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FEDERAL PROCEDURE-CHANGE OF VENUE-APPLICABILITY OF §1404(a) OF THE JUDICIAL CODE OF 1948 TO CASES ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT AND THE SHERMAN ANTI-TRUST ACT

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FEDERAL PROCEDURE—CHANGE OF VENUE—APPLICABILITY OF §1404(a) OF THE JUDICIAL CODE OF 1948[1] TO CASES ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT[2] AND THE SHERMAN ANTI-TRUST ACT[3]—Two recent decisions of the United States Supreme Court have resolved this problem. In the first case, plaintiff employee sued defendant employer for damages under the FELA. Taking advantage of the broad choice of venue given him,[4] plaintiff sued in the Chicago district court which was some 400 miles from Irvine, Kentucky, the place of injury and residence of all the witnesses. Defendant moved for transfer to a Kentucky district court, "For the convenience of parties and witnesses, in the interest of justice. . . ."[5] The motion was granted and plaintiff sought a writ of mandamus in the United States Supreme Court to compel the original tribunal to hear the case. *Held*, application denied since the transfer was a proper one. *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944 (1949).

In the second case, plaintiff, the United States, brought a civil action under the Sherman Act against defendant corporation; under the applicable venue statute,[6] plaintiff selected a California district court, and defendant moved for dismissal on the grounds of judicial forum non conveniens. This motion was granted,[7] but the Supreme Court reversed on appeal.[8] Defendant then moved in the California court for transfer to the Chicago district court, relying on §1404(a) which had become effective in the meantime.[9] Again the district court granted the motion,[10] and plaintiff applied to the Supreme Court for a writ of certiorari. *Held*, application denied since §1404(a) authorized the transfer. *United States v. National City Lines, Inc.*, 337 U.S. 78, 69 S.Ct. 955 (1949).

These cases present a problem in statutory construction, namely, whether §1404(a), which appears in the Venue Chapter[11] of Revised Title 28 of the Judicial Code and purports to apply to "any civil actions,"[12] applies to civil actions in which venue is provided for by entirely distinct titles of the code.[13] Several arguments were made against applying §1404(a) to FELA cases and civil actions

[1] "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." P. L. No. 773, 80th Cong., 2nd sess., §1404(a) (June 25, 1948.)

[2] 35 Stat. L. 65 (1908) as amended by 36 Stat. L. 291 (1910) and 53 Stat. L. 1404 (1939), 45 U.S.C. (1946) §§51-59.

[3] 26 Stat. L. 209 (1890), 15 U.S.C. (1946) §§1, 2.

[4] 35 Stat. L. 66 (1908) as amended by 36 Stat. L. 291 (1910), 36 Stat. L. 1167 (1911) and 53 Stat. L. 1404 (1939), 45 U.S.C. (1946) §56.

[5] Relying on §1404(a), which employs this language, see note 1, supra.

[6] 38 Stat. L. 736 (1914), 15 U.S.C. (1946) §22.

[7] United States v. National City Lines, Inc., 7 F.R.D. 456 (1947).

[8] United States v. National City Lines, Inc., 334 U.S. 573, 68 S.Ct. 1169 (1947).

[9] Since §1404(a) states a rule of procedure, it may be applied to suits commenced before September 1, 1948, the effective date of the section. Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944 (1949).

[10] United States v. National City Lines, Inc., (D.C. Cal. 1948) 80 F. Supp. 734.

[11] Chapter 87, §§1391-1406 (1948).

[12] See note 1, supra.

[13] As to FELA litigation, Title 45; in civil actions under the Sherman Act, Title 15.

under the Sherman Act. First, it was suggested that the words "any civil action" should be construed in light of the fact that §1404(a) is included in chapter 87, the venue chapter, of Title 28; Congress meant, it was said, that the new section should apply to any civil action in which venue was controlled by chapter 87. Chief Justice Vinson gave two answers to this proposition: (a) Congress had specifically provided against construction of Title 28 by this sort of reasoning;[14] (b) the same expression was also used in two of the general venue sections[15] of chapter 87. Presumably, therefore, the same meaning was intended as in §1404(a), but to construe "any civil action" in the former sections as meaning only those civil actions in which venue was provided for by chapter 87 would be unreasonable.[16] Secondly, it was argued that a result of applying §1404(a) to FELA and Sherman Act litigation would be partial repeal of the venue statutes governing such litigation; that neither of these statutes was included in the Congressional listing of statutes, repealed by Revised Title 28, and, therefore, that Congress did not intend such partial repeal. The answer of Chief Justice Vinson was that §1404(a) dealt with a problem distinct from venue, namely, defendant's right to a transfer of the case for reasons of convenience after plaintiff had selected a forum; therefore, declared the Chief Justice, Congress would not consider the venue statutes affected and would not list them as repealed. At first glance, this appears to be a distinction without a difference, but on closer examination it makes sense. A broad choice of venue is desirable in these cases simply because a narrower provision may cause plaintiff real hardship; this consideration motivated the enactment of such broad venue provisions as those governing the FELA and the Sherman Act.[17] However, there is considerable evidence that plaintiffs were taking unfair advantage of their broad choice of venue in these cases by forcing defendants to litigate in inconvenient forums,[18] and the Supreme Court had held

[14] "No inference of legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any . . . section is placed. . . ." Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944 (1949).

