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FEDERAL COURTS-VENUE-TRANSFER TO A MORE CONVENIENT FORUM UNDER TITLE 28, UNITED STATES CODE, SECTION 1404(a)

Nolan W. Carson S. Ed.
University of Michigan Law School

FEDERAL COURTS—VENUE—TRANSFER TO A MORE CONVENIENT FORUM UNDER TITLE 28, UNITED STATES CODE, SECTION 1404(a)—A cause of action based on diversity of citizenship was brought in a United States District Court in Pennsylvania by a New York corporation against a Delaware corporation. Plaintiff joined a New York corporation as an involuntary plaintiff.[1] Defendant then moved for a transfer based on forum non conveniens[2] to the Southern Dis-

[1] Rule 19(a), Federal Rules of Civil Procedure.

[2] 28 U.S.C. (1950) §1404(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."

trict of New York. *Held,* this suit could not have been brought originally in the Southern District of New York since the present involuntary plaintiff, amenable to process in that district, could only have been joined as a defendant[3] and diversity of citizenship would have been absent. *Masterpiece Productions, Inc. v. United Artists Corp.,* (D.C. Pa. 1950) 90 F. Supp. 750.

Prior to 1948 an action in a federal court could be dismissed on the grounds of forum non conveniens, plaintiff being required to bring a new suit in the more convenient forum.[4] In 1948, section 1404(a) of Title 28, United States Code, gave the doctrine of forum non conveniens statutory force and improved its effectiveness by providing for transfer of the action to any other district or division where it might have been brought. A conflict has arisen among the district courts on the proper interpretation to be given the phrase "where it might have been brought." The problem lies in whether a district court where the action might have been brought must have proper venue, personal jurisdiction, and jurisdiction over the subject matter, or whether less than all of these original requirements need be present. It is evidently agreed that the transferee district must be one where venue would have been proper if the suit had been commenced there[5] but there is disagreement as to whether defendant must also have been amenable to process in that district.[6] The court in the present case adds the requirement of independent jurisdiction over the subject matter in the transferee district.[7] The requisites of the transferee forum must of course be drawn from the probable intent of Congress in its use of the equivocal phrase "where it might have been brought." An investigation of the reviser's notes appended to Title 28 and other pre-enactment materials reveals nothing as to the meaning of the phrase. Some insight can be gained by recourse to the meaning given a substantially similar phrase used in a sister provision, section 1406(a), to describe the transferee forum. That section as originally enacted in revised Title 28 required the district court where venue was improperly laid to transfer the action to any other district or division "in which it could have been brought."[8] A subsequent document[9] clearly shows that the Senate Committee on the Judiciary understood the phrase to require proper venue but not amena-

[3] Rule 19(a), Federal Rules of Civil Procedure.

[4] Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947).

[5] Otto v. Hirl, (D.C. Iowa 1950) 89 F. Supp. 72; Tivoli Realty, Inc. v. Paramount Pictures, Inc., (D.C. Del. 1950) 89 F. Supp. 278; Foster-Milburn Co. v. Knight, (2d Cir. 1950) 181 F. (2d) 949; see Ferguson v. Ford Motor Co., (D.C. N.Y. 1950) 89 F. Supp. 45.

[6] Cases requiring amenability to process: Foster-Milburn Co. v. Knight, supra note 5; Tivoli Realty, Inc. v. Paramount Pictures, Inc., supra note 5. *Contra*: Otto v. Hirl, supra note 5; see McCarley v. Foster-Milburn Co., (D.C. N.Y. 1950) 89 F. Supp. 643, reversed on petition to the court of appeals for an extraordinary writ to prevent transfer, Foster-Milburn Co. v. Knight, supra note 5.

[7] Also see Lucas v. New York Cent. R. Co., (D.C. N.Y. 1950) 88 F. Supp. 536.

[8] "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[9] S. Rep. No. 303, 81st Cong., 1st sess., p. 6 (1949), dealing with a proposed amendment to §1406(a).

bility to process in the transferee district.[10] In view of the similarity of the phrases, it is unlikely that Congress meant to require amenability to process in one type of transfer and not the other. It seems very probable that these phrases in sections 1404(a) and 1406(a) are used in the venue sense. However, there is no indication whether the transferee forum was intended to be one with independent jurisdiction over the subject matter of the cause or whether the design was to allow a transfer for trial in another forum with jurisdiction flowing derivatively from the inconvenient forum. The district courts have never been given the powers of courts of general jurisdiction. Since their inception, they have been limited in their jurisdiction to actions which are shown to come within the jurisdictional statutes. In view of this long-standing restriction, it is likely that Congress did not intend to allow derivative jurisdiction under section 1404(a). Although the court in the instant case found that there was no independent jurisdiction in the Southern District of New York, the possibility of realignment was not in issue and consequently was not considered. A realignment of the unwilling party according to its interest in the subject of the action might have given the required diversity. Although exceptional cases may arise where the independent jurisdiction requirement will prevent transfer,[11] the greatest check upon the free transfer of suits under section 1404(a) will come from the requirement that the more convenient forum must be proper under the applicable venue statute.

Nolan W. Carson, S.Ed.

[10] S. Rep. 303 states at p. 6: "It is thought that this provision may be subject to abuse in that a plaintiff might deliberately bring a suit in the wrong division or district where he could get service on the defendant, and when the question of venue is raised the court is required to transfer the case to the court where it 'could have been brought.' However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue." On §1406(a), in general, and in respect to the problem mentioned in the above quotation, see note by the author, 49 MICH. L. REV. 636 (1951).

[11] Lucas v. New York Cent. R. Co., supra note 7.