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Richard S. Miasington

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VENUE IN THE FEDERAL COURTS—
THE PROBLEM OF THE INCONVENIENT FORUM

RICHARD S. MASINGTON

INTRODUCTION

In 1947 the Supreme Court of the United States formally recognized and incorporated into federal law the doctrine of forum non conveniens. The principle embodied in this doctrine is that although the jurisdiction of the court and venue of the action are proper, the court has the inherent power to resist the imposition of its jurisdiction. The court may resist by dismissing the cause so that it may be brought anew in a more convenient place. However, in all cases, the doctrine presupposes the existence of at least one other forum in which the defendant is amenable to process.

This doctrine was inferentially recognized by the Supreme Court in cases prior to 1947, but was not applied by the Court in all instances. In Federal Employers’ Liability Act and anti-trust cases the Court refused to give forum non conveniens the effect of negating the liberal venue provisions of the special statutes involved. As a consequence, defendants in these situations could not avoid inconvenient trials. In view of the hardship of inconveniences in these cases, Congress was motivated to enact remedial legislation providing for transfer of cases in federal courts from one district to another:

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.

Although it appears that the aforementioned hardship was the specific initiating force behind the enactment, the language of § 1404(a) is broad...
in scope and applies to "any civil action." Judicial interpretation has confirmed the applicability of § 1404(a) to cases wherein special venue provisions are involved as well as those cases where general venue statutes apply.

The purpose of this article is to examine the scope of § 1404(a) with a view toward clarifying the status of the law in the following respects:

1. What is transfer?
2. Has transfer under § 1404(a) replaced forum non conveniens?
3. What are the factors involved in granting or denying transfer?
4. To what court may an action be transferred?
5. What procedures are involved in having an action transferred?
6. What avenues are available for appellate review of transfer orders?

**What Is Transfer?**

As noted above, § 1404(a) was designed to relieve the harshness of the older doctrine of forum non conveniens. The harshness lies in the fact that should the court choose to resist the imposition of its jurisdiction because of the presence of a more convenient forum elsewhere, the court has but one alternative, viz., to dismiss the action without prejudice so that it may be brought again in a more convenient forum. Dismissal puts an end to the suit for the present purpose so that if the plaintiff is to pursue his remedy he has to start ab initio in the new forum by filing a complaint, serving the defendant and so forth. This procedure is indeed harsh for, while forum non conveniens presupposes the existence of another forum where the defendant can be served, there is no guarantee that the defendant will be available for service, and a stipulation to that effect by the defendant is not a prerequisite to dismissal. Moreover, there is always the danger that the statute of limitations might run so that the action may be barred in the interim period between the dismissal and the filing of a new complaint.

Section 1404(a), on the other hand, avoids both these dangers risked by the plaintiff when forum non conveniens is applied, in that transfer is not synonymous with dismissal. When a district court orders an action to be transferred, the transferee court picks up the cause where the transferor court left it. All pre-transfer service, motions and orders remain in effect and the

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7. Kilpatrick v. Texas & P. Ry., 337 U.S. 75 (1949); United States v. National City Lines, 337 U.S. 78 (1949); Ex parte Collett, 337 U.S. 55 (1949); United States v. E. I. du Pont de Nemours & Co., 83 F. Supp. 233 (D.D.C. 1949); "§ 1404(a) introduced a new principle into federal judicial procedure. It is a comprehensive, general statute applicable to all civil actions without exception. . . . [T]he general provision relating to change of place of trial, does not affect, and in turn is not restricted or limited by, any statutes relating to venue—either general venue statutes or special statutory provisions relating to venue in actions of specified types."
10. All States Freight v. Modarelli 196 F.2d 1010 (3d Cir. 1952).
action continues procedurally unaffected. Jurisdiction over the person of the defendant is retained, and the remedy is preserved against the running of the statute of limitations.