[15] P. L. No. 773, 80th Cong., 2d sess., §§1392-93 (1948), the text of which is as follows: (1) §1392, "Defendants or property in different districts in same State (a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts. (b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts"; (2) §1393, "Divisions; single defendant; defendants in different divisions (a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides. (b) Any such action, against defendants residing in different divisions of the same district or different districts in the same State, may be brought in any of such divisions."

[16] To appreciate just how unreasonable, read the text of §§1392-93, note 15, supra, substituting "civil actions in which venue is provided for by chapter 87" for "any civil action."

[17] As to venue under FELA, see Martin, "Improper Venue under the Federal Employer's Liability Act," 3 WASH. AND LEE L. REV. 247 at 248 (1942); as to the same problem under the Sherman Act, see Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 at 373-74, 47 S.Ct. 400 (1926).

[18] As to FELA litigation, see Martin, "Improper Venue under the Federal Employer's Liability Act," 3 WASH. AND LEE L. Rev. 247 at 248-49 (1942); as to Sherman Act litigation, see the principal case when it was previously before the Supreme Court, United States v. National City Lines, Inc., 334 U.S. 573 at 576-77, 68 S.Ct. 1169 (1947).

the judicial forum non conveniens doctrine inapplicable to cases in which plaintiff's choice of venue was given him by statute.[19] Thus it would be logical for Congress to seek a compromise which would allow plaintiff his broad choice of venue and nevertheless allow a defendant, when unduly prejudiced by that choice, to obtain a transfer to a more convenient forum. In the view of the principal cases, Congress intended §1404(a) to perform this function. Finally, it was argued that the legislative history of the new section showed that Congress had not intended to make controversial changes in the law by Title 28 Revision, that §1404(a), construed to apply to FELA and Sherman Act cases, would make such a change, and, therefore, that Congress had not intended such a construction. The answers given to this reasoning were as follows: the statutory language, "any civil action," was so clear that no reference to legislative history was necessary; furthermore, Congress was well informed as to the import of §1404(a) and, since no controversy had in fact been aroused, Congress must have regarded the change as noncontroversial. Persuasive affirmative arguments also support the solution reached by the Supreme Court in the principal cases. First, a literal construction of §1404(a) clearly includes FELA and Sherman Act cases. Second, the reviser's notes to §1404(a),[20] when it was before Congress, listed a case arising under the FELA in which plaintiff had imposed an inconvenient forum upon defendant as an example of the need for the proposed new sction. Finally, the district courts considering the applicability of §1404(a) to FELA and Sherman Act litigation had almost unanimously held the section applicable.[21] Therefore, although there is some room for controversy,[22] it would appear that the principal cases reflect a sound construction of §1404(a).

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[19] This conclusion was reached as to FELA cases in Baltimore & Ohio Ry. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6 (1941); and as to civil actions under the Sherman Act in United States v. National City Lines, 334 U.S. 573, 68 S.Ct. 1169 (1947).

[20] H.Rep. 308, 80th Cong., 1st sess., A 132 (1947); H.Rep. 2646, 79th Cong., 2d sess., A 127 (1946).

[21] The following cases held §1404(a) applicable to FELA litigation: Hayes v. Chicago R.I. & Pac. Ry. Co., (D.C. Minn. 1948) 79 F. Supp. 821 (1948); Nunn v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., (D.C. N.Y. 1948) 80 F. Supp. 745; Chaffin v. Chesapeake & Ohio Ry. Co., (D.C. N.Y. 1948) 80 F. Supp. 957; Richer v. Chicago, R.I. & Pac. Ry. Co. (D.C. Mo. 1948) 80 F. Supp. 971; Scott v. N.Y. Central Ry. Co., (D.C. Ill. 1948) 81 F. Supp. 815. Contra: Pascarella v. N.Y. Central Ry. Co., (D.C. N.Y. 1948) 81 F. Supp. 95. Both of the following cases held §1404(a) applicable to civil actions under the Sherman Act: United States v. National City Lines, Inc., (D.C. Cal. 1948) 80 F. Supp. 734; United States v. E. I. DuPont de Nemours & Co., (D.C. D.C. 1949) 83 F. Supp. 233.

[22] Justice Douglas, Justice Black concurring, dissented in both of the principal cases; Justice Rutledge concurred with the majority, but expressed some doubt that Congress fully realized that §1404(a) applied to FELA and Sherman Act litigation.