was not the sole focal point of *forum non conveniens*. Another broad area which absorbed the impact of the doctrine was that of corporate law. In *Rogers v. Guaranty Trust Co.*,[19] defendant-corporation was organized under the laws of New Jersey, doing business there and in a number of other states, but having its principal place of business in New York where most of its records were kept and where its directors' meetings were held. A minority shareholder brought suit alleging that the employee stock subscription plan was illegal under New Jersey statutes. The federal district court in New York dismissed the bill, without prejudice, on the ground that New Jersey was the proper forum. The Supreme Court, reviewing this decision,

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[13] For example, in Egbert v. Short, [1907] 2 Ch. 205, it was determined that service upon defendant, a domiciliary of India, while he was casually within the country was insufficient cause to justify the choice of an English forum considering the attendant vexation that would ensue upon defendant, whose witnesses and evidence were in India.

[14] *Supra* note 3.

[15] Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

[16] Baltimore & O.R.R. v. Kepner, 314 U.S. 44, 55 (1941) (dissenting opinion).

[17] 285 U.S. 413 (1932).

[18] *Id.* at 423.

[19] 288 U.S. 123 (1933).

cited *Canada Malting Co.* as authority, and declared that, "while the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power." [20] While the Court felt that no fixed rule as to the exercise of jurisdiction in derivative actions involving the internal affairs of a foreign corporation could be devised, it did venture to state that convenience, efficiency, and justice would be operative factors in such a determination. Mr. Justice Stone, dissenting, pointed to the complexity of the proceedings and noted that, after two years of litigation, the matter would have to be started anew. Mr. Justice Cardozo, also dissenting, felt that since *forum non conveniens* is "an instrument of justice," it should be hesitatingly applied where "justice will be delayed, even though not thwarted altogether, if jurisdiction is refused." [21]

In certain instances, the issue of an appropriate forum was deemed a matter of law rather than discretion, *e.g.*, in the case of the special venue provisions in the Federal Employers' Liability Act (FELA).[22] In *Baltimore & O.R.R. v. Kepner*,[23] a FELA action, the Supreme Court held that a privilege of venue granted by the legislature creating the cause of action could not be frustrated for reasons of convenience or expense. If the venue requirements were deemed unjust, the problem should be resolved by the legislature. Mr. Justice Frankfurter, dissenting, maintained that the discretion to decline jurisdiction by applying *forum non conveniens* was deeply rooted in our law, and was indicative of a civilized judicial system. He asserted that the result of the majority rule would be both inequitable and unjust, imposing hardships on one party, not necessarily for the convenience of the other party.

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[20] *Id.* at 130.

[21] *Id.* at 151.

[22] 36 Stat. 291 (1910), as amended, 45 U.S.C. § 56 (1964). The section, in part, provides that "an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." Another of the statutes providing for special venue is the Sherman & Clayton Antitrust Act, 69 Stat. 282 (1955), 15 U.S.C. § 22 (1964), which provides that "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . ."

[23] 314 U.S. 44 (1941). Plaintiff was injured in an accident in Ohio where he was a resident and where the employer railroad operated a part of its system. He elected to sue under the FELA in a New York district court which was 700 miles from the place of the accident. The defendant railroad applied to the state courts of Ohio for an injunction to restrain suit in the federal court. The injunction was denied. 137 Ohio 409, 30 N.E.2d 982 (1940).

The strongest circumstance for application of *forum non conveniens*, in his opinion, was "where the conveniences to be balanced are not merely conveniences of conflicting private interests but where there is added the controlling factor of public interest." [24]

Further factors considered in a determination as to whether *forum non conveniens* would be applied are to be found in *Williams v. Green Bay & W. R. R.*[25] These factors are: (1) the possibility that a suit might be vexatious or oppressive; (2) the suit might be placed in one forum when in fairness it should be litigated in another; (3) the relief sought against a foreign corporation might cause such supervisional difficulties or be so extensive that the cause could be more efficiently handled near home; and (4) the limited geographical jurisdiction of the federal court might reduce the effectiveness of the decree.[26] In the last analysis, reasoned the Court, each case would turn upon its own facts. A close examination of the "factors" suggested in *Williams* reveals that most, if not all, of these are nothing more than the "factors" considered in determining whether equity will exercise its discretionary powers.[27]