**Has Transfer Under § 1404(a) Replaced Forum Non Conveniens?**

The question has been raised whether transfer under § 1404(a) is now an exclusive remedy for one burdened with carrying on a lawsuit in an inconvenient forum, or whether federal courts may still dismiss a case by employing the inherent power of forum non conveniens. It has been stated that "the evident purpose of the statute is to do away with dismissal as an inherent right of the courts and to substitute therefor the right in proper cases to transfer to a more convenient forum when there is such a forum." This view apparently has been accepted by acquiescence. Only one district court has expressed the view that § 1404(a) is an additional alternative rather than a supplanting doctrine. That forum non conveniens has been replaced seems logical in light of the legislative history, but this position is subject to exceptions:

First: the statute is necessarily limited in its operation to the confines of the federal judiciary. Its very wording — "transfer . . . to any other district or division" — indicates that the death knell has not been sounded on forum non conveniens in federal courts. In fact situations where the "presupposed" alternative forum or fora are not within the federal judicial framework, forum non conveniens still has vitality. Thus, if a suit is inconvenient in the federal court, but more convenient in a state or foreign court where the defendant is amenable to process, the federal court can not transfer the case, but it can dismiss. While state and foreign courts are not obliged even on the basis of comity to accept a case transferred from a federal court, so long as their doors are open, the plaintiff can begin anew in those courts if the federal court should dismiss. Therefore, forum non conveniens with its latent perils is still very much alive.

Second: because of the recent ruling of the Supreme Court in *Hoffman v. Blaski*, discussed below, a stringent limitation has been placed on the

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12. Gross v. Owen, 221 F.2d 94, 96 (D.C. Cir. 1955): "The statute took nothing from the courts. Rather it conferred a new and additional authority to transfer a proper case where previously the court had no alternative but to dismiss." See also Daquila v. Schlosberg, 253 F.2d 888 (D.C. Cir. 1958).
17. See text accompanying note 68 *infra.*
worrying of the statute which refers to the available transferee fora.\textsuperscript{18} Other federal courts where the action “might have been brought” have been limited to those courts in which the plaintiff could have originated the action as a matter of right, in that jurisdiction over the person of the defendant could have been obtained and venue would have been laid properly. The fact that the defendant stipulates in his motion to transfer that he will waive venue objections and render a personal appearance in the transferee forum is immaterial. With this new limitation placed on the statute many other federal courts are now unavailable as transferee fora.

However, under forum non conveniens, while such stipulations are not required, they are permissible, so that dismissal can be conditioned upon the defendant’s pledge to waive venue and appear in another more convenient court.\textsuperscript{19} The trend in the future then would seem to be towards a greater use of forum non conveniens in instances where no transferee forum is available and the chosen forum is still too inconvenient.

\textbf{WHAT ARE THE FACTORS INVOLVED IN GRANTING OR DENYING TRANSFER?}

It is to be noted that the statute creates a legal trinity as the criteria to be considered in granting or denying a motion to transfer:\textsuperscript{20} (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice. These are the sole bases upon which the trial court may make a determination as to whether transferring a cause to another forum is justified.\textsuperscript{21} Many trial court decisions give the impression that other criteria are frequently followed because of the peculiarities of the litigation at bar. However, it should be noted that the third unit of the trinity — “the interest of justice” — gives wide latitude to judicial discretion. The effect of this wording then is to allow transfers for almost any legally justifiable reason if the trial court judge notes that in his opinion his action is taken “in the interest of justice.”

The factors affecting whether or not transfer will be granted are many. No one can be singled out as ultimately determinative. More than one but less than all factors will usually be present in any given case. Sometimes they overlap. These factors will be discussed separately, but it is the com-

\textsuperscript{18} “[D]istrict court may transfer any civil action to any other district or division where it might have been brought.” (Emphasis added.)


\textsuperscript{21} Chicago, R.I. & Pac. R.R. v. Igoe, 220 F.2d 299, 302 (7th Cir.), cert. denied, 350 U.S. 822 (1955): “In acting on such a motion the District Judge has broad discretion, but in exercising his discretion he is limited in his consideration to the factors specifically mentioned in § 1404(a), and he may not properly be governed in his decision by any other factor or consideration.”
posite effect of those present in any given case which controls the trial court's decision.

