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amended" doctrine should be adopted to avoid the waste and injustice of reversing a case which has been justly disposed of. 30

CURTAILING THE SCOPE OF 1404 (A)—ROUND TWO

The Judicial Code of 1948 enacted a modification of the doctrine of forum non conveniens into federal statutory law. 1 Section 1404(a) 2 authorizes district courts to transfer civil actions when the convenience of parties and witnesses and the interests of justice will be served thereby. 3 Transfers can be made to any other district or division where the action

30. Cf. Mayfield v. First National Bank of Chattanooga, Tennessee. 137 F.2d 1013 (6th Cir. 1943) (trial court after denying amendment of pretrial order admitted irrelevant evidence, held, pretrial order will be treated as amended to include the new issue). But in the Mayfield case the party who argued against treating the pleadings as amended was the party who had originally sought to have it amended. The issue had been litigated and decided against him, and he was relying on the original denial of an amendment to secure a reversal. Obviously to reverse here would have been to reward rather than penalize the inadequacy of the pretrial order. It is still open in the federal courts whether the court would treat the order as amended if the extraneous issue had been decided against the party who had objected to its litigation.


For a general discussion of the background of forum non conveniens see Barrett, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929); Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947); Comment, 56 Yale L.J. 1234 (1947).

2. "For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C.A. § 1404(a) (1950).

Interpretation of the phrase "any civil action" was the first major problem to arise. Prior to enactment of 1404(a), forum non conveniens was not available in suits arising under statutes with special venue provisions, such as FELA, Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44 (1941), and the Clayton Act, United States v. National City Lines, 334 U.S. 573 (1948).

Following enactment of 1404(a), the Supreme Court held that "any civil action" included actions brought under FELA, Ex Parte Collett, 337 U.S. 55 (1949) and the Clayton Act, United States v. National City Lines, 337 U.S. 78 (1949). See Notes, 58 Yale L.J. 482 (1949); 37 Calif. L. Rev. 697 (1949). These decisions are now being attacked in Congress—H.R. 7550 would eliminate all special venue statutes from the scope of the section. 18 U.S.L. Week 2415 (Mar. 14, 1950).

For a discussion of whether other non-criminal actions such as suits in admiralty are included see Moore's Judicial Code Commentary 200 n.1, 207 (1949).

3. 1404(a) alters the prior practise of dismissal of an action through application of the doctrine of forum non conveniens by authorizing the transfer of an action to a proper and more convenient venue. See Moore's Judicial Code Commentary 199, 200 et seq. (1949).
“might have been brought.” From the beginning, this phrase has been interpreted to permit transfer only to a district where venue is proper.4

Foster-Milburn Co. v. Knight,5 a recent second circuit decision, further limits the applicability of 1404(a) by requiring in addition availability for process in the transfer district. In order to serve process properly, a California plaintiff sued Foster-Milburn in New York for a tort which occurred in California.6 California was proper venue, and the district judge, upon plaintiff’s motion for transfer, found it a convenient forum. The judge therefore decided that 1404(a) authorized a transfer.7 When this action was challenged,8 the second circuit held that 1404(a) did not permit transfer to a district where the defendant was not available for service of process.9

4. Apparently few litigants have attempted to transfer to a district where venue is improper, for while courts frequently state in dicta that the venue test must be met there are few holdings on the point. See, for example, Ferguson v. Ford Motor Co., 89 F. Supp. 45 (S.D. N.Y. 1950) where, in holding that 1404(a) does not require venue in the new district to be proper for all defendants, the court rejected defendant’s argument that it need not be proper for any. See also the dictum in Lucas v. New York Cent. R. Co., 88 F. Supp. 536, 537 (1950). Moore states unequivocally that venue in the district to which transfer is requested must be proper. 3 Moore, Federal Practice 2139 n.87 (2d ed. 1948).

5. 181 F.2d 949 (2d Cir. 1950).

6. FED. R. Civ. P. 4(f) provides that all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held. Plaintiff’s counsel advised suit in New York, the district of defendant’s residence, because he believed that defendants were not doing business in California to the extent necessary to establish their presence there for the purpose of service of process on them under Rule 4(d), Fed. R. Civ. P.

7. When the second circuit announced its decision, Judge Knight had not yet issued a formal order. After a hearing, he had filed an opinion stating his conclusion. McCarley v. Foster-Milburn Co., 89 F. Supp. 643 (W.D. N.Y. 1950).