A more sophisticated treatment of the criteria for the exercise of *forum non conveniens* is contained in *Gulf Oil Corp. v. Gilbert.*[28] There, in a negligence action, jurisdiction of the New York district court was based on diversity of citizenship. Defendant pleaded that jurisdiction should be declined by the federal court in New York because of the inconvenience to a Pennsylvania corporation and because a substantial interest of plaintiff would be served thereby. The action was dismissed. On review, the Supreme Court held that a federal court had power to dismiss a suit pursuant to the doctrine of *forum non conveniens,* and that here that power was not abused. The Court divided the relevant factors into those of private interest and those of public interest. Private interest (interest of the litigant) was subdivided into: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if appropriate; expense of trial; enforceability of a judgment; possibility of a fair trial; and harassment, vexation and oppression of the defendant by the plaintiff.[29] Public interest included: docket congestion; availability of juries in congested courts; trial of an action

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[24] *Supra* note 16, at 57-58.
[25] 326 U.S. 549 (1946).
[26] *Id.* at 554-56.
[27] See CHAFEE & RE, CASES AND MATERIALS ON EQUITY 67-165 (4th ed. 1958).
[28] 330 U.S. 501 (1947).
[29] Gulf Oil Corp. v. Gilbert, *supra* note 3.

within the view and reach of affected interests where they are multitudinous; local interest served in having local controversies decided at the situs of their origin; and the appropriateness in having the trial of a diversity case in a forum familiar with the law to be applied.[30] Mr. Justice Black, dissenting, sought to limit the application of the doctrine to cases in equity or admiralty. Only Congress, he contended, could properly authorize, by way of statute, what the Court had done.[31] He maintained that strong arguments could be advanced against such a grant of discretionary power to federal trial courts. For example, it could be shown by any interstate defendant that the forum of plaintiff's choice was inconvenient. Such power would produce ambiguity, confusion, and hardship by cluttering the federal courts with preliminary trials of fact as to the comparative convenience of several forums, and by leading to numerous indistinguishable decisions from which no positive formula for choice of forums could be derived.

Section 1404(a)—The Statute and Its Application

As Mr. Justice Black was registering his dissent in the *Gilbert* case, Congress was formulating the legislation to which he and the Court in *Kepner* had referred. In 1948, as part of the revision of the Judicial Code, a subsection was added to section 1404 which provided:

> (a) 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.[32]

Section 1404(a) assumes there are at least two forums where venue is proper and allows transfer from one forum to the other. The broad purposes of 1404(a) are to make the federal venue statutes more flexible in operation, and to reduce the possibility of forum shopping. An explanation of the statute requires an examination of cases which have construed it. In this regard, each clause of subsection (a) shall be treated in order.

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[30] *Id.* at 508-09.

[31] *Id.* at 515. This is in accord with the majority view in Baltimore & O.R.R. v. Kepner, *supra* note 16, at 54.

[32] 28 U.S.C. § 1404(a) (1964). The reviser's note points to the *Kepner* result as illustrative of the need for such a provision. 28 U.S.C. § 1404(a), reviser's note (1966). This section should be distinguished from section 1406(a) which provides that, where venue is improperly laid, a court may dismiss the cause or, in the interests of justice, transfer the action to a district where it could have been brought. 28 U.S.C. § 1406(a) (1964).

Convenience of Parties and Witnesses in the Interest of Justice

Before the enactment of 1404(a), a heavy burden was upon the moving party to establish inconvenience.[33] As exemplified in *All States Freight, Inc. v. Modarelli*,[34] this burden was somewhat lessened under the statute. In that case, defendant moved under 1404(a) to transfer to Ohio an action brought against him in a New Jersey federal district court. Upon denial of the motion, he petitioned the Court of Appeals, Third Circuit, for an order of mandamus[35] ordering the district court judge to transfer the case. The court of appeals, while denying the petition on other grounds, stated that the statute was quite different from the doctrine of *forum non conveniens*, it was not enacted to include the stricter limitations applicable under the common-law doctrine. In *Norwood v. Kirkpatrick*,[36] involving three separate suits for injuries filed under the FELA, a similar question as to the scope of section 1404(a) was raised. On a motion to dismiss or, alternatively, to transfer the actions to another district court, the district court judge stated that if he had been free to construe 1404(a), he would have denied the transfers because, in his view, the section called for an application of *forum non conveniens*. However, he was bound by the decision of the Third Circuit in the *Modarelli* case.[37] On review, the Supreme Court supported the rejection in *Modarelli* of the narrower doctrine of *forum non conveniens*. The Court felt that Congress, in enacting the statute, "intended to permit courts to grant transfers upon a lesser showing of inconvenience." [38] However, the Court was careful to note that this did not mean "that the relevant factors have changed or that plaintiff's choice is not to be considered, but only that the discretion to be exercised is broader." [39]