I. Convenience of the Parties

With respect to the convenience of the parties, the first factor to be considered is the plaintiff's choice of the forum. The plaintiff usually chooses a forum because of its convenience to him. Historically, there has always been a judicial sanctity about respecting the plaintiff's choice of the forum, except, perhaps, in obvious cases of forum shopping. In regard to transfer, that historical attitude towards respecting the plaintiff's choice of forum is present. Most courts have taken the position that unless the balance of factors in favor of and against transfer is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. These courts all agree that a simple balance of convenience in favor of the defendant is not enough to justify the transfer. However, some courts at one extreme follow the older thinking described in the forum non conveniens cases, viz., that trial in the chosen forum must constitute vexatiousness or oppression of the defendant before transfer will be granted. Courts at the other, more liberal, extreme, would not cast the plaintiff's selection in the leading role at all, and some even shift the burden to the plaintiff to show an absence of a need for transfer after the defendant has made a prima facie showing of that

22. Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir. 1950): "By 1404(a) Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. . . . On that basis, these words found in Gulf Oil v. Gilbert . . . still have vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for transfer, and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered against the 'convenience' of the witnesses or what otherwise might be the 'balance of convenience' as between the parties." Accord, Nicol v. Kosinski, 188 F.2d 537 (6th Cir. 1951); Headrick v. Atchison, T. & S.F. R.R., 182 F.2d 305 (10th Cir. 1950); Chicopee Mfg. Corp. v. Kendall Co., 154 F. Supp. 248 (W.D.S.C. 1957); Lesser v. Chevalier, 138 F. Supp. 330 (S.D.N.Y. 1956); Benrus Watch Co. v. Bulova Watch Co., 126 F. Supp. 470 (D. R.I. 1954); Savage v. Kaiser Motors Corp., 116 F. Supp. 433 (D. Minn. 1953); First Nat'l Bank v. Fidelity & Deposit Co., 107 F. Supp. 894 (D. Mass. 1952); Ortiz v. Union Oil Co., 102 F. Supp. 492 (S.D.N.Y. 1952); Tivoli Realty Co. v. Paramount Pictures, 103 F. Supp. 174 (D. Del. 1951).


25. All States Freight, Inc. v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952): "The forum non conveniens doctrine is quite different from section 1404(a). That doctrine involves . . . dismissal . . . . It is quite naturally subject to careful limitation for . . . [it] makes it possible for [the plaintiff] to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this . . . danger. Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine." Accord, General Felt Prods. Co. v. Allen Industries, 120 F. Supp. 491 (D. Del. 1954).
need. One writer has suggested that, since the case of Norwood v. Kirkpatrick, the conflict in approach has been resolved so that a lesser showing of convenience is now required, and that the more liberal position referred to above should be followed. However, few cases follow this precedent. Consequently the plaintiff's choice of the forum is still the leading element in determining the convenience of the parties. But the courts cannot summarily disregard the other factors of private interest to the litigants in presenting their cases, such as: the relative ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the cost of transporting witnesses, the possibility of viewing the premises when it is necessary and the location of parties' books, records and documents.

It is generally held that the inconvenience of counsel of the litigants is not a relevant factor; nevertheless it should be kept in mind that when the costs of the litigation reach the point of prohibiting prosecution of a suit, the additional fees of new counsel in the transferee forum or the added fees for time and travel of original counsel are worthy of judicial consideration. This is certainly germane to the economic convenience of the parties.

All things being considered, however, the convenience of the parties is largely an individual factual determination in every case and the results will vary accordingly.

II. Convenience of the Witnesses

While § 1404(a) speaks of transfer in terms of the convenience of the witnesses, the meaning is not literal. That is to say, in most cases the witnesses are not even present to indicate to the court the relative personal convenience of their attendance at one place or another. Even when counsel explains the personal inconvenience of a crucial witness, little weight is
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given such a consideration. What the phrase has come to mean is the convenience of the parties in being able to produce an inconveniently located witness or witnesses.

