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Civil Procedure--Federal Transfer Statute and Res Judicata

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a majority vote, the court decided to apply the same remedial statute[7] used in the prior cases to the controversy at hand. This statute provides:

> [I]n furtherance of justice and on such terms as it deems proper, the court may amend any pleadings, process, or proceeding . . . by correcting a mistake in any other respect. When an action or proceeding fails to conform to the laws governing civil procedure, the court may permit either to be made conformable by amendment.

It is clear that under this statute a court has the discretion to allow the amendment of a defective petition.

The court then considered whether a court's power to allow an amendment was affected by the expiration of the statute of limitations. In answering this question, the court cited *Kokolakis v. Paris,*[8] a case in which the same court of appeals which affirmed the trial court's decision in the present case, had held a petition to be defective when its verification was made by an unauthorized person. In that case the appellate court allowed the addition of a verification to a petition after the statute of limitations had run. The *Kokolakis* case and others cited by the court[9] show that such amendments can be made after the period of limitation has expired. Therefore the court reversed the decision and remanded the case to the lower court.

The liberal decision reached by the court appears to be just, for it does not allow a procedural defect to prevent a trial of the cause on its merits. The decision is significant in that it settles a previously uncertain area of Ohio law. This uncertainty is indicated by the fact that only one judge supported both conclusions — that an unverified petition was defective and that the verification could be added by amendment.[10] As a result, the court, although evidencing uncertainty itself, clarified the law on a fundamental and important act in the conduct of a suit.

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CIVIL PROCEDURE — FEDERAL TRANSFER STATUTE AND RES JUDICATA

Hoffman v. Blaski, 363 U.S. 335 (1960)

In *Hoffman v. Blaski* and *Sullivan v. Behimer,*[1] the United States Supreme Court gave a literal construction to a federal transfer statute and thereby limited the area of disagreement over interpretation among

7. OHIO REV. CODE § 2309.58.

8. Civil No. 35733, Ohio Sup. Ct., *motion to certify denied,* Nov. 26, 1958.

9. Brown v. Cleveland Baseball Co., 158 Ohio St. 1, 106 N.E.2d 632 (1952); Cohen v Bucey, 158 Ohio St. 159, 107 N.E.2d 333 (1952).

10. Although both conclusions were adopted by a majority of the court, the majority on each conclusion was comprised of different judges.

the lower courts. Yet, by rendering a single opinion to decide an issue brought up in two different procedural situations, the Court left the door open for the type of delay and unnecessary litigation which marked the *Blaski* case.

Section 1404(a) of the federal transfer statute, which was enacted in 1948 and which expanded[2] the federal forum non conveniens doctrine established by the Court in *Gulf Oil Co. v. Gilbert*,[3] reads as follows:

> For the convenience of the parties and witnesses, in the interests of justice a district court may transfer any civil action to another district or division where *it might have been brought*.[4] (Emphasis added.)

In the *Behimer* case, plaintiff brought a stockholder's derivative action in the United States District Court for the Northern District of Illinois. Defendant, upon showing that the records of its newly acquired company were located in Utah, moved that the court transfer the case to the District Court in Utah. The Illinois court sustained the motion and ordered the transfer. Plaintiff applied to the Court of Appeals for the Seventh Circuit for a writ of mandamus. The writ was granted, and the district court was commanded to vacate its transfer order.[5] The judge in the district court filed a writ of certiorari to the United States Supreme Court.

The Supreme Court upheld the decision of the Court of Appeals for the Seventh Circuit. As the defendant corporation was not "doing business" in Utah at the time plaintiff brought suit in Illinois,[6] wrote Mr. Justice Whittaker in the majority opinion, the plaintiff could not originally have "properly brought" suit in Utah.[7] The "unambiguous, direct, and clear"[8] language of the statute, the Court said, shows that the place "where it might have been brought" means where the plaintiff had the absolute right to bring suit, notwithstanding voluntary submission by the defendant. The defendant should not be permitted to make a retroactive waiver of his venue privilege, the Court added, or the phrase, "where

1. 363 U.S. 335 (1960).
2. Norwood v. Kirkpatrick, 349 U.S. 29 (1955).
"The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term 'for the convenience of the parties and witnesses, in the interest of justice' intended to grant transfers upon a lesser showing of inconvenience." Norwood v. Kirkpatrick, *supra* at 32.
3. 330 U.S. 501 (1947).
4. 28 U.S.C. § 1404(a) (1959).
5. Behimer v. Sullivan, 261 F.2d 467 (7th Cir. 1958).
6. The stockholders brought suit for damages arising from the defendants' acquisition of the assets located in Utah purportedly at an unfair price.
7. 363 U.S. 335, 343 (1960).
8. *Ibid.*

it might have been brought," would be emasculated. In other words, if the defendant could now waive venue after suit had been properly initiated, a court could transfer the case to any federal forum despite the fact that the judicial forum non conveniens doctrine presupposed at least two proper forums in which the action might have been brought originally.[9]