Perhaps of more importance than the convenience of the parties, under the federal transfer statute, is the convenience of the witnesses. This is not so much out of compassion as it is out of a concern for the testimony that witnesses carry with them.[40]

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[33] 1 MOORE, FEDERAL PRACTICE ¶ 0.145[5], at 1778 (2d ed. 1964).

[34] 196 F.2d 1010 (3d Cir. 1952).

[35] Since an order granting or denying transfer to another forum is deemed to be interlocutory in nature, some courts disallow immediate appeal. While the transfer order may be appealed after final judgment, by then the matter is usually moot. To overcome this difficulty, those courts which do not allow an interlocutory appeal to be taken resort to the extraordinary writ of mandamus. See generally Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122 (1957).

[36] 349 U.S. 29, 30-32 (1955).

[37] *Id.* at 30.

[38] *Id.* at 32.

[39] *Ibid.*

[40] In many cases the convenience of witnesses is not considered where it appears that their testimony can be presented by deposition or where

Laudably, the courts usually determine the value of witnesses by a test of quality rather than quantity.

While the federal courts have maintained that the transfer statute allows them greater latitude in the issue of convenience than under *forum non conveniens*, the factors by which convenience is measured are apparently the same as those under the common-law doctrine as set forth by Mr. Justice Jackson in *Gulf Oil Corp. v. Gilbert*.[41] The factors most often cited under 1404(a) as reasons for transfer are: relative ease of access to sources of proof;[42] availability of compulsory process for unwilling witnesses and the cost of obtaining willing witnesses;[43] and other practical considerations which make the trial of a case expeditious and inexpensive.

The Court May Transfer

Transfer under 1404(a) may be made on motion by either plaintiff or defendant.[44] Where the defendant moves for transfer, the courts, not disposed to disturb plaintiff's choice of forum, will require substantial proof of a party's inconvenience.[45] Transfer, it appears, could be effected upon the court's own motion.[46] Although there is no time limit within which a transfer motion may be made, it seems to be generally accepted that a late motion is viewed with disfavor.[47] For example, one court felt that, "[one]

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their testimony can be given by others. See Sypert v. Miner, 266 F.2d 196 (7th Cir. 1959) (transfer allowed where court felt that expert testimony from witness who would be inconvenienced by transfer could be obtained from other experts in the transferee forum). *But see* 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.5, at 425 (Wright ed. 1960), where it is suggested that such a position is unsound.

[41] 330 U.S. 501, 508 (1947).

[42] *E.g.*, Meagher v. Great Lakes Dredge & Dock Co., 201 F. Supp. 113 (N.D. Ohio 1962); Grubs v. Consolidated Freightways, Inc., 189 F. Supp. 404 (D. Mont. 1960); Le Clair v. Shell Oil Co., 183 F. Supp. 255 (S.D. Ill. 1960); Patterson v. Louisville & N.R.R., 182 F. Supp. 95 (S.D. Ind. 1960).

[43] *E.g.*, United Artists Associated, Inc. v. N.W.L. Corp., 198 F. Supp. 953 (S.D.N.Y. 1961); Ackert v. Ausman, 198 F. Supp. 538 (S.D.N.Y. 1961), *mandamus denied sub nom.* Ackert v. Bryan, 299 F.2d 65 (2d Cir. 1962).

[44] Philip Carey Mfg. Co. v. Taylor, 286 F.2d 782 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); Roberts Bros., Inc. v. Kurtz Bros., 236 F. Supp. 471 (D.N.J. 1964); McCarley v. Foster-Milburn Co., 89 F. Supp. 643 (W.D.N.Y.), *rev'd on other grounds sub nom.* Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950).