This interpretation having been recognized, the problem lies in the test to be applied in determining whether it is too inconvenient for the parties to have to produce the distantly located witnesses in the plaintiff's chosen forum. In this regard there is uniformity of opinion that the test should be a qualitative and not a quantitative one. That is, key witnesses, and not the total number, is the determinative factor.

In order to enable the court to reach an intelligent conclusion on the motion to transfer for this reason, the movant should provide the court with a list of the witnesses, their location, and a statement as to the nature of their testimony. The mere production of a voluminous list of witnesses is insufficient without an indication of the necessity for and import of their testimony. Just as important as the inconvenience of the movant's witnesses is the convenience of the non-movant's witnesses. This indicates that a change of place of trial should not be granted when the opposing party will thereby lose the testimony of an important witness.

As has been implied in this discussion of witness convenience, inconvenience is measured only in geographic terms—that is, proximity to or distance from the forum. Economic factors influencing a witness' ability or inability to appear are not considered. The crucial distance in the case of an unwilling witness would appear to be 100 miles, because federal subpoena power extends only that far. In the case of willing witnesses there is no

37. Chicago, R.I. & Pac. R.R. v. Hugh Breeding, Inc., 232 F.2d 584 (10th Cir. 1956) (the fact that the defendant produces an affidavit that it has to transport twenty witnesses is an insufficient basis for transfer unless the defendant shows the substance of the testimony of each so that the court can determine the materiality of the testimony and the need or absence thereof for such witnesses).
39. Jenkins v. Wilson Freight Forwarding Co., 104 F. Supp. 422 (S.D.N.Y. 1952) (1404(a) was designed and reserved for those instances where transfer is sought to a district court substantially distant from the district where the action has been instituted).
definable standard. Courts speak in terms of "relative distances" and the nature and availability of transportation facilities.41

III. The Interest of Justice

The interest of justice is the catch-all phrase of the statute which affords justification for almost any exercise of the trial court's discretion to grant or deny transfer. The term "interest of justice" may be a reason separate and distinct from the convenience of the parties and witnesses as well as the resultant factor of such convenience.42 That is to say, a factor such as the availability of compulsory process for an unwilling witness may serve both the convenience of a party in proving his case and the convenience of justice in arriving at a just determination of the cause;43 whereas, a factor such as the crowded condition of a docket primarily deals with conditions in furtherance of the administration of justice.

The pre-§ 1404(a) case of Gulf Oil Corp. v. Gilbert44 enunciated several "public interests" involved in the application of forum non conveniens which are still appropriate in deciding whether or not to grant a transfer. These public interests are:

1. congestion of the docket: this factor is given treatment ranging from great to slight importance. Often the same court will find docket congestion determinative in one case and immaterial in another, depending upon the facts.45

41. Bailey v. New York Cent. R.R., 166 F. Supp. 191 (E.D. Pa. 1958) (where travel distances are "relatively short" transfer will not be granted); accord, Davis v. American Viscose Corp., 159 F. Supp. 218 (W.D. Pa. 1958); Otto v. Hir, 89 F. Supp. 72 (D. Iowa 1952) (transfer warranted where witness would have to travel 240 miles); Anthony v. RKO Pictures, 103 F. Supp. 56 (S.D.N.Y. 1951) (where great majority of witnesses of both parties were in California, the New York action was transferred).


44. 330 U.S. 501 (1945).

(2) *local interest* in having local controversies decided at home;\(^{46}\)

(3) the *imposition of jury duty* on citizens of a community foreign to the origin of the cause of action; and

(4) trial of *diversity cases* in the home forum so that a foreign forum is not burdened with *conflict of laws* and *foreign law* problems.

