

Federal Jurisdiction--Venue--Requirements Necessary for Transfer Under Section 1404 (a) of the Judicial Code (Hoffman v. Blaski, 363 U.S. 335 (1960))

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admissible, for the word "divulge" in the section has not been interpreted as referring to admissibility. Nevertheless it is certainly within the province of the Supreme Court's duties to formulate rules of evidence for the federal court system; the Court has "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions,"³⁶ and viewed in this light, the *Nardone* case is more easily supportable.

However, as was pointed out in *Schwartz v. Texas*, section 605 was not intended to change state rules of evidence. The first Court of Appeals decision in the instant case would have that effect in certain instances.³⁷ That decision may be viewed as an extension of the previous extensions outlined above. It is submitted that perhaps the breaking point has been reached.



FEDERAL JURISDICTION — VENUE — REQUIREMENTS NECESSARY FOR TRANSFER UNDER SECTION 1404(a) OF THE JUDICIAL CODE.— In two cases¹ before the Supreme Court respondents (plaintiffs) served process and brought actions in federal district courts having jurisdiction and proper venue over the adverse parties. The adverse parties (defendants), showing "convenience" and "interests of justice," moved for transfer under Section 1404(a) of the Judicial Code.² They admitted that the proposed transferee forums did not originally have venue, but claimed that the clause "where [the action] might have been brought" should not apply solely to the time of the bringing of the action, but also to any subsequent time, when, by their waiver of lack of venue, the proposed transferee forum would be one where the action "might *then* have been brought." Petitioners, both district court judges, granted the motions for transfer, but the Court of Appeals for the Seventh Circuit,³ in mandamus proceedings,

³⁶ *McNabb v. United States*, 318 U.S. 332, 341 (1943).

³⁷ These instances would be where federal court intervention would prevent the further violation of § 605, as by the divulgence of the wiretaps, and non-intervention would result in irreparable injury to petitioner. See *Pugach v. Dollinger*, 275 F.2d 503, 506-07 (2d Cir. 1960).

¹ *Hoffman v. Blaski*, *Sullivan v. Behimer*, 363 U.S. 335 (1960) (The cases, numbered 25 and 26 respectively, were treated in one opinion by the majority of the Court, but Justice Frankfurter wrote separate dissenting opinions.)

² 28 U.S.C. § 1404(a) (1958). The section reads: "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."

³ In the *Hoffman* case, the Court of Appeals for the Fifth Circuit had already determined that § 1404(a) applied. *Ex parte Blaski*, 245 F.2d 737

remanded the actions to the transferor forums. The Supreme Court, affirming the decision of the Court of Appeals on certiorari, *held* that a forum is one where the action "might have been brought" only if the plaintiff could have brought the action there in the first instance *independently* of the wishes or any subsequent action by the defendant. *Hoffman v. Blaski*, 363 U.S. 335 (1960).

Admittedly, the doctrine of forum non conveniens was the basis of the legislative formulation of section 1404(a).⁴ Prior to this statute, this doctrine had been held applicable to the federal courts, and the Supreme Court had stated the relevant factors to be considered in determining whether or not the doctrine is to be applied.⁵ Because the doctrine of forum non conveniens called for dismissal of the action, and possibly the concomitant loss of the right to bring the action⁶ (*e.g.*, through the running of a statute of limitations), the defendant had to show that the balance was "strongly in his favor" to disturb the plaintiff's choice of forum.⁷

The fact that section 1404(a) was based on this doctrine, and yet effected a radical departure by providing for transfer instead of dismissal,⁸ caused much judicial controversy in the determination of just how much "in accord" with the old doctrine the courts were to

(5th Cir. 1957). The fact that the Court of Appeals for the Seventh Circuit, a court of coordinate jurisdiction, later said it did not, was not considered material by the majority of the Court in the instant case. The Court points out that the first decision did not purport to determine the jurisdiction of the transferee forum (the Seventh Circuit). *Hoffman v. Blaski*, 363 U.S. 335, 340 n.9 (1960). The Court then states several reasons why the principles of *res judicata* do not apply. The minority of the Court would rest the decision of this case solely on this ground.