8. Defendant, Foster-Milburn Co., applied to the second circuit for a writ of mandamus or prohibition to prevent Judge Knight from entering an order transferring the action. Although it had previously refused to review a 1404(a) transfer by mandamus, Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866 (2d Cir. 1950), see Note 50 Col. L. Rev. 537 (1950), and had left the question for the court of appeals of the circuit to which the action had been transferred, the second circuit distinguished the Foster-Milburn case as raising a question of jurisdiction. For a stronger assertion that the second circuit will review motions to transfer made in that circuit see Ford Motor Co. v. Ryan, 182 F.2d 329 (1950).

9. The court based its decision on the ground that 1404(a) was not meant to provide plaintiffs a device for extraterritorial service of process. To interpret the section so as to allow transfer to a district where plaintiff could not have initially served process on the defendant, the court reasoned, was in effect to allow such service. “So revolutionary a change” required a plain expression of intent by Congress. However, even if an interpretation allowing transfer in this case could be said to be a substantial change, it seems hardly revolutionary. The defendant’s right not to be served in one district for trial in another has never been absolute. True, the general rule established in accordance with the Judiciary Act of September 24, 1789, c.20, § 11, 1 Stat. 73, 79, is that a court cannot issue process beyond the limits of the district, Harkness v. Hyde, 98 U.S. 476 (1878); Ex Parte Graham, 3 Wash. 456 (Cir. Ct. 1818), and that a defendant in a civil suit can be subjected to a court’s jurisdiction in personam only by service within the district. Toland v. Sprague, 12 Pet. 300, 330 (U.S. 1838). But Congress recently has made numerous exceptions to this rule.
The ruling in effect denies plaintiffs any real benefit from the section. Ordinarily a plaintiff will not undertake the extra step of suing and then moving for transfer to a district in which he could have sued originally. Because of this 1404(a) will help only those plaintiffs who discover some reason for transferring after suit has been brought.

When a defendant seeks to transfer, however, the Foster-Milburn requirement of availability for process should have no effect. On the one hand, a defendant's motion to transfer to a district where he could not have been served with process should be deemed a submission to the transferee court's jurisdiction. On the other hand, the plaintiff should have no standing to object to such submission on the part of the defendant.

Even without the Foster-Milburn limitation, beneficial application of 1404(a) is restricted by the proper venue requirement. The most convenient

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See, for example, 15 U.S.C.A. § 22 (1941) (Clayton Act), 15 U.S.C.A. § 77v (1941), (Securities Act of 1933), 15 U.S.C.A. § 78a (1941) (Securities Exchange Act of 1934), 15 U.S.C.A. § 79y (1941) (Public Utility Holding Co. Act, 1935), 15 U.S.C.A. § 80a-43 (1941) (Investment Company Act, 1940). Moreover, it is hardly necessary to suppose that 1404(a) introduces anything like a substantial change into the general requirements of service of process. The only valid reason for limiting the running of process to the territorial limits of the state in which the district court is held is that, were extraterritorial service allowed, injustice and inconvenience to the defendant might result. 1404(a) presents no such possibility. It does not even enter the picture until suit has been instituted in the district where defendant can properly be served. When 1404(a) does become relevant, it protects the defendant from inconvenience and injustice. Part of the burden assumed by the party moving for transfer is to show that "convenience of the parties" and the "interests of justice" warrant transfer.

Courts might want to adopt a position midway between the extremes of not allowing plaintiffs to transfer to a district where the defendant could not have been served and allowing plaintiffs so to transfer when simple convenience and justice would be met. If they wish to do so, courts could require plaintiffs to make a "strong showing" before allowing transfer. In an analogous situation, the defendant must make a strong showing when seeking to transfer a suit brought under statutes conferring on the plaintiff special venue privileges. See, e.g., Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950) (Clayton Act).

10. Before the Foster-Milburn case one district had held that 1404(a) is not available at all to plaintiffs. In Barnhart v. John B. Rogers Producing Co., 86 F. Supp. 595 (N.D. Ohio 1949) an Ohio district court contended that since plaintiffs voluntarily choose their own forum they should not be allowed to transfer. See Notes, 28 Tex. L. Rev. 872 (1950), 48 Mich. L. Rev. 1032 (1950), 63 Harv. L. Rev. 708 (1950). Under the general requirements of proper venue and process however, some plaintiffs will have little choice of forum. The Foster-Milburn case is a good example of such a situation.

11. In this circumstance however, plaintiff can get into another district without 1404(a); for if the reason is sufficiently important, he can dismiss and initiate a new action in the more favorable district. See, e.g., Bolten v. General Motors Corp., 180 F.2d 379 (7th Cir. 1950).

