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TRANSFER OF FEDERAL OFFENSES COMMITTED IN MORE THAN ONE DISTRICT OR DIVISION

Lester B. Orfield*

Rule 21 (b) of the Federal Rules of Criminal Procedure provides:
"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

The first draft of the Federal Rules of Criminal Procedure contained no provision analogous to the present Rule 21 (b). To the contrary, Rule 82, modeled on Civil Rule 82, provided that these rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of criminal proceedings therein." But the annotation points out that on August 8, 1941 a committee for the District of Colorado suggested that the defendant should be indicted in the district where he is operating or the greater number of victims are located and not in some far off district merely to give the prosecution an unfair advantage. The second draft, dated January 12, 1942, was also silent, as was the third, dated March 4, 1942. Rule 1 (a) of both the second and third drafts provided that jurisdiction and venue were not affected by the Rules.

The fourth draft, dated May 18, 1942, was the first draft to provide for transfer as to an offense committed in two or more districts. Rule 22 (a) provided as follows: "... if the indictment or information shows that the offense charged was committed in more than one district, the court may on motion transfer the proceeding to any other district in which the indictment or information shows the offense to have been committed. No such transfer shall be ordered unless the court has obtained the approval of the senior circuit judge of the circuit in which the proceeding was instituted, and if the transfer is to a district in another circuit the court shall obtain the approval of the

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senior circuit judge of that circuit.” The fifth draft, dated June 1942, by its Rule 23 (a), was to similar effect. It was, however, made clear that the motion must be made by the defendant and that transfer be “required in the interests of justice.” The annotation pointed out that the “provision is applicable particularly in conspiracy cases where the overt acts charged have been committed in several districts and in other cases of this nature.”

The following comments were made to the Advisory Committee on the rule as it appeared in the First Preliminary Draft (seventh draft). The United States Attorney for the Northern District of Georgia raised the question “that the transferee judge or United States Attorney should concur before a cause is transferred as provided for in

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2 The annotation goes on: “See, e.g. U.S.C., Title 18, §88 (Conspiring to commit offenses against the United States), §338 (Using mails to promote frauds; counterfeit money), §408 (Motor vehicles; transportation, etc., of stolen vehicles).”

3 The annotation states: “The rule does not affect the defendant’s right to have a change of venue under U.S.C., Title 18, §338 a (Mailing threatening communications), §408 d (Threatening communications in interstate commerce).”
this rule." The United States Attorney for the Northern District of Illinois felt that the venue selected as to a conspiracy charge might be rather arbitrary and ill considered "depending on the particular view that that particular judge in that particular district takes on the government's case which it doesn't know anything about except in reading the indictments." Using the example of a mail fraud charge, the United States Attorney for Minnesota pointed out that the United States Attorney of the district where the motion to transfer is made might have required a year to assimilate the case whereas the United States Attorney in the district to which transfer is sought might be wholly unfamiliar with the case. Hence there should be no transfer without his consent. The following comments were made on the Second Preliminary Draft: The Tennessee federal judges thought the rule unnecessary. The prior practice of adjustment by the United States attorneys was preferable. The United States Attorney for the Southern District of New York asked: "What is intended by the phrase 'in the interest of justice'?" If it meant that the defendant should be prosecuted in the district of his home or business, there might be cases in which his home or business was not in the district to which the case was transferred. Furthermore, there would be hardship on the government as "it would mean the transfer to the other district or division of the prosecuting official, the government agents, the documentary evidence, and the government witnesses." Transfer for prejudice under Rule 21 (a) is not comparable as the transfer there involved "is justified in order to assure to a defendant a fair and impartial trial."

II

The right to trial by a jury selected from the vicinage has existed since Magna Carta. But Parliament from time to time enacted statutes transferring the place of trial from one county to another. These statutes sometimes provided for transfer of crimes committed in the thirteen Colonies to England for trial. The colonists opposed chiefly the removal of cases involving charges of treason. The Declaration

5 Id. at 518.
6 Id. at 519.
7 Id. vol. III, p. 84.
8 Id. at 84.
9 Orfield, Criminal Procedure from Arrest to Appeal 353-354 (1947).
of Independence objected to "transporting us beyond Seas for pretended offenses." Article 3, section 2, of the Constitution gave the federal criminal the minimum of protection that his "Trial shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment provides that the "accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed." Thus when a state contains several districts the defendant has the right to a jury of the particular district of the crime. Literally read, the Constitution thus requires trial in the state and by a jury of the state and district in which the crime was committed. The Sixth Amendment, literally construed, guarantees a jury of the district and not a trial in the district. But the cases construe it as guaranteeing a trial in the district. The Sixth Amendment requires further that the "district shall have been previously ascertained by law." The defendant need not have been physically present at the time the crime was committed. There has been a similar trend among the newer states to guarantee the right of a state defendant to trial in the county in which the crime was committed.