⁴ See the Reviser's Notes following 28 U.S.C. § 1404(a) (1958). *Accord*, MOORE, COMMENTARY ON THE JUDICIAL CODE ¶ 0.03(28), at 199 (1949).

⁵ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Among the considerations stated by the Court are: (1) availability of compulsory process for attendance of the unwilling witnesses; (2) relative ease of access to sources of proof; (3) cost of obtaining attendance of the willing witnesses; (4) possibility of view of the premises if such would be appropriate to the action; (5) other practical problems that make the trial of a case easy, expeditious and inexpensive; (6) court congestion in certain centers; (7) jury duty as a burden on the community which is a stranger to the litigation. *Id.* at 508.

⁶ *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010 (3d Cir. 1952). "That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely. . . ." *Id.* at 1011.

⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

⁸ MOORE, COMMENTARY ON THE JUDICIAL CODE ¶ 0.03(29), at 201-02 (1949). ". . . § 1404(a) does not authorize a dismissal for forum non conveniens; instead, when this doctrine is invoked, the action is to be transferred to a proper and more convenient venue." *Ibid.*

act.⁹ Thus it had been held by a District Court in the Sixth Circuit that the entire section was unavailable to plaintiffs because it was based on forum non conveniens, and that doctrine was available only to defendants.¹⁰ On the other hand, a District Court in the Second Circuit permitted a plaintiff to move under section 1404(a) because now that transfer was provided for instead of dismissal, the doctrine of balancing forums was not in itself inconsistent as applied to plaintiffs.¹¹

The extent to which the courts have considered the section to be a codification of the doctrine of forum non conveniens has influenced their subsequent interpretations of the clause "where it might have been brought."¹² Thus, it had been held in the Third Circuit that subsequent express consent by defendants to a venue which was not originally proper, either because of a lack of statutory venue in the proposed forum or because the defendants were not amenable to process, was sufficient to allow a transfer, thereby equating "might have been brought" with "could now be brought."¹³ However, it has been held in the Second Circuit that the defendant must have been originally amenable to process in the proposed transferee forum if section 1404(a) is to be available, precisely because the doctrine of forum non conveniens presupposed at least two forums in which the defendant was amenable to process.¹⁴ The argument

⁹ See, e.g., *Anthony v. Kaufman*, 193 F.2d 85 (2d Cir. 1951) (granting defendant's motion for transfer although defendant had not originally been amenable to process); *Foster-Milburn Co. v. Knight*, 181 F.2d 949 (2d Cir. 1950) (denying plaintiff's motion to transfer to a forum where defendant was not originally amenable to process); *Troy v. Poorvu*, 132 F. Supp. 864 (D.C. Mass. 1955) (granting plaintiff's motion to transfer despite defendant's lack of amenability to process in the transferee forum); *Rogers v. Halford*, 107 F. Supp. 295 (E.D. Wis. 1952) (denying plaintiff's motion because defendant was not amenable to process in the transferee forum). However, the doctrine of forum non conveniens had been held inapplicable to cases arising under federal acts having their own venue provisions. *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) (Clayton Act); *Baltimore & O.R.R. v. Kepner*, 314 U.S. 44 (1941) (FELA). But § 1404(a) was held applicable to "any civil action," including those formerly out of the range of forum non conveniens. *Ex parte Collett*, 337 U.S. 55 (1949) (FELA); *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949) (Clayton Act).

¹⁰ *Barnhart v. John B. Rogers Producing Co.*, 86 F. Supp. 595 (N.D. Ohio 1949) (plaintiff's raising of the doctrine of forum non conveniens would amount to a motion to dismiss).

¹¹ *Dufek v. Roux Distrib. Co.*, 125 F. Supp. 716 (S.D.N.Y. 1954).

¹² See cases cited note 9 *supra*.