With valid arguments both for and against this narrow interpretation, the Court's effort to give a clear-cut construction to section 1404(a) of the federal transfer statute and avert further disagreement in the lower courts is to be commended.[10] Yet, the *Blaski* case raises another prob-

9. Gulf Oil Co. v. Gilbert, 330 U.S. 501, 507 (1947) (dictum).

Mr. Justice Frankfurter dissented, Sullivan v. Behimer, 363 U.S. 335, 351 (1960), stating that the phrase, "where it might have been brought," was definitely not "clear and unambiguous." "Brought" could be interpreted as meaning commenced, and an action can be commenced when the complaint is filed. Therefore, an action may be transferred to any district court which has jurisdiction over the subject matter as the action could have originally been brought there by filing a complaint regardless of whether venue was proper and whether jurisdiction could have been exercised over the person of the defendant at the time of original filing.

Another point of disagreement between the majority opinion and the dissent related to the question of whether § 1404(a) went to the jurisdiction of the court. The majority opinion held that the provision conferred upon the lower courts a new power and that courts exceeding this power — by authorizing a transfer to a forum where the action might not have originally been brought — were exceeding their own jurisdiction. Mr. Justice Frankfurter countered that "statutory venue rules governing the place of trial do not affect the power of a federal court to entertain an action, or of the plaintiff to bring it, but only to afford the defendant a privilege to object to the place chosen. . . ." Sullivan v. Behimer, *supra* at 361. For this reason a retroactive waiver should have been permitted, and any error the transferor court may have made did not go to its jurisdiction but related only to the selection of a proper venue.

The result of the dissent's reasoning, however, favors the defendant under § 1404(a) at the expense of the plaintiff as the plaintiff may not be able to obtain a transfer to another district where venue is improper unless the defendant agrees to waive any objection. This result existed in the Second Circuit. Plaintiff's motion to transfer an action to California was refused because venue was improper and the defendant refused to waive his objection. Foster-Milburn v. Knight, 181 F.2d 949 (2d Cir. 1950). But the Court of Appeals granted a defendant's motion to transfer when he consented to waive jurisdiction over the person and venue in the transferee district. Anthony v. Kaufman, 193 F.2d 85 (2d Cir. 1951); see Torres v. Walsh, 221 F.2d 319 (2d Cir. 1955). While the majority pointed out this holding would cause "gross discrimination" against the plaintiff, it should be noted that the forum non conveniens doctrine from which § 1404(a) is derived was established for the benefit of the defendant and not for the benefit of both parties.

The dissent further noted that there would be no problem of wrenching the plaintiff "out of the forum of his choice to go forward in a place to which he objects," because the transferor court still must consider if the order would be "in the interests of justice and convenience." Sullivan v. Behimer, *supra* at 366.

Both district courts and courts of appeal have frequently struggled with the construction of the phrase, "where it might have been brought," some siding with the views in the majority opinion, others with the views in the dissent. Only one case not overruled, however, appears to be on all fours with the *Behimer* case. The decision was in line with the majority view. Hampton Theatres, Inc. v. Paramount Film Distrib. Corp., 90 F. Supp. 645 (D.D.C. 1950).

10. Two weeks later the Court appeared to be chipping away at the rule it had laid down in the Blaski and Sullivan cases. In Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960), plaintiff barge-owner sued the defendant cargo-owner in the District Court of Tennessee for damages to his barge which sank while the cargo was being loaded. After the barge was salvaged and towed down the Mississippi, the cargo owner libelled the barge in the Federal District Court in New Orleans, Louisiana. The barge owner moved that the action be transferred to Tennessee where he had brought his original suit. The plaintiff objected, alleging that the action could not have been brought in Tennessee, the residence of the barge

lem, the implications of which the majority opinion apparently failed to recognize; for the Court tacitly approved a lower federal court's rejection of the decision of another federal court of concurrent jurisdiction when the *same issue* was raised again in the *same case.*

In the *Blaski* case, plaintiff brought suit in the United States District Court for the Northern District of Texas on a patent infringement by the defendant. The court, upon defendant's showing that an action on the same patent infringement was pending in the District Court of Illinois, and that discovery measures had uncovered evidence relating to the *Blaski* case, ordered transfer to Illinois. Plaintiff applied to the Court of Appeals for the Fifth Circuit for a writ of mandamus to vacate the order. The writ was denied and the District court's transfer order upheld.[11]