The situations just discussed have involved constitutional rights of the defendant. Congress by statute has given the defendant additional rights. Title 18, section 3235 provides: "The trial of offenses punishable with death shall be had in the county where the offense was

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11 But if the crime is not "committed within any state, the trial shall be at such place or places, as the Congress may by law have directed." 18 U.S.C. §3235 provides that the trial of such crimes "shall be in the district where the offender is found, or into which he is first brought." See Dobie, "Venue in Criminal Cases in the United States District Court," 12 Va. L. Rev. 287-288 (1926).

12 The prosecution must prove such venue, United States v. Gillette, (2d Cir. 1951) 189 F.2d 449 at 452.


committed, where that can be done without great inconvenience.”\textsuperscript{18} Likewise under the older 28 U.S.C. section 114, trial was to be in the division of the district in which the crime was committed unless the defendant’s motion for transfer to another division of the district was granted. This statutory rule was substantially incorporated into Federal Criminal Rules 18 and 19. No statute provided generally for transfer as to crimes committed in two or more districts or divisions. Rule 21 (b) thus represents an addition to the rights of a defendant established solely by rule of court.\textsuperscript{19} Together with Rules 20 and 21 (a) it represents the latest advance in placing a defendant in a favorable position as to venue. There seems to have been no movement among the states to adopt a rule similar to Rule 21(b).\textsuperscript{20} This is quite natural as the degree of hardship involved in most state cases will be small because the geographical distances involved are so different.

It should be observed that when a transfer is granted or denied under Rule 21 (b) no question of constitutional rights is involved as the offense was committed in both districts.\textsuperscript{21} There would be a violation of the Sixth Amendment only if “no part of the offense had been committed” in the district.\textsuperscript{22} The situation is wholly unlike those under Rules 20 and 21 (a) for in those cases the proceeding is transferred to a district in which no part of the offense was committed.

What purpose was served by the adoption of Rule 21 (b)? The answer may be most graphically stated by considering venue in conspiracy cases. Such venue may be laid in any district in which an overt act in furtherance of the conspiracy was committed as well as at the place of agreement.\textsuperscript{23} Justice Jackson has recently stated in a

\begin{itemize}
\item \textsuperscript{18}This provision goes back to the Judiciary Act of 1789 (Stat. L. 73).
\item The British criminal law provides for transfer. Archbold, Pleading, Evidence & Practice, 32d ed., 103 (1949); 1 & 2 Geo. 6, c. 63, ¶11; Orfield, Criminal Procedure from Arrest to Appeal 353-354 (1947).
\item \textsuperscript{20}Both the American Law Institute Code of Criminal Procedure (1931) and the National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (September 1951) are silent on the subject, though both provide for change of venue for prejudice.
\item \textsuperscript{21}The Constitution does not require that an equivocal statute be construed as creating a crime committed only in one district. United States v. Johnson, 323 U.S. 273 at 275, 65 S.Ct. 249 (1944).
\item \textsuperscript{22}Kott v. United States, (5th Cir. 1947) 163 F. (2d) 984 at 987.
\item \textsuperscript{23}Hyde v. United States, 225 U.S. 347, 32 S. Ct. 793 (1912). For the able dissenting opinion of Justice Holmes, in which Justices Lurton, Hughes and Lamar concurred, see 225 U.S. 384-391. At p. 387 Holmes points out that “this is one of the wrongs that our forefathers meant to prevent.” The British rule of today is as broad as the American. Archbold, Pleading, Evidence & Practice in Criminal Cases, 32d ed., 1453-1455 (1945).
\end{itemize}
concurring opinion: "An accused, under the Sixth Amendment, has the right to trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district. Circumstances may even enable the prosecution to fix the place of trial in Washington, D.C., where a defendant may lawfully be put to trial before a jury partly or even wholly made up of employees of the Government that accuses him." 24

Federal Rule 21 (b) is thus a recognition that the "preferential position of the Government was inherently unfair and needed modification in order that the Government and defendants might approach some degree of equality" in the choice of forum. 25 Federal judges should "not be denied all power to check attempted unfairness by a too zealous government." 26

III

Aside from Rule 21 (b) there is "no authority for a transfer to another district." 27 Even the Supreme Court is restricted, Justice Rutledge having stated: "Our general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue." 28

Construing the rule, one court has stated that "there are three prerequisites to the court ordering a transfer of a proceeding of this

It has been held that under a statute permitting transfer between divisions of a district, there can be no transfer where a district contains no divisions. United States v. Beadon, (2d Cir. 1931) 49 F. (2d) 164, cert. den. 284 U.S. 625, 52 S.Ct. 11 (1931).
kind to another district or division: first, the defendant must move for the transfer; second, it must appear from the indictment or from a bill of particulars that the alleged offense was committed also in that district or division to which the defendant moves for transfer of the proceeding; and, third, the court must be satisfied that in the interest of justice such transfer should be made.”