[45] SEC v. Harwyn Publishing Corp., 232 F. Supp. 274 (S.D.N.Y. 1964); Oltman v. Currie, 231 F. Supp. 654 (E.D.S.C. 1964).

[46] I-T-E Circuit Breaker Co. v. Becker, 343 F.2d 361, 363 (8th Cir. 1965).

[47] Barrows v. Central Motor Lines, Inc., 192 F. Supp. 835 (N.D. Ohio 1961); Nagle v. Pennsylvania R.R., 89 F. Supp. 822 (N.D. Ohio 1950). See generally 1 MOORE, *op. cit. supra* note 33, ¶ 0.145 [4-3], at 1768-69 (2d ed. 1964).

who seeks a change of venue must act with reasonable promptness . . . and if he . . . delays until shortly before trial the interest of justice in early trials overcomes any convenience to the parties which might result from change of venue." [48] Upon granting of the 1404(a) motion, the papers are delivered to the transferee forum, and the transferor court loses all control of the litigation.[49]

Any Civil Action

While the doctrine of *forum non conveniens* applied to all transitory actions governed by general venue statutes, it was not applicable to local actions or to instances where venue was determined by special venue provisions. The same approach was taken initially under 1404(a), but the Supreme Court, in a case arising under the FELA, quickly rejected this contention, holding that the "reach of 'any civil action' is unmistakable. . . . [T]he phrase is used without qualification, without hint that some should be excluded." [50] Consistent with this view, the provisions of 1404(a) have been held applicable to actions under the Declaratory Judgment Act,[51] the Jones Act,[52] and the Federal Tort Claims Act.[53] Though the statute, presumably, would apply to local actions, there would be difficulty in finding a transferee forum "where it might have been brought." [54]

Where the Action "Might Have Been Brought"

The interpretation of this limitation upon the discretionary power of transfer has been the subject of sharp disagreement. In *Foster-Milburn Co. v. Knight*,[55] plaintiffs, residents of California, brought an action against defendant, a New York resident, in a

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[48] Nagle v. Pennsylvania R.R., *supra* note 47. *But cf.* Adler v. McKee, 92 F. Supp. 613 (S.D.N.Y. 1950), which stated that "the passage of time itself is [not] sufficient grounds for [transfer]. . . ." *Id.* at 614.

[49] See generally 1 BARRON & HOLTZOFF, *op. cit. supra* note 40, § 86.1 at 410-11.

[50] *Ex parte* Collett, 337 U.S. 55, 58 (1949).

[51] See Kerotest Mfg. Co. v. C-O Two Fire Equip. Co., 342 U.S. 180 (1952).

[52] See Wookey v. Waterman S.S. Corp., 89 F. Supp. 909 (S.D.N.Y. 1950).

[53] See Nowotny v. Turner, 203 F. Supp. 802 (M.D.N.C. 1962).

[54] See Lettig Canning Co. v. Steckler, 188 F.2d 715 (7th Cir.), *cert. denied*, 341 U.S. 951 (1951), an in rem action in which a motion for transfer under 1404(a) was held properly denied since the action could be brought only where the res was found. Compare Continental Grain Co. v. The FBL-585, 364 U.S. 19 (1960), a case seemingly contra to *Lettig*. Perhaps that opinion is distinguishable as being unique due to the admiralty overtones of the case.

[55] 181 F.2d 949 (2d Cir. 1950).

federal district court in New York for a tort committed in California. The district court granted a 1404(a) motion by plaintiff to have the action transferred to the Southern District of California. Defendant filed a petition with the Court of Appeals, Second Circuit, for a writ of mandamus to prevent the transfer. Judge Hand, speaking for the court, held that an action could not be transferred on plaintiff's motion to a forum where defendant was not amenable to process. Subsequently, the circuit court qualified its holding by granting a defendant's motion for transfer—although defendant had not originally been amenable to process—on a theory of waiver.[56]