Other factors included in the term "interest of justice" which are enumerated in the great body of case law on the subject are as follows:

(5) *delay* of parties before moving to transfer: this factor has been found on one hand to bar transfer;\(^{47}\) on the other, not to be determinative;\(^{48}\) and has also received intermediate treatment as being partially determinative of a motion to transfer.\(^{49}\)

(6) *financial capability* of the litigants to bear the expenses of trial;\(^{50}\) in this regard consideration has been given to the fact that the adversary is an impecunious plaintiff,\(^{51}\) the effect of a prolonged trial on the defendant's business,\(^{52}\) and the cost of obtaining witnesses.\(^{53}\)

(7) *consolidation of causes pending in other fora*: this is one of the strongest reasons for transfer because minimizing the number of trials directly serves the interest of justice.\(^{54}\)

(8) *enforceability of a judgment*;\(^{55}\)

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\(^{49}\) Harwich v. Atlantic Coast Line R.R., 129 F. Supp. 558 (D. Mass. 1955) (defendant's delay did not prevent transfer where it was conditioned on the defendant's paying the plaintiff's attorney's fees in preparation for trial in the transferee forum); Rhodes v. Barnett, 117 F. Supp. 312 (S.D.N.Y. 1953) (delay of two years should be given weight); Adler v. McKee, 92 F. Supp. 613 (S.D.N.Y. 1950) (passage of time itself is not sufficient ground for denial of transfer but is a factor to be considered); Kest v. New York Cent. R.R., 116 F. Supp. 615 (W.D.N.Y. 1953) (seven month delay to be balanced against the fact that the defendant sought information from the plaintiff for the seven months which information was used in the motion).


\(^{54}\) Christopher v. American News Co., 176 F.2d 11 (7th Cir. 1949) (transfer allowed in a multiparty suit where all parties could not be served in one district so as to avoid duplication); Cressman v. United Air Lines, Inc., 158 F. Supp. 404 (S.D.N.Y. 1958) (fact that other similar actions are pending recognized as one of many factors); Winsor v. United Air Lines, Inc., 153 F. Supp. 244 (E.D.N.Y. 1957) (where it was likely that four other cases pending against the same defendant arising out of the same airline crash would be consolidated, transfer was granted); Accord, Aircraft Marine Products v. Burnby Engineering Co., 96 F. Supp. 588 (S.D. Cal. 1951); *But see* Heiser v. United Air Lines, Inc., 167 F. Supp. 237 (S.D.N.Y. 1958), where transfer to facilitate consolidation was denied, and United States v. Wright, 282 F.2d 427 (3d Cir. 1960), affirming denial of transfer because trial court judge feared that his order of transfer would prompt other districts to transfer similar pending actions to the same transferee forum.

Other factors which have been singled out as not relevant in considering whether to grant or deny transfer are:

1. Inconvenience of counsel in having to take a deposition out of the district;\[62\]
2. Speculation that a jury verdict may be larger or smaller in the transferee or transferor forum;\[83\] and
3. The fact that conflicts of decisions on points of substantive law among the circuits may afford different results.\[84\]

Although the latter has been ruled out as a factor having any weight in determining whether or not transfer should be granted, this writer believes that the varying substantive law in the circuits is still a strong motivating force behind attempts to have cases transferred, although other “acceptable” grounds for the motion are asserted.\[84a\]

**TO WHAT COURT MAY AN ACTION BE TRANSFERRED?**

In giving district courts discretionary\[65\] power to transfer cases on the basis of the stipulated criteria,\[66\] § 1404(a) does not allow transfer merely to any other court that the transferor court deems appropriate.\[67\] Rather,
the transferee court must be one where the action "might have been
brought." This statutory language might seem clear on first reading, but it
has been a source of serious judicial conflict which has but recently been
resolved by the Supreme Court in the case of *Hoffman v. Blaski.*