As has been seen, the first requisite is that the motion for transfer be made by the defendant. The right is not confined to the defendant for constitutional reasons as the offense was also committed at the place to which transfer is sought. Hence the Constitution does not stand in the way of amending the rule so as to permit transfer on the motion of the government or of the court. It would be pointless to extend the right to the government as the government exercised a choice when it instituted the prosecution. If at some later time the government regrets its choice, it can always seek a dismissal of the prosecution, though under Rule 48 (a) this requires the consent of the court. Another possibility is to let the court of its own motion make the transfer. It is to be doubted that the court is in as good a position as counsel for defendant to determine where the trial should be had. The government needs no protection from the judge for the reasons stated above. If the judge should make a mistake and transfer to a district where the offense was not committed, the proceedings might be void as to defendants who protested. Since the defendants did not move for transfer it would have to be assumed that transfer was against their wishes. If the court is to be given the power to transfer of its own motion, the consent of the defendant should be made a prerequisite.


30 On the other hand, it has been held under 28 U.S.C. §1404 (a) that a plaintiff as well as a defendant may move for a transfer in federal civil cases. Otto v. Hirl, (D.C. Iowa 1950) 89 F. Supp. 72. Noted 35 Minn. L. Rev. 96 (1950). Other decisions are contra. See also 50 Mich. L. Rev. 343 (1951).

31 With respect to the Canal Zone, provision by executive order in 1914 was made for transfer on application of either the government or defendant to another division of the district. This was upheld in Fullerton v. Government of the Canal Zone, (5th Cir. 1925) 8 F. (2d) 968 at 970.

Rule 34 of National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (Sept. 1951) permits the government to have a change of venue for prejudice.

It will be noted that the second requisite for transfer is that "the offense was committed in more than one district or division." While the place to which the proceeding is transferred must be one of such districts or divisions, it does not follow that the place where the motion to transfer is made must also be. Thus it would appear that the Nebraska court erred when it stated that a requirement for transfer is that the accusation disclose "an offense committed both in the district in which the prosecution is brought and in the district to which its transfer is requested, with the consequence that the accusation could have been made in either district." Thus if the offense were committed in Kansas and Oklahoma, but prosecuted in Nebraska, it would seem that Nebraska could transfer. The rule does not expressly cover the situation where the offense is committed only in one district or division and prosecution is brought elsewhere. Literally construed, the rule would not provide for transfer. Presumably the defendant would then move to dismiss the indictment in the district of prosecution. Presumably the prosecuting attorney in the district of commission could commence prosecution without the necessity of a transfer, though removal proceedings under Rule 40 might be necessary.

Rule 21 (b) covers an offense "committed in more than one district or division." There has always been much controversy as to when a crime was so committed both before and after the adoption of the rule. For example, a district judge held that the crime of evading military service by making false affidavits could be committed only at the place where the draft board received the affidavit; the appellate court agreed to this but admitted that it was doubtful and found it unnecessary to decide the point. With respect to the crime of making

33 Under 28 U.S.C. §1404 (a) the district court may transfer "any civil action to any other district or division where it might have been brought." This statute assumes that the action was filed in a jurisdiction where "venue may be properly laid, for if it has not been so brought, it would be subject to dismissal." United States v. E. I. DuPont de Nemours & Co., (D.C. D.C. 1949) 83 F. Supp. 233, 234.
35 Kott v. United States, (5th Cir. 1947) 163 F. (2d) 984 at 987. As a practical matter the defendant would not move to transfer as he could not be prosecuted at all in Nebraska.
36 But see Kott v. United States, (5th Cir. 1947) 163 F. (2d) 984 at 987. As to civil actions, 28 U.S.C. §1406 (a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall . . . transfer such case to any district or division in which it would have been brought."
false statements to the War Assets Administration, a count alleging this crime must spell out a continuous offense and inferences may not be drawn from other counts.\(^{89}\) The offense of furnishing a false statement under the Renegotiation Act was treated as a continuing offense, the facts being spelled out by a bill of particulars obtained by the defendants.\(^{40}\) A district court held that causing a letter to be placed in the mails to defraud was committed only in the district of mailing, hence if the proceeding has been transferred from the place of mailing it must be retransferred to such place. Though the court of appeals dismissed the appeal it concluded that the crime was committed both at the place of mailing and the place of delivery.\(^{41}\) The statute spelled out only one crime whereas the district court had erroneously split it up into three crimes: mailing a letter, causing it to be placed in any post office, and knowingly causing it to be delivered.