However, the Court of Appeals, First Circuit, presented a different view in *In the Matter of Josephson.*[57] Petitioners, shareholders of a New Mexico corporation doing business in Massachusetts, brought a derivative suit in a Massachusetts federal district court, naming as defendants the corporation and three directors domiciled in Massachusetts. The court granted defendants' motion under 1404(a) for transfer of the case to the New Mexico district court, where venue was also proper, but where the directors were not amenable to process. Petitioners sought mandamus, contending that the transfer was not authorized under 1404(a) because New Mexico was not a district in which the action "might have been brought." The Court of Appeals in denying the writ, referred to the test of *Foster* as "gloss . . . put upon the language of 1404(a)." [58] They upheld the transfer on the ground that the words "might have been brought" refer only to venue and do not require, even in the absence of waiver, that a defendant who has been served in the transferor forum be amenable to process in the transferee forum.[59] Under this interpretation, a plaintiff, as well as a defendant, may move to transfer an action to a district in which defendant could not have been served, provided venue was proper.

The Supreme Court, in *Hoffman v. Blaski,*[60] construed another aspect of the phrase "might have been brought." There the plaintiffs served process and brought action in a Texas federal district

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[56] Anthony v. Kaufman, 193 F.2d 85 (2d Cir. 1951), *cert. denied,* 342 U.S. 955 (1952). The *Foster* decision was followed by the Ninth Circuit and numerous federal district courts. See Shapiro v. Bonanza Hotel Co., 185 F.2d 777, 780-81 (9th Cir. 1950); see, *e.g.,* Ragsdale v. Price, 185 F. Supp. 263 (M.D. Tenn. 1960); Bunker v. Armstrong, 184 F. Supp. 472 (D. Minn. 1960); Mitchell v. Gundlack, 136 F. Supp. 169 (D. Md. 1955); United States v. Reed, 104 F. Supp. 260 (E.D. Ark. 1952).

[57] 218 F.2d 174 (1st Cir. 1954).

[58] In the Matter of Josephson, 218 F.2d 174, 185 (1st Cir. 1954).

[59] *Id.* at 184-85.

[60] 363 U.S. 335 (1960) (includes *Sullivan v. Behimer,* treated together with *Blaski* in the majority opinion; however, Mr. Justice Frankfurter wrote a separate dissent for each case).

court which had jurisdiction and in which venue was proper. Defendants moved for transfer under 1404(a) to an Illinois district court alleging "convenience" and "interest of justice." The defendants, admitting that an action brought originally in the transferee forum would have been dismissed for lack of venue, asserted that the phrase "might have been brought" should be construed as meaning proper venue at the time of the transfer. Therefore, defendants' waiver of venue enabled the transferee forum to be a place where the action "might *then* have been brought." [61] After the district court granted the order, plaintiffs petitioned for mandamus to vacate the order, but the Court of Appeals, Fifth Circuit, denied the writ. Upon the receipt of the papers by an Illinois federal district court, plaintiffs moved for a transfer back to the Texas federal district court. After denying the motion, the Court of Appeals, Seventh Circuit, reversed and remanded the actions to the transferor forum. On certiorari, the Supreme Court held that a forum is one where the action "might have been brought" only if the plaintiff could have brought the action there originally, independently of the subsequent actions by the defendant. Mr. Justice Frankfurter, in dissent, observed that while the Court had disposed of one problem as respected 1404(a), it left unresolved a problem of judicial administration since the Court permitted different circuits to review the issue of transfer.

In an attempt to ward off further conflict arising from the phrase "might have been brought," the Supreme Court, in 1964, heard *Van Dusen v. Barrack*.[62] The personal representatives of Pennsylvania residents who died as a result of a Massachusetts plane crash brought suit in a Pennsylvania district court against the airline and several manufacturers. The defendants moved to transfer the action to a district court in Massachusetts, where venue and personal jurisdiction would also have been proper. The district court granted the motion and the plaintiffs sought mandamus to restrain the transfer. The Federal Rules of Civil Procedure require that the capacity of representatives to sue is to be determined by the law of the state in which the district court sits.[63] Thus, on the ground that the plaintiffs had not qualified under Massachusetts law to sue as personal representatives in that state, the Court of Appeals, Third Circuit, concluded that the action

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[61] *Id.* at 342.

[62] 376 U.S. 612 (1964). For a thorough discussion of the background of *Van Dusen v. Barrack*, see generally Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99 (1965).