12. Theoretically, a defendant might move to transfer to a district where he could not have been served with process, and, once the action had been transferred, move to dismiss in the new court for lack of personal jurisdiction. Any court faced with this maneuver should have little difficulty denying the second motion. See Moore's Judicial Code Commentary 210, 211 (1949): "... if the motion to transfer is granted and the case is transferred to another district, this latter district should accept the ruling as the law of the case for it..."
forum is frequently the place where the cause of action arose. This may not be proper venue. A suit based solely on diversity of citizenship, for example, can ordinarily be prosecuted only in the district where all plaintiffs or defendants reside. Thus a diversity tort or contract action may have to be pressed hundreds of miles from the place where the witnesses reside and the cause of action arose. Under the present interpretation of 1404(a), the court is powerless to transfer to this possibly more convenient forum. Furthermore, in the absence of a special venue statute, a suit not based solely on diversity can usually be laid only in the district where the defendant resides. Section 1404(a) as now interpreted does not permit transfer in such suits no matter how inconvenient the forum. And even though many statutory causes of action have liberal venue provisions, the most convenient forum may still not be one of proper venue.

Wiping out both the process and venue requirements would not give parties complete freedom to choose their jurisdiction, and thereby make nonsense of the statutes limiting venue and barring extraterritorial service of process. In the first place, a plaintiff would have to meet these require-

13. This point is made in Blume, Place of Trial of Civil Cases, 48 Mich. L. Rev. 1, 37 (1949).
   If all of the defendants reside in the same state it is not necessary that they all reside in the same district in order to be joinable. 28 U.S.C.A. § 1392(a) (1950).
15. Where defendant is a corporation or an alien, restriction of transfer to a district of proper venue may be less serious. A corporation may be sued in any district where it is incorporated, licensed to do business, or is doing business. 28 U.S.C.A. § 1391(c) (1950). An alien may be sued in any district. 28 U.S.C.A. § 1391(d) (1950).
   This is true even when the statutory cause of action is coupled with diversity of citizenship as a basis of federal jurisdiction. Since the action does not rest solely on diversity, proper venue would be limited to the district where the defendant resides. American Chemical Paint Co. v. Dow Chemical Co., 161 F.2d 956 (6th Cir. 1947). See Moore's Judicial Code Commentary 171 (1949).
17. See note 25 infra for statutes there cited.
19. The Judiciary Act of September 24, 1789, c. 20, § 11, 1 Stat. 73, 79, limited proper venue to the place of defendant's residence or wherever he might be found. Since this provision seems to have been read, in diversity cases, in conjunction with that giving circuit courts original cognizance of suits "brought between a citizen of the state where the suit is brought and a citizen of another state," Judiciary Act of September 24, 1789, c. 20, § 11, 1 Stat. 73, 78, venue was in fact limited, in diversity cases, to the place of defendant's residence, or, if the defendant could be found there, place of plaintiff's residence. See, e.g., Craig v. Cummings, (1811), note to Shute v. Davis, 1 Pet. 431 (Cir. Ct. 1817); White v. Fenner, 1 Mason 520 (Cir. Ct. 1818); Kitchener v. Strawbridge and Sullivan, 4 Wash. 84 (U.S. Cir. Ct. 1821). There is reason to believe that by so limiting the number of places at which trial might be brought, and preserving to defendants the right to be tried in their own district and not in distant places, Congress did much to insure the acceptance of a federal system of trial courts in the troubled times of 1789. See, Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 71 (1923). For similar reasons, no doubt, the Judiciary Act of 1789 provided that no one might be arrested in one district for trial in another, and it was early established that a court might not authorize the
ments in order to get into court at all. Thereafter, the party requesting
transfer, although he would not have to meet venue and process require-
ments in the new district, would have to meet another, and stiffer, test—
proving that convenience and justice dictate transfer.20