Justice Rutledge stated in the opinion of the Court in a civil antitrust case that the Court expressed "no opinion on whether Rule 21 (b) applies to criminal anti-trust prosecutions."\(^{42}\) This statement should not be taken too seriously. As well stated by Federal District Judge Delehant: "An appellate court does not damn an inferior court's opinion by declining to pass upon its correctness, and that is especially true on occasions when the lower court's ruling is not at all involved in the matter pending on appeal."\(^{43}\) Title 28 U.S.C. section 1404 (a) has been held to apply to civil antitrust suits.\(^{44}\) Since it is a counterpart to Rule 21 (b) it would seem that the same rule applies to criminal antitrust cases. An identical rule would obviously facilitate the litigation of companion criminal and civil cases. Several members of the Supreme Court Advisory Committee have concluded that the Rule applies to antitrust cases.\(^{45}\)

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\(^{41}\) Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 935.


Title 18 U.S.C., section 3237, effective September 1, 1948, is now the governing statute as to venue of crimes committed in more than one district. It provides: "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

The annotation points out that this is a complete rewriting of the former 28 U.S.C. section 103 to clarify legislative intent and to omit special venue provisions from many sections.46 While the phrase "committed in more than one district" may be comprehensive enough to include "begun in one district and completed in another," the use of both expressions precludes any doubt as to legislative intent. The last paragraph removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts as in 18 U.S.C. section 1073.47 It should be noted that the statute refers only to offenses in more than one district and not to offenses in more than one division.

Suppose the prosecution simultaneously instituted criminal proceedings in each of the districts in which the one continuous offense was committed. Rule 21 (b) protects the defendant by permitting a transfer to one single district. Previous to the rule the government


47 In United States v. Johnson, 323 U.S. 273 at 276, 65 S.Ct. 249 (1944), the Court had stated: "It is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdiction to prosecute in any criminal court of the United States through which a process of wrongdoing moves."
could perhaps have been compelled to elect between the districts. 48
Double jeopardy should preclude two convictions. 49

Obviously the phrase "in the interest of justice" has a broad meaning. 50 For example, Rule 33 provides that the court "may grant a new trial to a defendant if required in the interest of justice." No one has ever contended that this phrase in Rule 33 could be narrowly pinned down. The same would seem to be true of Rule 21 (b). Judge Yankwich 51 has listed eight factors indicating that a transfer may be in the interest of justice: (1) the defendant has to leave his domicile to go to a distant place, (2) he must employ counsel in a distant city, (3) he must bring his witnesses from afar, 52 (4) a corporation defendant has its business headquarters in another city, (5) a corporation defendant has its records in another city, (6) another district is robbed of its rightful jurisdiction, (7) fairness would be absent, and (8) unjustifiable expense and delay would be eliminated. He did not indicate that there might not be other factors. In fact, he stated that "it is quite evident that, in each case, we are called upon to determine whether, under the particular circumstances of the case, a transfer would be in the interest of justice." 53

Another judge has offered the following definition: "They must mean the taking into full account of the rights of the accused, the Government, and the public, that is to say, the promotion of a speedy and at the same time a fair trial, with appropriate consideration for the curtailing of unnecessary expense or prolongation of litigation, and in

50 The British statute uses the phrase "in the interests of justice." But the power to transfer is vested exclusively in the High Court of Justice. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE, 32d ed. 103 (1949); 1 & 2 GEO. 6, c. 63, ¶11; ORFIELD, CRIMINAL Procedure FROM ARREST TO APPEAL 353-354 (1947).
28 U.S.C. §1404 (a) provides for transfer of civil cases for "the convenience of parties and witnesses, in the interest of justice . . . ."
52 If at the place of intended transfer, a substantial number of witnesses must come from other districts, transfer has been denied. United States v. Eisler, (D.C.D.C. 1947) 75 F. Supp. 634 at 639.
this connection the relative cost to the parties, their possible embar­
rassment by reason of absence from their homes and places of business
for extended periods of time, the relative cost and hardship through re­
moval of books and records into another jurisdiction, as against non­
removal."54

If weight is given to a statement of the United States Supreme
Court made forty years before the Rules went into effect, a defendant
should rather easily obtain transfer to the place where he has his home.
Justice Brown stated: "But we do not wish to be understood as approv­
ing the practice of indicting citizens of distant states in the courts of
this District, where an indictment will lie in the State of the domicile
of such person, unless in exceptional cases where the circumstances
seem to demand that this course shall be taken."55

The third prerequisite does not apply to the statute authorizing
change of venue as a matter of right in a limited class of cases.56
Section 3239 of 18 U.S.C. provides: "Any defendant indicted under
sections 875, 876 or 877 of this title, with respect to communications
originating in the United States, shall, upon motion duly made, be en­
titled as of right to be tried in the district in which the matter mailed
or otherwise transmitted was first set in motion, in the mails or in com­
merce between the States."57

It would appear evident that prejudice or bias of the judge is not
a ground for transfer. Instead, as the annotation to the note points
out, it is a ground for change of judge as provided for in the federal
statute.58 While in some states no clear distinction is taken between
change of judge and change of venue, Rule 21 (b) as well as the
American Law Institute Code of Criminal Procedure59 clearly makes
the distinction.