When the case reached the Illinois District court, plaintiff moved that the action be dismissed. The District Court overruled the motion. Plaintiff applied to the Court of Appeals for the Seventh Circuit for a writ of mandamus ordering the case transferred back to Texas. The writ was granted.[12] The court of appeals justified its action, as in the *Behimer* case, on the grounds that since the action could not originally have been maintained in Illinois, the Texas District Court did not have the power to order transfer.[13]

> In any event, we think the decision of the Fifth Circuit in this matter is erroneous. Such being the case, we are under no more obligation to follow it as the law of the case than that Circuit would be to follow what it considers an erroneous decision by this court.[14]

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owner, because that court did not have in rem jurisdiction over the barge. In a 7-to-2 opinion the Supreme Court upheld the order of transfer on the grounds that as the Tennessee court had jurisdiction over the barge owner, an in personam action as opposed to an in rem libel might have been brought there. (Two of the seven majority justices concurred on other grounds). Mr. Justice Whittaker, true to his position in the *Blaski* case, wrote the dissenting opinion. Continental Grain Co. v. Barge, FBL-585, *supra* at 27.

In addition, the Court did not separate the problem of jurisdiction and venue in the Blaski v. Hoffman and Sullivan v. Behimer opinion. Under § 1404(a) is a district "where the action might have been brought" one where venue was properly laid but where the defendant could not have initially been served? The Court of Appeals for the First Circuit separated jurisdiction from venue under § 1404(a) when it granted a motion to transfer to a district where venue was proper although the transferee court did not have jurisdiction over the person. *In re* Josephson, 218 F.2d 174, 184 (1st Cir. 1954). Judge Magruder based the decision, in part, on the premise that "once service of process upon all the defendants has been effectuated in Massachusetts, an order of transfer under § 1404(a) sends the case 'as is' to the transferee court, with no need of a new service of process upon the defendants after the case reaches the court in New Mexico." *In re* Josephson, *supra* at 185 (dictum). The premise that original process runs with the transfer does not appear to be widely accepted. *But see* Braucher, *Inconvenient Federal Forum,* 60 HARV. L. REV. 909, 934 (1947).

11. *Ex parte* Blaski, 245 F.2d 737 (5th Cir. 1957).

12. Blaski v. Hoffman, 260 F.2d 317 (7th Cir. 1958).

13. *Id.* at 321. The writ was granted by a 2-to-1 decision on rehearing. The court, in a 3-to-0 decision five months before, had upheld Judge Hoffman's decision in the district court and denied the writ.

14. *Id.* at 322.

The Court of Appeals for the Seventh Circuit cited just two cases in support of this rule.

On writ of certiorari to the United States Supreme Court, the Seventh Circuit Court of Appeals decision was upheld along with the *Behimer* case in one majority opinion written by Mr. Justice Whittaker. Mr. Justice Frankfurter, joined by two other justices, wrote separate dissents for each case. The dissent to the *Blaski* case raised the issue of res judicata and comity between courts of coordinate jurisdiction.[15]

A district court opinion written in 1955 by then Judge Whittaker figured strongly both in the reasoning of the Court of Appeals for the Seventh Circuit and that of the majority opinion of the Supreme Court.

In that case, *General Electric Company v. Central Transit Warehouse Company*,[16] the defendants moved for a transfer from Missouri to Iowa. The Missouri court overruled the motion, explaining that the defendant was not subject to process in Iowa and that venue was improperly laid there. On rehearing, the court found that the defendant's subsidiary corporation was its agent and that the defendant was "doing business" in Iowa after all. A conditional transfer order was made:

Wilson v. Kansas City Ry., 101 F. Supp. 56 (W.D. Mo. 1951); United States v. Reid, 104 F. Supp. 260 (E.D. Ark. 1952). The Supreme Court discussing the issue of law of the case under the label, res judicata, added a third, Fettig Canning Co. v. Steckler, 188 F.2d 715 (7th Cir.), *cert. denied,* 341 U.S. 951 (1951). The *Kansas City Ry.* case is discussed in note 21 *infra.*

Fettig Canning Co. v. Steckler, *supra,* involved the libel of adulterated foodstuffs under the FEDERAL FOOD, DRUG, AND COSMETIC ACT. Defendant moved for transfer under § 1404(a) from Missouri to Indiana where he resided. The transfer order was granted, and subsequently the District Court for the Southern District of Indiana remanded the case to the District Court for the Eastern District of Missouri. The Court of Appeals for the Seventh Circuit refused a writ of mandamus to vacate the remand order. Fettig Canning Co. v. Steckler, *supra* at 719. The Indiana court appeared as much concerned with its own jurisdiction or lack of it over the condemned articles which the government had seized but had never physically brought into the district as it did with the Missouri court's power to order transfer.

