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FEDERAL PROCEDURE—VENUE—TRANSFER UNDER SECTION 1404(a) TO DISTRICT WHERE VENUE ORIGINALLY WOULD HAVE BEEN IMPROPER—Civil anti-trust actions were properly brought against defendants in the Federal District Court for the District of Delaware. Defendants sought a transfer of the suits to a district court in Texas under section 1404(a) of the Judicial Code, which allows a transfer when requirements of convenience are met to any district where the suit "might have been brought."[1] Although venue in the Texas District Court would not have been proper when the suits were originally instituted, defendants claimed that their express waiver of improper venue removed the bar to transfer. The district court ruled that it lacked the power to make the transfer. On petition to the court of appeals for a writ of mandamus, *held,* two judges dissenting, that transfer can be made if the district court feels that it would serve the convenience of parties and witnesses and would be in the interest of justice. *Paramount Pictures v. Rodney,* (3d Cir. 1950) 186 F. (2d) 111.

The principal case turns on the interpretation of the words "might have been brought" in section 1404(a) of the Judicial Code.[2] The court interprets the words as being synonymous with "could now be brought," as not requiring the conditions for transfer at the time the plaintiff originally brought suit. Since the Texas court had jurisdiction of the subject matter under section 1337 of the Judicial Code[3] and section 12 of the Clayton Antitrust Act[4] and could acquire personal jurisdiction by service anywhere in the United States, and since the defendants waived any objection to improper venue, Texas is a place where the action "could now be brought." The court adds that even if the words "might have been brought" refer to the time at which plaintiff brought suit, the statute only requires that the transferee court would have had jurisdiction, not

[1] 28 U.S.C. (Supp. III, 1950) §1404(a) provides: "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.

[2] Ibid.

[3] Chief Judge Biggs stated in the principal case at 114: "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 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."

[4] 28 U.S.C. (Supp. III, 1950) §1337. The forum non conveniens doctrine was not applied to cases where a special exclusive jurisdictional statute existed, such as §1337 of the Judicial Code, but United States v. National City Lines, 337 U.S. 78, 69 S.Ct. 955 (1948) held that §1404(a) extended the doctrine to these suits also.

proper venue, since improper venue can always be waived.[5] The dissenters take issue principally with the interpretation of the phrase, "might have been brought." They state that this should be interpreted to refer to the time when plaintiff brought his action so that the subsequent consent to improper venue by defendants would have no effect.[6] Section 1404(a) replaced the general doctrine of forum non conveniens that although a district court had jurisdiction and proper venue, it could dismiss the suit if another and more convenient forum existed which also had proper jurisdiction and venue.[7] Section 1404(a) revised the general doctrine by providing for the court to transfer the suit to the more convenient forum rather than to dismiss it. The language, "might have been brought," is carried over from the general doctrine that the action was to be dismissed when the plaintiff might have properly brought it in a more convenient forum.[8] An impartial reading of section 1404(a) would seem to indicate that Congress intended to allow a transfer when plaintiff had a choice of districts in which to bring his action, but chose an inconvenient forum.[9] It is conceded that the district courts in Texas were unavailable to him. To hold that defendants' waiver of improper venue allows the court to order a transfer is to change the tense of the statute and to allow the defendant to determine subsequently[10] where the plaintiff should have brought the action.[11] It seems difficult to believe that Congress intended a defendant to have such power. In an effort to liberalize procedure, it appears that logical statutory construction has been abandoned.

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[5] 38 Stat. L. 736 (1914), 15 U.S.C. (1946) §22. In these actions, there is no need to show diversity of citizenship, a supplemental federal question, or an amount in controversy exceeding $3000. American Amusement Co. v. Ludwig, (D.C. Minn. 1949) 82 F. Supp. 265.

[6] 28 U.S.C. (Supp. III, 1950) §1406(a).

[7] The dissenters in the principal case also say that §12 of the Clayton Act allows extraterritorial service only if venue was proper when the suit was originally brought. Therefore, they reason, the Texas court could not obtain personal jurisdiction over defendants. Sure Fit Products v. Fry Products, (D.C. N.Y. 1938) 23 F. Supp. 610 seems to support this position.

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

[9] Schoen v. Mountain Producers Corp., (3d Cir. 1948) 170 F. (2d) 707 at 717; Pascarella v. New York Central Railroad Co., (D.C. N.Y. 1948) 81 F. Supp. 95.

[10] An earlier decision of this court recognized the application of this idea and said that the place where the action "might have been brought" was to be determined as of the time when plaintiff originally brought his action. Schoen v. Mountain Producers Corp., supra note 9 at 717.

[11] Prior consent by waiver has been allowed. See Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 S.Ct. 153 (1939).