880 at 885. For the latest exposition see United States v. White, (D.C. Neb. 1951)
95 F. Supp. 544 at 550-551.

dissented in this case, they agreed on this point. 199 U.S. 62 at 87-88. This statement
was cited in a case construing Rule 21 (b). United States v. National City Lines, Inc.,

56 See note to Rule 21 (b); also the note to Rule 18.

57 This statute became effective September 1, 1948. The annotation to this statute
indicates that it is based on Title 18, 1940 ed., §§ 338 (a) and 408 (d) referred to in the
note to Rule 21 (b).

58 28 U.S.C. § 144, formerly § 25. See ORFIELD, CRIMINAL PROCEDURE FROM ARREST
TO APPEAL 373-376 (1947).

59 Chapter 11.
To these three prerequisites a fourth should perhaps be added. Rule 22 of the Federal Criminal Rules provides: "A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe." Thus if the defendant moves to transfer after arraignment he runs the risk that his motion will be held untimely. As Judge Parker has said: "As to the basis for the motion, it appears that defendant delayed making it for more than a year after the indictment had been found against him and until after the case had twice been set for trial in the Middle District of North Carolina by consent of his counsel, and that no reason for removal was given based upon anything that had occurred in the meantime. A transfer under such circumstances would not have been an exercise but an abuse of discretion."

The Rule does not expressly state the earliest time at which the motion to transfer may be made. However, it would seem that it could not be made before the finding of an indictment or the filing of an information since Rule 21 (b) provides that the court shall transfer "if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division..." Thus there could be no motion immediately after an arrest or a proceeding before a commissioner when these precede an indictment or an information.

Possibly there is another prerequisite to transfer: namely, that the defendant contemplated a trial and not a plea of guilty in the transferee district. Under Rule 20 only a plea of guilty may be transferred to the second district. Rule 21 is entitled "Transfer From the District or Division for Trial." However, Rule 21 (b) does not itself specify that the transfer is for trial. It is therefore to be doubted that there may be transfer only for trial. Furthermore it is arguable that a trial may consist of pleading guilty and sentencing.


61 But the English rule would permit a motion at this stage. The English Supreme Court rule permits an application for transfer "either before or after the indictment is preferred and signed, or found by the grand jury, as the case may be." ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES, 32d ed., 104 (1949).

62 The italics are mine. In United States v. Six Dozen Bottles of Dr. Peter's Kuriko, (D.C. Wis. 1944) 55 F. Supp. 458, it was held that a transfer for trial did not permit the transferee district to retransfer.

63 People ex rel. Burke v. Fox, 150 App. Div. 114, 134 N.Y.S. 642 (1912). In United States v. Gallagher, (3d Cir. 1950) 183 F. (2d) 342 at 346, the court stated, "we assume, without deciding that the proceedings had in the district court upon the
Nor is it a prerequisite to transfer that the defendant act under advice of counsel.\textsuperscript{64} It has been held that a defendant may waive trial by jury without advice of counsel.\textsuperscript{65} Here no constitutional right of the defendant is involved, but simply a right given him by the Federal Rules of Criminal Procedure. A single district court decision has required advice of counsel as to waiver of venue for guilty plea under Rule 20.\textsuperscript{66} The holding was dictum since before the court rendered its decision, the defendant withdrew her consent to transfer. It appears to be the practice in the Northern District of California to require representation of counsel or intelligent waiver thereof as to waiver under Rule 20.\textsuperscript{67} It is another matter if the defendant desires counsel. Under Rule 44 he is \textit{entitled} to counsel as soon as he "appears in court."\textsuperscript{68} Under Rule 5 (b) he may \textit{retain} counsel at the proceedings before the commissioner.

\section*{IV}

It should not be assumed that the government has acted unfairly in choosing a particular venue. The government must select a venue where any of several venues may have almost evenly balanced factors for and against selection. The choice of the government may be narrowed "by circumstances of which the public is unaware, such as grand jury and trial docket congestion in certain districts and the timing of trial terms of court."\textsuperscript{69}

\begin{flushright}
\textsuperscript{64} None of the drafts of the Advisory Committee provided for a right to counsel, whereas the seventh committee draft gave it as to Rule 20. Orfield, "The Constitutionality of Federal Criminal Rule 20," 34 \textit{Conn. L. Q.} 129 at 137-138 (1948); note, 46 \textit{Mich. L. Rev.} 964 at 967 (1948).
\textsuperscript{65} Adams, Warden v. United States ex rel. McCann, 317 U.S. 269 at 275, 63 S.Ct. 236 (1942). Three judges dissented. The case involved using the mails to defraud, thus possibly an offense committed in more than one district.
\textsuperscript{66} In re Schwindt, (D.C. Ore. 1947) 74 F. Supp. 618. Here of course the defendant is waiving a constitutional right.
\end{flushright}
Rule 21 (b) has been said to leave the question of transfer "to the discretion of the District Judge" and "merely an erroneous exercise of that discretion will not require a reversal. An abuse of discretion is necessary."\(^ {70} \)