United States v. Reid, *supra,* also involved a libel against adulterated foods by the government. The transferee district refused to accept the government's contention that the order of transfer was the law of the case and decided that the transferor court had made a jurisdictional error. While venue was proper in the transferee district, the defendant was not subject to service of process there, and the transferee court was not a forum where the action "might have been brought." Compare *In re* Josephson, *supra* note 10.

15. 363 U.S. 335, 345, 351 (1960).

The procedural situation in Hoffman v. Blaski is not too different from that in Angel v. Bullington, 330 U.S. 183 (1947). Mr. Justice Frankfurter, writing the majority opinion, also invoked res judicata. That case was first litigated in the North Carolina state courts before it was dismissed. Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941). The plaintiff, losing party, started the action again in the federal courts where he initially prevailed. Bullington v. Angel, 56 F. Supp. 372 (W.D. N.C. 1944), *aff'd,* 150 F.2d 679 (4th Cir. 1945). The Supreme Court reversed the Court of Appeals for the Fourth Circuit declaring that as the plaintiff had failed to appeal from the state supreme court decision, the constitutional issue he now raised was res judicata. If the forum non conveniens doctrine which authorized dismissal, had not been replaced by § 1404(a) authorizing transfer, Angel v. Bullington, *supra,* would be even more closely parallel. But as there is no dismissal under the transfer statute, law of the case may be a more appropriate term than res judicata. According to one definition, law of the case "rests basically upon principles of res judicata applied internally to a particular case . . . whereas res judicata is more commonly applied to a fresh attempt to try a cause of action which was once adjudicated and not appealed from. . . ." Sonenfield, *Civil Procedure, 1955 Survey of Ohio Law,* 7 WEST. RES. L. REV. 241 (1956).

16. 127 F. Supp. 817 (W.D. Mo. 1955).

> If upon trial, plaintiff prevails upon those issues of agency, which it has tendered, it will follow that Terminal is doing business in the Northern District of Iowa and subject to statutory venue and answerable to process there, and that this action 'might have been brought there,' and in this view, which I am now satisfied is correct, the court does have power [to order the transfer]. . . .[17]

There is no record of trial for the case in Iowa. What would have happened if the plaintiff had prevailed on the issue of defendant's liability but not on the issue of agency? Either the plaintiff would have been left without a remedy or he would have had to try the entire case again in Missouri. For if the Iowa court did not have jurisdiction to entertain it, then the determination of defendant's liability was void. Thus, the problem of relitigating the same facts, first to determine jurisdiction and then to decide on the merits, is expressly raised in the *Central Transit* case. It is impliedly raised in the *Blaski* case, because the issue of the jurisdictional construction of 1404(a) reached the Court, not on appeal direct from the Fifth Circuit but on certiorari from a coordinate circuit, the Seventh, in which the transferee court was located.[18]

Under *Erie Railroad v. Tomkins* guidelines,[19] federal courts do not always apply identical standards in determining what constitutes doing business in different states.[20] Sanctioned by *Hoffman v. Blaski*, will courts of coordinate jurisdiction make an independent examination of this question to determine where an action "might have been brought" and thereby obstruct transfer orders under 1404(a)?[21] These were the problems which concerned Mr. Justice Frankfurter when he referred to the

17. *Id.* at 827.

18. In fairness, however, to the majority opinion in the Blaski case, it should be noted that the issue of res judicata or law of the case was never raised before the Supreme Court. In fact, Judge Hoffman, District judge for the Northern District of Illinois, stated in his oral opinion deciding that case:

"The defendants assert that the jurisdiction of the transferor court has already been determined by the Fifth Circuit and that the issue is therefore res judicata, and that if this court were to remand, the Texas court would refuse to accept the case. Initially, it must be determined whether this court may inquire into the jurisdiction of the Texas court to transfer the action. I am of the opinion that this court may so inquire and that the doctrine of res judicata and the law of the case raise no barrier to such inquiry." Petition for cert. for Appellant, app. p. 3a, Hoffman v. Blaski, 363 U.S. 335 (1960).

19. 304 U.S. 64 (1938).