Under the present statute, a court cannot escape the venue requirement;
but there is no reason why it should impose the additional requirement of
availability for process.21 Venue must be proper in the transferee district

service of process outside the district in which it sat. Judiciary Act of September 24, 1789,
c. 20, § 11, 1 STAT. 73, 79; Ex parte Graham, 3 Wash. 456 (U.S. Cir. Ct. 1818). Though Con-
gress did amend the general venue statute by Act of March 3, 1887, c. 373, § 1, 24 STAT. 552,
as corrected by Act of August 13, 1888, c. 866, § 1, 25 STAT. 433, and thus accomplished, in
part, its purpose of restricting the jurisdiction of the federal courts, the requirements as to
venue in diversity cases remained essentially the same—proper venue being the place of
defendant's residence, or the place of plaintiff's residence. While explicit exceptions have
been made to the rule barring extraterritorial service of process, see note 9 supra, Fed. R.
Crv. P. 4(f) embodies the old doctrine. See note 6 supra. It would seem that the essen-
tial purpose of venue and process requirements today is to protect the defendant from
being dragged to trial anywhere in the country at the whim of the plaintiff, to prevent him
thus, from being subjected to injustice and inconvenience, and possibly to regulate the juris-
diction of the federal courts. Section 1404(a) is in accord with both of these policies.
See note 9 supra.

20. Important factors to be considered by a court in granting or denying the remedy
afforded by forum non conveniens were: (1) private interests of the litigants; (2) relative ease
of access to sources of proof; (3) availability of compulsory process for attendance of unwill-
ing witnesses; (4) cost of obtaining attendance of willing witnesses; (5) possibility of view of
premises if view would be appropriate to action; (6) other practical problems that make trial
easy, expeditious, and inexpensive; (7) relative advantages and obstacles to a fair trial;
(8) factors of public interest; (9) plaintiffs choice of forum. Gulf Oil Corp. v. Gilbert, 330

For a discussion of whether standards embodied in the doctrine of forum non conveniens
should be considered altered by its modification and enactment into 1404(a), see Ford
Motor Co. v. Ryan, 182 F.2d 329, 330 (1950). The timeliness of the motion may also be a
factor in deciding whether or not to transfer. Conceivably an action may be transferred at
any time up to final judgment, but the likelihood of a motion being granted diminishes as
the action progresses. If the filing is delayed a considerable period after commencement of
the action, the further delay caused by rescheduling in the transfer district, and the court's
familiarization with the case, will militate against the transfer. See, e.g., Levenson v. Little,
1948).

21. Common law courts did state the requirement that in order to grant the remedy of
forum non conveniens there must be two forums at which suit could be brought. See, e.g.,
(H. L.) 13, 22; Sim v. Robinow, 19 Rettie (Sess. Cas. 4th Ser.) 665, 669 (1892). See also
GLOAG & HENDERSON, INTRODUCTION TO THE LAW OF SCOTLAND 22 (3rd ed. 1939); Blair,
The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1, 33 (1929);
Comment, 56 YALE L.J. 1234, 1247 (1947). But it is doubtful that both availability for
service of process and proper venue were included in this requirement under the common law
doctrine of forum non conveniens before its adoption in the federal courts. The specific issue
never arose since service of process did not present the problems it does in the federal sys-
tem. Moreover the doctrine was traditionally invoked on motion by a defendant.

Nor did service of process and proper venue problems arise specifically while forum non
because of 1404(a)'s "where it might have been brought" proviso. If an action could be transferred to any district which the transferor court finds to be convenient and just, the proviso would have no meaning. But the term "brought" probably refers only to venue and not to availability for process as well.\(^2\) For one thing, 1404(a) appears in the venue chapter of the Code;\(^23\) the section is itself entitled "Change of Venue."\(^24\) For another, those sections of the Code prescribing proper venue, as well as other venue statutes, use the term "brought."\(^25\)

With the venue requirement explicit in the statute, and the process requirement imposed by the Foster-Milburn court, the only satisfactory solution is to amend the statute. Congress should replace the proviso "where it might have been brought" with the phrase "without regard to any venue or service of process requirement imposed in this title or in any other law." This amendment would make courts free to transfer actions in all cases where the convenience of parties and witnesses and the interests of justice would be served.

\textit{Conveniens} was being applied in the federal courts before enactment of 1404(a). The only support for a requirement of both proper venue and availability for process under the federal common law doctrine comes from a Supreme Court dicta that \textit{forum non conveniens} "presupposes at least two forums in which the defendant is amenable to process." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). In that case, the defendant could have been served in the more convenient forum.

22. One district court felt that it was not precluded from transferring an action on plaintiffs motion to a district where venue was proper but defendant could not originally have been served with process. Where convenience and justice required transfer, the court found that the proviso "where it might have been brought" was "clear and unambiguous" and that the "authority contained in said section is likewise clear and direct for the court here to order this case transferred." Otto v. Hirl, 89 F. Supp. 72, 75 (S.D. Iowa 1950).

23. 28 U.S.C.A. §§ 1391-1406, c. 87 (1950) entitled "District Courts; Venue."