Federal Circuit Judge John J. Parker has stated that the question of transfer is one "resting in the sound discretion of the District Judge."\(^ {71} \) When a motion is denied the presumption is that it is denied "in the discretion of the trial judges" if nothing appears to the contrary. If the defendant, after overruling of the motion, is convicted, and then raises the issue of wrongful denial of transfer on appeal, the burden is on him to show that the motion should have been granted and that he was prejudiced by the denial. Even if the trial judge had acted upon the mistaken view that only the place of trial had jurisdiction of the offense, the defendant bore the same burden. The fact that the defendant delays in moving for transfer for more than a year after the finding of the indictment is a factor against him. Thus the appellate court placed a burden upon the defendant to show prejudice that was almost insuperable. The purpose of Rule 21 (b) is not to secure a new trial after conviction. As Judge Parker himself stated, the purpose is "to expedite trials and give proper consideration to the convenience of parties and witnesses."

Federal District Judge Delehant has pointed out that prior to Rule 21 (b) the Department of Justice chose the site of prosecution of a multiple district crime and that despite the adoption of the Rule "that prerogative of the prosecution ought not lightly to be nullified."\(^ {72} \) This is particularly true, he contends, if the case has been carried before a grand jury.\(^ {73} \) Good order in the management of judicial business requires that "ordinarily" cases be disposed of where commenced. The court should not be "unduly solicitous" as to the preferences of a defendant resident in another district who defrauds persons living in the district from which transfer is sought. If it were proved that general

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\(^ {70} \) Kott v. United States, (5th Cir. 1947) 163 F. (2d) 984 at 987. The appeal was after conviction. Also stating that it is a "matter for the discretion of the judge," see Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 937.

\(^ {71} \) Shurin v. United States, (4th Cir. 1947) 164 F. (2d) 566 at 570, cert. den. 333 U.S. 837, 68 S.Ct. 608 (1948).


\(^ {73} \) But Rule 21 (b), as it is worded, cannot come into operation until the case has been carried to the grand jury.
sentiment or opinion prevailed in the place of intended transfer "improperly tolerant of any misdeeds of the defendant or cynically contemptuous of the plight of his alleged victims," this might be a factor against transfer. 74

In a case arising before the Federal Rules in which the defendant had been convicted of first degree murder and sentenced to capital punishment the United States Supreme Court held that a denial of change of venue because of local prejudice to another division of the district was not erroneous. "Matters of this sort are addressed to the discretion of the trial judge, and we find nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment." 75 The same question arose as to the federal statute providing for trial in the county as to capital offenses. Lower federal court decisions held that the district judge is vested with discretion to determine the question of "great inconvenience" and that in the absence of an abuse of this discretion, his determination would be sustained. 76 Transfer under Rule 21 (a) for prejudice has been held to rest in the sound discretion of the trial judge. 77

As, however, the rule provides that the court "shall" transfer the proceeding there is "thus an element of obligatoriness in the provision ('shall') once a satisfactory showing is made." 78 The fourth, fifth, sixth and seventh committee drafts of the rule used the word "may." The eighth and ninth drafts substituted the word "shall."

V

The jurisdiction of the federal courts of appeals is "by 28 U.S. C.A. §225, limited 'to review by appeal final decisions', with excep-

74 95 F. Supp. 544 at 551-552.
75 Stroud v. United States, 251 U.S. 15 at 20, 40 S.Ct. 50 (1919).
An appeal by a defendant from an order denying a transfer "is not from a final decision but from a preliminary or interlocutory order. It is, therefore, not 'an appeal permitted by law'. . . ." Similarly it has been held that an order re-transferring a case was not a final decision reviewable on appeal to the court of appeals under 28 U.S.C.A. section 1291. As well stated by Judge Delehant, "That position should prompt a judge in the consideration of such a motion to a degree of care and caution proper in circumstances involving final or relatively final action upon an important question." Since the matter is not one of jurisdiction, if the defendant wishes to be sure of appellate consideration, he must be careful to raise the point in the lower court that the court erred in denying the transfer.

The defendant may not take an interlocutory appeal. Nor may the government. Justice Rutledge stated in the opinion of the Court in a civil case that "it is at least doubtful whether the Government had a right to appeal from the order of transfer in the criminal case." Judge Goodrich stated that his view as to the finality of a transfer order was "strengthened" by this statement. Moreover, pointing out that no appeal may be taken from a transfer order in a civil case, he concluded that he could "see no ground for treating Rule 21 (b) differ-


80 Semel v. United States, (5th Cir. 1946) 158 F. (2d) 231 at 232. This holding was unnecessary as the time for filing the record on appeal had elapsed. In general a defendant cannot appeal until after trial and conviction when his motion for change of venue because of prejudice is denied. Orfield, Criminal Procedure From Arrest to Appeal 369-370 (1947).