20. "Several United States courts have emphasized when federal jurisdiction is based upon diversity of citizenship, the validity of the service of process is dependent upon the law of the state in which the federal court is sitting, and that, therefore, the initial question is, not whether the state could, consistent with due process, assert jurisdiction over the foreign corporation, but rather whether the state has in fact chosen to assert jurisdiction under the facts like those present before the federal court." STEVENS & LARSON, CORPORATIONS 32 (2d ed. 1955).

21. In Wilson v. Kansas City Ry., note 14 *supra*, plaintiff brought suit in a California state court against three defendants, only one of whom was doing business in California. The other two defendants were served by publication. Before service was completed, the case was removed to the federal district court. The two defendants moved to quash service, and their motion was upheld. The plaintiff stipulated that the first defendant was not liable and then obtained a transfer of the action against the other two to the District Court of the Western District of Missouri. The Missouri court dismissed the action on the grounds that the California court did not have jurisdiction over the parties, with the result that the plaintiff was

technical doctrine of res judicata and the need for comity between courts of coordinate jurisdiction.[22] The question of jurisdiction over the person and proper venue — the question of where an action "might have been brought" — were issues litigated by both parties in the Court of Appeals for the Fifth Circuit which has the authority to determine its own jurisdiction. If these questions be determined erroneously, why should they be subject to collateral attack in a court of coordinate jurisdiction instead of direct attack only in the same courts where these questions were initially raised?[23]

The dissenting opinion referred to the "judicial unseemliness" of the *Blaski* litigation.[24] Yet, as a result of the majority opinion, there almost certainly will be multiple litigation on procedural questions under the transfer statute in the future. Meanwhile, if plaintiff Blaski has filed suit again in Texas, will the first question for consideration be whether the District Court now has jurisdiction once it has yielded to another district under the federal transfer statute?[25]

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barred by the statute of limitations from bringing the suit anew. The Missouri court's decision as to the California court's jurisdiction to order transfer seems justified as this issue was never litigated by the defendants in the California court, and the hearing on the motion to transfer by that court was in the nature of an *ex parte* proceeding. But what if the California court had originally overruled the defendants' motion to quash and then ordered transfer? Should the Missouri court be permitted to dismiss plaintiff's action on the grounds that the California court's ruling was erroneous and that it did not have jurisdiction to order the transfer?

22. 363 U.S. 335, 348 (1960).

23. MOORE'S FEDERAL PRACTICE maintains that the law of the case should apply in the transferee court insofar as the transferor court made any errors of fact or discretion. But "if the transferee district court is convinced that the transfer order is manifestly erroneous as a matter of law so that its judgement may be subject to reversal, then it may depart from the law of the case and decide the issue in accordance with its legal views." 1 MOORE, FEDERAL PRACTICE ¶ 0.404, at 4229 (2d ed. 1960).

24. 363 U.S. 335, 346 (1960). The separate opinion by Mr. Justice Stewart which concurred with the majority added: "From the point of view of efficient judicial administration the resulting history of this litigation is not subject to applause." 363 U.S. 335, 345 (1960).

25. Mr. Justice Stewart and Mr. Justice Frankfurter disagreed on this issue. Mr. Justice Stewart concurring with the majority opinion wrote: "But as the Court points out, no claim was made here that the decision of the Fifth Circuit precluded Judge Hoffman or the Seventh Circuit from remanding the case, and on the merits of the question I agree with the Court that the principles of res judicata were inapplicable." 363 U.S. 335, 345 (1960).

Mr. Justice Frankfurter wrote in the dissent: "Unless and until this Court acts, the litigants have no forum in which trial may go forward. Each Court of Appeals involved refused to have the District Court in its Circuit hear the case and has sent it to a District Court in the other." 363 U.S 335, 348 (1960).

A situation similar to the dilemma in Hoffman v. Blaski has already occurred. The District Court for the Eastern District of Arkansas ordered transfer of a condemnation proceeding to the Western District under another transfer statute. The Western District remanded on the grounds that the Eastern District lacked jurisdiction to transfer. The Eastern District ruled that its prior transfer order was valid and that it now lacked jurisdiction to hear the case. The Court of Appeals for the Eighth Circuit upheld the Eastern District's decision and ordered the case retransferred to the Western District. Before a final decision on the merits was reached, the case appeared in four forums seven different times. United States v. 353 Cases, 117 F. Supp. 110 (W.D. Ark. 1953); United States v. 353 Cases, 135 F. Supp. 333 (E.D. Ark. 1955); United States v. District Court, 226 F.2d 238 (8th Cir. 1955); United States v. 353 Cases, 247 F.2d 473 (8th Cir. 1957).