¹³ *Paramount Pictures, Inc. v. Rodney*, 186 F.2d 111 (3d Cir. 1951). "The difference between the phrase 'might have been brought' of Section 1404(a) and that employed in this opinion, 'could now be brought,' is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar." *Id.* at 114. *Accord*, *Anthony v. Kaufman*, 193 F.2d 85 (2d Cir. 1951). Both cases involved motions by the defendants.

¹⁴ *Foster-Milburn Co. v. Knight*, 181 F.2d 949 (2d Cir. 1950) (motion was

that the mere filing of a complaint was equivalent to "bringing" the action was rejected.¹⁵

Chief Judge Magruder, in *In re Josephson*,¹⁶ took the position that if the proposed transferee forum had jurisdiction of the subject matter and venue, regardless of the defendant's original amenability to process, the controlling factors should be "convenience" and the "interest of justice."¹⁷ Since the promulgation of the section, this pattern of conflicting decisions has recurred constantly throughout the federal courts.¹⁸

The Supreme Court in the instant case directly encountered two major problems vexing the lower courts, *i.e.*, the precise grammatical meaning of "might have been brought,"¹⁹ and the elements required for a forum to be one where the action "might have been brought."²⁰ Clearly, under this decision, no subsequent waiver of lack of venue or surrender to process by the defendant will suffice to effect a transfer under section 1404(a) on the theory that "might have been brought" means "could now be brought."²¹

made by plaintiff to transfer to a forum where the defendant was not originally amenable to process).

¹⁵ *Ibid.* The fact that "a civil action is commenced by filing a complaint with the court" (FED. R. CIV. P. 3) caused plaintiffs to argue that since they could have filed the complaint without serving process on the defendant, the action "might have been brought." The court held that while "filing" was equivalent to "commencement," neither sufficed for the "bringing" of an action under § 1404(a). *Accord*, *Rogers v. Halford*, 107 F. Supp. 295 (E.D. Wis. 1952). *Contra*, *Otto v. Hirl*, 89 F. Supp. 72 (S.D. Iowa 1950).

¹⁶ 218 F.2d 174 (1st Cir. 1954).

¹⁷ This case, on a defendant's motion, represents a compromise between the two extremes. On the one hand it rejects the necessity for original amenability to process in the transferee forum. Theoretically, perhaps, such an interpretation could work a hardship by forcing a plaintiff out of a forum where he could have litigated, into one where he cannot, simply because the defendant is not amenable to process. Judge Magruder points out that in reality this would not happen for two reasons: (1) if process is effected in the transferor forum, it will remain effective since the transfer sends the case "as is" to the transferee forum; or, (2) if process is not effected in the transferor forum, the "interest of justice" would prevent transfer.

On the other hand, it requires that the transferee forum be one originally having jurisdiction and proper venue, although there is dictum to the effect that § 1404(a) also authorizes transfer to a forum not having statutory venue provided that the defendants, who might have objected to the lack of venue originally, waive that objection.

¹⁸ See cases cited note 9 *supra*.

¹⁹ *Hoffman v. Blaski*, 363 U.S. 335 (1960). "Petitioners' 'thesis' and sole claim is that § 1404(a) . . . should be broadly construed, and, when so construed, the phrase 'where it might have been brought' should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer. . . ." *Id.* at 342.

²⁰ "We agree with the Seventh Circuit that: 'If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought.'" *Id.* at 344.

²¹ "[W]e think the dissenting opinion of Judges Hastie and McLaughlin in

Likewise, it seems clear that transfer is no longer possible under section 1404(a) unless the proposed transferee forum was one in which venue originally lay, and where the defendant was amenable to process in the first instance.²² In short, the Court has ruled that unless the plaintiff could have brought the action in the proposed transferee forum just as he brought it in the present (transferor) forum, section 1404(a) is not applicable.

The Court's rejection of the argument that "might have been brought" is the equivalent of "could now be brought" is sound enough. Even the judiciary should not be able to twist the "plain words" of a statute to such an extent.