81 Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933. See also Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1 at 4 (1951).


83 Rosencrans v. United States, 165 U.S. 257 at 263, 17 S.Ct. 302 (1897); Orfield, Criminal Appeals in America 96 (1939); note, 54 Harv. L. Rev. 1204 at 1206-1207 (1941).

84 All the litigated cases involve appeals by defendants.

85 United States v. National City Lines, Inc., 334 U.S. 573 at 594, 68 S.Ct. 1169 (1948). In note 43 he stated: "The precise point apparently has not arisen since the adoption of Rule 21 (b), but there would seem to be no statutory basis for appeal from an order of this type. See 18 U.S.C. § 682. See also Semel v. United States, 158 F. 2d 231, 232." As to mandamus to prevent change of venue in civil cases see 50 Mich. L. Rev. 341 (1951).

86 Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 935.
ently in this respect from the corresponding civil transfers provisions of 28 U.S.C.A. §1404."87

A civil case has suggested that while no appeal lies, a denial of transfer of venue may be reviewed by the court of appeals on mandamus. In the particular case, however, mandamus was denied as there was no proof of sufficient abuse of discretion.88 Conceivably, application might be made directly to the Supreme Court for a writ of mandamus. This could well have been tested out as to Criminal Rule 20 but was not.89

Possibly the solution is to enact a statute conferring on the court of appeals authority in its discretion to allow an appeal from an order denying a transfer.90 At the same time the statute should provide that such discretionary appeals are permissive, not mandatory, so that failure to take an appeal will not bar an appeal when the judgment becomes final. In the absence of such a statute there is a temptation for the appellate court to write an opinion stating that it has no jurisdiction, but obliquely stating how it would have decided the appeal if it could have entertained it.91 British procedure permits an interlocutory appeal to the High Court of Justice, but of course this is more necessary in Great Britain as there the defendant may be tried in any county or place in which he is apprehended.92

VI

Difficulty in applying Rule 21 (b) may conceivably arise when the court of intended transfer would prima facie have jurisdiction over only part of the counts of the indictment because some of the offenses were committed wholly outside of the jurisdiction of that

87 Ibid. See also Kaufmann, J., "Observations on Transfers Under Section 1404 (a) of the New Judicial Code," 10 F.R.D. 595 (1951).
91 This seems to have been done in Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933.
court. One court has held that this precluded a transfer. The Federal Rules were said to make no provision for transfer for trial purposes of only part of the counts of an indictment. The prosecutor could thus always deny a defendant a transfer simply by adding counts which allege the commission of the crime in the district in which the proceedings were instituted. Rule 21 (b) should therefore be amended so that a case may be transferred "in whole or in part." To transfer the whole proceedings in the instant case would violate the constitutional provisions as to place of trial. But it would appear that venue may be waived. As the Court of Appeals for the First Circuit has said: "In any event, the defendant cannot complain about that order because he made the motion to transfer." Venue is waived where there is a transfer for prejudice under Rule 21 (a). Likewise it is waived where there is a transfer for plea and sentence under Rule 20. Of course where there are several defendants, those who oppose transfer should not be subjected to transfer. There were several defendants in the instant case. Most of the defendants joined in the motion for transfer while the others did not resist but in effect joined in the motion. It is therefore difficult to see in what way any constitutional rights as to place of trial were violated. The problem of the case might not have arisen at all if the defendants had availed themselves of Rule 7 (f) to move for a bill of particulars as the bill might have substantiated their claim that every count involved an offense committed in both districts.

The district court in Maine arrived at a similar result. Citing the case from Hawaii, the court stated: "If any part of the indictment is non-transferable, no part of the indictment may be transferred." The constitutional provisions as to place of trial prevented a waiver as to the non-transferable part of the indictment. "No action of the defendant can serve as a waiver of this jurisdictional requirement." While an appeal in this case was dismissed on the ground that a final decision was not involved, the court stated: "We want it to be clear that we are

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83 United States v. Hughes Tool Co., (D.C. Hawaii 1948) 78 F. Supp. 409. The court admits that on the facts it would have granted a transfer if only the two multi-district counts had been placed in the indictment.

84 Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 937.


87 9 F.R.D. 198 at 203.
neither approving nor disapproving the Hughes Tool Co. case..."