[63] FED. R. CIV. P. 17(b) provides: "The capacity of . . . a representative . . . to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

could not "have been brought" in Massachusetts and directed the district court to vacate its order for transfer. The Supreme Court, on certiorari, reversed unanimously, holding that the final phrase of 1404(a) referred *solely* to the federal rules of venue and personal jurisdiction, and not to any laws of the transferee state. Characterizing 1404(a) as a federal judicial housekeeping measure that merely effected a "change in the courtrooms," Mr. Justice Goldberg declared that the transferee forum must apply "these . . . laws of the transferor State which would significantly affect the outcome of the case." [64] The Court distinguished *Blaski*, stating that in *Van Dusen* both venue and personal jurisdiction were proper in Massachusetts. The Court believed that the only issue was whether 1404(a) referred also to state rules that might further restrict the availability of convenient federal forums. Noting that the statute is found in the part of the Judicial Code dealing with "Jurisdiction and Venue," it concluded that the statutory context was "persuasive evidence" that the final phrase of 1404(a) refers only to federal limitations.

Problems Arising Under the Transfer Statute

An examination of these cases indicates that 1404(a) has not proved in practice to be the panacea it was hoped to be in theory. Witness of this fact is the tortuous path of *Hoffman v. Blaski* to the Supreme Court.[65] Mr. Justice Stewart there remarked: "from the point of view of efficient judicial administration the . . . history of this litigation is no subject for applause." [66] The administrative problems which concern 1404(a) lie in the area of procedure for transfer and appeal. As shown in the *Blaski* case, needless delay may result from determinations by different district courts on one issue of transfer. This problem may be termed as one of a horizontal nature, that is, it involves expeditiousness of litigation where coordinate courts are involved. The decision in *Blaski* represents only a partial solution to the horizontal problem, foreclosing the possibility of forum shopping on the part of the defendant. Other aspects of the problem of transfer procedure remain unsolved.

Problems vertical in nature are those dealing with reviewability of 1404(a) orders. Review may be obtained in two ways; through the Interlocutory Appeals Act,[67] or by petitioning for a writ of mandamus.

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[64] Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).
[65] See Kitch, *supra* note 62.
[66] Hoffman v. Blaski, 363 U.S. 335, 345 (1960) (concurring opinion).
[67] 28 U.S.C. § 1292(b) (1964).

There is disagreement among the circuits as to whether the Interlocutory Appeals Act is available to one seeking review of a transfer order. At this point, the majority of circuits deciding the issue have held that interlocutory review is not available.[68] Consequently, losing parties have, almost uniformly, sought relief by petitioning for writs of mandamus. In response, the circuit courts have heard the petitions with increasing frequency, aware of the need for a consistent body of law in view of the vague language of the statute. The result has been a confused and inadequate body of law, with the courts of appeals disagreeing among themselves even as to when mandamus should be available.[69] The net effect of these petitions is to delay litigation. In the words of Mr. Justice Frankfurter, the consequence is "that a question once decided has been reopened, with all the wasted motion, delay and expense which that normally entails." [70]

Solutions and Alternatives

Writers have suggested that the solution to the difficulties raised by the *Foster-Milburn* and *Blaski* cases is to delete the phrase "where it might have been brought." [71] This would presumably solve the problems previously discussed. District court judges would be free to determine without qualification exactly what forum would be, justice considered, most convenient for the parties and witnesses. In regard to the appealability of transfer orders, it has been suggested that by denying mandamus the delays and additional litigation now suffered would be eliminated.[72] In contrast, it has been implied that by laying down general standards to determine the availability of mandamus, the burden of deciding the propriety of a transfer order would be greatly relieved.[73]

To alleviate much of the confusion in regard to the applicable standards utilized in determining transfer, it has been suggested that these principles and criteria be codified to whatever extent

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[68] At present, the Second, Third, and Sixth Circuits disallow the use of § 1292 in a transfer case, holding that mandamus is the proper method by which review may be secured. See Olnick & Sons v. Demster Bros., 365 F.2d 439 (2d Cir. 1966); Standard v. Stoll Packing Corp., 315 F.2d 626 (3d Cir. 1963); Bufalino v. Kennedy, 273 F.2d 71 (6th Cir. 1959). In contrast, the fifth circuit has maintained that interlocutory appeal rather than mandamus is the mode of review from a transfer order.