It is difficult, however, to see such a great distortion of "plain words" in interpreting the word "might," on a *defendant's* motion, to mean a forum where the plaintiff could have brought the action *if* the defendant had surrendered to process or consented to the venue. Such an interpretation is consistent with the defendant's traditional prerogative to waive lack of venue,²³ obviates the problem of extra-territorial service of process (since the interpretation applies only to defendant's motion), places more weight upon "convenience" and the "interest of justice," and is "in accord" with the doctrine of forum non conveniens by giving the defendant a slight advantage in respect to a remedy which was previously exclusively his own.

Instances might be imagined where such an interpretation per se could work a hardship on the plaintiff.²⁴ There are, however, other limiting words in section 1404(a)²⁵ which should prevent such a hardship. If the defendant shows such compelling reasons of "convenience" and "justice" despite the fact that the action, if originally brought in the proposed forum, would have been subject to objection on the grounds of improper venue or lack of amenability to process, why should these reasons be totally disregarded? The holding of the Court seems, indeed, to imply a lack of confidence in the ability of the lower courts to properly balance the interests of the parties in the light of "convenience" and "justice."²⁶

Paramount Pictures, Inc. v. Rodney, 186 F.2d 111 (C.A. 3d Cir.), correctly answered this contention: ". . . In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when the suit was instituted." *Id.* at 343.

²² ". . . and it is immaterial that the defendant subsequently [makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum]." *Id.* at 344.

²³ See MOORE, COMMENTARY ON THE JUDICIAL CODE ¶ 0.03(28), at 172-73 (1949): "[V]enue . . . is a privilege personal to each defendant, which he can and does waive unless he makes proper and timely objection. . . ."

²⁴ See note 17 *supra*.

²⁵ 28 U.S.C. § 1404(a) (1958): "For the *convenience* of parties and witnesses, in the *interest of justice* . . ." (Emphasis added.)

²⁶ See Justice Frankfurter's remark that ". . . this argument against transfer

Perhaps the majority felt that such an interpretation would result in a greater divergence from the doctrine of *forum non conveniens* than the wording of the section warrants.²⁷ Nonetheless, at present, if section 1404(a) is to be available, the proposed transferee forum must be one over which the court has jurisdiction and venue, and where the defendant *was originally* amenable to process.²⁸

Any wider extension of the availability of transfers must now depend upon clearer legislative pronouncement.



LABOR LAW — INDUCEMENT OF SUPERVISOR PERMITTED BY AMENDED SECTION 8(b)(4).—A subcontractor without a union contract was employed at two different construction sites. At the first site, the general contractor operated under a union agreement requiring observance of union rules¹ in all subcontracts. A superintendent at the site had full authority over these subcontracts, as well as the authority to hire and fire, to hear grievances, and to handle routine operational problems. The subcontractor employed suspended union members and did not observe union conditions, which facts were brought to the attention of the superintendent by an agent of the union. The superintendent cancelled the subcontract. At the second site, the subcontractor was removing dirt in trucks driven by non-union personnel. Union officers told the contractors that union drivers would not work with non-union drivers, and, as a result, the subcontractor's non-union trucks were barred from the

in situations like the present implies distrust in the ability and character of district judges to hold the balance . . .” *Hoffman v. Blaski*, 363 U.S. 335, 368 (1960) (dissenting opinion to case No. 26, *Sullivan v. Behimer*).

²⁷ In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the Court had stated: “In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . .” *Id.* at 506-07 (dictum). Considering the wording of the section and its admitted formulation “in accord” with the doctrine of *forum non conveniens* in the light of this statement strengthens the majority view.

²⁸ *But see* *Continental Grain Co. v. Federal Barge Lines, Inc.*, 364 U.S. 19 (1960). Here, a barge and its owner were libelled in admiralty. The Court allowed transfer to a forum where the owner was originally amenable to process, but where in *rem* jurisdiction over the barge was originally unavailable. The Court reasoned, however, that this was really a single civil action against the owner, although the barge was considered as a separate party through a fiction of admiralty law. Thus compelling reasons of “convenience” and “interest of justice” were allowed to override the fiction. Mr. Justice Whittaker, who wrote the majority opinion in the instant case, insisted, in his dissenting opinion that the holding of the instant case should control.

¹ The union required employment of union members at the union pay scale.