A month after the Hawaiian case a different and more satisfactory result was arrived at by another district court. This case also involved several defendants. The court ordered a transfer from Maryland to Illinois, even though two defendants opposed a transfer. The court ordered a severance of parties, as is provided for under Rule 14, so as to transfer those four defendants seeking a transfer. The defendants objecting to transfer were not transferred. The possibility of duplication of testimony was not a bar to transfer. In this case, unlike the Hawaiian case, the defendants moved for and secured a bill of particulars over the objection of the government. The court permitted severance of parties for transfer, but not severance of offenses or counts. The court stated: "Also, these four moving defendants do not contend, and we conclude that they may not successfully contend, that there may be a transfer of less than the entire proceedings as to them. That is to say, we conclude there may not be a transfer of one or more, and not of all counts in the indictment as respects them." The court gave no reason for such distinction. If the parties may be severed, why not the counts? To summarize the fact, situations may be broken down as follows: (1) when the accusation contains only one count and only one defendant is involved, there is no problem of severance; (2) when the accusation contains only one count and two or more defendants are involved, severance should be possible; (3) when the accusation contains more than one count and one or more defendants are involved, severance should be possible; (4) when the accusation contains two or more counts and two or more defendants and not all of the defendants are

98 Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 935.
100 The court made no reference to Rule 14.
103 United States v. Erie Basin Metal Products Co., (D.C. Md. 1948) 79 F. Supp. 880 at 882. It should be noted that Rule 21 (b) provides that the court "shall transfer the proceeding as to him." (Italics are mine).
charged in each count\(^{105}\) the difficulty is similar to that in the third situation.

VII

Suppose the motion for transfer is granted, what happens next? Rule 21 (c) provides: "When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division."\(^{108}\) It would seem that no duplication of proceedings would be required.\(^{107}\) Indictment or information would be in the district or division in which the motion was made. Trial would be in the district or division to which the case was transferred.\(^{108}\) Possibly the rule should be amended to provide that when disposition has been made of a transferred case, the clerk of the transferee court must notify the clerk of the court from which the case was transferred.\(^{109}\) The docket of the case could then be completed by an official entry of the final disposition of the case.

VIII

May there be more than one transfer of a case? Suppose the case had been transferred to a district or division in which no part of the crime had been committed. A district court held that there may then be a retransfer to the original court under the power of the court to determine its jurisdiction over the case, rather than under Rule 21 (b).\(^{110}\) While on appeal this case was dismissed on the ground that a final decision was not involved, the appellate court held that the court of the district to which transfer is made cannot review the order

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\(^{105}\) See Federal Criminal Rule 8 (b).


\(^{107}\) Similarly proceedings are not duplicated as to civil transfers under 28 U.S.C. §1404 (a). Recent case, 62 Harv. L. Rev. 707 (1949).

\(^{108}\) It was held under the old statute 28 U.S.C. § 114 permitting trial within the division of commission of the crime, indictment could be found in another division of the district. Salinger v. Loisel, 265 U.S. 224 at 235-237, 44 S.Ct. 519 (1924).

\(^{109}\) The Judicial Conference of the Second Circuit "voted to ask a reconsideration by the Senior Circuit Conference of its refusal to order the recording of a final judgment in the district where an indictment had been returned, when trial was had in another district, as permitted under the new criminal Rules." 33 A.B.A.J. 873 at 874 (1947).

of transfer before conviction.\footnote{111} The defendant could not complain as he made the motion to transfer, and thus impliedly waived the venue. The holding was weakened by the fact that the appellate court concluded that the transferee court did have jurisdiction as the crime was committed in part in that district.

Suppose the transferee court clearly has jurisdiction of the case as the crime was committed there in part. Can the defendant move to transfer to a third district or to the court from which the case was first transferred? In a case rejecting a transfer of a civil antitrust case prior to 28 U.S.C. section 1404 (a), Justice Rutledge stated: “In view of our decision in this civil case, there would be nothing to prevent appellees from making a motion under Rule 21 (b) of the Criminal Rules to have the criminal case retransferred to the Southern District of California, if in the changed outlook arising from this decision that should be their pleasure.”\footnote{112} On the other hand, a subsequent decision of the First Circuit denied an interlocutory appeal on a refusal to transfer back to the original district.\footnote{113} Transfer to a third forum would make long delays likely.\footnote{114} Most states permit only one change of venue for prejudice.\footnote{115} English law does not expressly forbid more than one transfer.\footnote{116}

\footnote{111} Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 937.
\footnote{113} Holdsworth v. United States, (1st Cir. 1950) 179 F. (2d) 933 at 937.
\footnote{114} Recent case, 62 HARV. L. REV. 707 at 708 (1949).
\footnote{115} ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 370 (1947). To the same effect see AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE §258 (1931). The NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 34 (Sept. 1951) lays down no limitation. In a civil case it was held that only one transfer was allowable under the transfer provision of the Federal Food, Drug and Cosmetic Act. United States v. Six Dozen Bottles of “Dr. Peter’s Kuriko,” (D.C. Wis. 1944) 55 F. Supp. 458.
\footnote{116} ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES, 32d ed., (1949); 1 & 2 Geo. 6, c. 63, §11 (3).