[69] See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 86.7 (Wright ed. 1960).

[70] *Supra* note 66, at 347-48 (dissenting opinion).

[71] See WRIGHT, THE FEDERAL COURTS 146 (1963).

[72] See *op. cit. supra* note 69, § 86.8 at 442.

[73] Kitch, *supra* note 62, at 141.

possible.[74] However, an opposing view suggests that the decisions on transfer should be left to the sound discretion of the trial court on a case-by-case basis, instead of regulating transfers by a rigid rule.[75] A third view would place the fault for problems concerning the statute upon the lack of realism on the part of courts in deciding whether to grant a transfer under 1404(a).[76]

The most extreme solution offered to solve the problems encountered in the operation of 1404(a) has been to dispose of the statute altogether.[77] It is felt that the statute, realistically, can be of help only in a few "hardship" cases. And upon weighing this slight benefit against the burdens of confusion, congestion and delay that the statute seems to carry with it, it is reasoned that it would be easier to bear the few instances of hardship, than to continue under the statute.

Conclusion

While deletion of the final limiting phrase of 1404(a) might allow for a selection of the most convenient forum, it is maintained that it would do so at the expense of a statutory guideline. While it can be argued that case law would more flexibly fill in the qualifications now supplied by the statute's final phrase, this argument could be effectively rebutted by pointing to the morass of confused case law extant concerning the statute. It is hard to see how this one modification of the statute, taken alone, would allow the courts to rectify what they have failed to do in the past. Assuming that the deletion of the words "might have been brought" would provide a workable solution to the conflicts arising as to 1404(a), the deletion would be successful only if it were accomplished in conjunction with an addition to the statute somewhat akin to section 1292, providing for some mode of interlocutory review of the transfer order. In this way, perhaps a cogent body of case law could develop around the statute. It should be noted, however, that while this solution might prove workable, it would be susceptible to delay. Therefore, this solution is, at best, only a fair alternative. To disallow any review of the trial court decision, while it might provide for rapid disposition of a transfer motion, would neither be just nor judicially sound. Where there are now several conflicting views as to the standards that will necessitate

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[74] See Kaufman, *Observations on Transfer Under § 1404(a) of the New Judicial Code*, 10 F.R.D. 595 (1951).

[75] See *op. cit. supra* note 69, § 86.8, at 441-42.

[76] *Id.* § 86.8 at 441; *op. cit. supra* note 71, at 145.

[77] Kitch, *supra* note 62, at 141-42.

a transfer under 1404(a), lack of appellate review would allow even greater variation.

Notably, the Supreme Court, since the enactment of 1404(a), either has spoken in general terms concerning the statute or has dealt narrowly with only one aspect of it. This allows the argument to be raised that a comprehensive construction of the statute by the Court is in order. It is unlikely that this will happen. First, the subject matter of the statute, being essentially concerned with factual issues of convenience, does not lend itself to far-ranging judicial interpretation. Second, the Court would not be dealing, as in the case of *forum non conveniens,* with a judicial doctrine but, rather, with a congressional measure. For this reason, it will be apprehensive of broadly interpreting aspects of the statute not factually presented to it.

Perhaps the chore of further defining the transfer provision best rests with Congress, its author. Congress has the resources to analyze the feedback from the multitudinous factual determinations in cases under 1404(a), and can most effectively synthesize it into a more detailed definition of the statute. Further, since Congress originally formulated the measure, it is in the best position to expound upon it. It may be argued that a more detailed codification of the factors which determine transfer might prevent the courts in the future from handling with some degree of flexibility new problems which may arise.

It is suggested that the need for judicial flexibility, in this instance, does not outweigh the need of the nisi prius federal courts to decide transfer motions before them quickly and uniformly. The issue of forum, perhaps once of great practical significance, today involves essentially no more than a matter of convenience, since the trend today is towards a more uniform legal system throughout the country. Considering modern methods of travel, even convenience as an important factor in the choice of one forum over another seems to diminish. In the great majority of cases, then, it would seem that the choice of forum involves mostly a question of who is to bear the burden of transportation to the trial court. If the problem may be thus reduced, is not the entire discussion as to 1404(a) "much ado about nothing"?