In this case suit was brought by an Illinois plaintiff against a Texas
defendant in a district court in Texas. Although the defendant could not
have been served if the action were originally brought in Illinois and the
venue would also have been improper there, the defendant moved to
transfer the cause to Illinois because of the convenience of the parties and
witnesses and the pendency of similar litigation there. The defendant stipu-
lated in his motion for transfer that objections to venue in Illinois would
be waived and that an appearance would be entered. The motion was
granted. The plaintiff's petition for a writ of mandamus directing vacation
of the transfer order was denied by the Fifth Circuit Court of Appeals
which heard argument on the question of whether the Illinois district was
one where the action "might have been brought." Once in the Illinois
district court, the plaintiff's motion to remand the case to Texas was
reluctantly denied. But the Seventh Circuit Court of Appeals granted the
plaintiff's writ of mandamus, directing the Illinois district judge to reverse
his order, and holding that the wording of § 1404(a), i.e., "where it might
have been brought" referred only to a district where the plaintiff had a right
to sue independent of waivers of objections to jurisdiction and venue by the
defendant. The Supreme Court, after granting certiorari, resolved the
conflict in favor of the Seventh Circuit's view, and sent the case back to
Texas. The Court rejected the notion that the statute comprehended transfer
to a district where the action might have been brought *at the time of the
motion to transfer,* finding the defendant's waiver of venue and jurisdic-
tional objections immaterial. The majority argued that § 1404(a), while intended
to promote convenience of adjudication, was not designed to allow circum-
vention of jurisdiction and venue requirements. The plaintiff must have the
right to bring the action in the intended transferee court at the time the suit
is instituted independent of the wishes of the defendant. In taking this

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68. 363 U.S. 335 (1960).
69. Venue over patent infringement cases, which was the nature of this action,
is controlled by 28 U.S.C. § 1400(b) (1958) which provides: "Any civil action for
patent infringement may be brought in the judicial district where the defendant
resides, or where the defendant has committed acts of infringement and has a regular
and established place of business." Here the defendant did not reside in the Illinois
district, did not infringe therein, and had no regular and established place of business
in Illinois.
70. Ex parte Blaski, 245 F.2d 737 (1957).
71. Oral opinion.
73. 359 U.S. 904 (1959).
position, the Court resolved a conflict among several circuits\(^74\) and a divergence of opinion in many districts\(^75\) as to the meaning of this wording.

A vigorous dissenting opinion by Mr. Justice Frankfurter stated that the position taken by the majority:

\[G\]ives the narrowest possible scope to the operation of § 1404(a).

There can be expected to be very few, if any, alternative forums in a given case where the plaintiff has a 'right' to sue, considering that that means places of unobjectionable venue where the defendant is amenable to service of process and where there are no other impediments such as a statute of limitations which the defendant can rely on to defeat the action.\(^76\)

The net effect of the statute as now interpreted is to limit its use to cases where the plaintiff has a choice of two or more equally available federal courts in which to initiate suit and elects the more inconvenient one. It should be noted that the statute originally was passed to liberalize forum non conveniens,\(^77\) but under this construction the statute now has a limitation placed upon it which was never placed on forum non conveniens. That is, the movant cannot stipulate that he will waive objections to jurisdiction and venue as a condition precedent to the granting of the motion, whereas he could do so under forum non conveniens.\(^78\)

Prior to this decision there had been some support for the position that a plaintiff who has no alternative forum in which to initiate suit may have

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\(^74\) Cases allowing transfer despite the defendant's immunity from process and impropriety of venue in the transferee court are: \textit{Ex parte} Blaski, 245 F.2d 757 (5th Cir. 1957); Torres v. Walsh, 221 F.2d 319 (2d Cir. 1955); In re Josephson, 218 F.2d 174 (1st Cir. 1954); Anthony v. Kaufman, 193 F.2d 85 (2d Cir. 1951); and Paramount Pictures, Inc. v. Rodney, 186 F.2d 111 (3d Cir. 1951). For cases denying transfer in the same situation, see Behimer v. Sullivan, 261 F.2d 467 (7th Cir. 1958); Hoffman v. Blaski, 260 F.2d 317 (7th Cir. 1958); Blackmur v. Guere, 190 F.2d 427 (5th Cir. 1951); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950), and Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950).

\(^75\) The following districts have held that the defendant's waiver of venue and/or jurisdiction of the person in the transferee forum renders it one where the action "might have been brought": McGee v. Southern Pac., 151 F. Supp. 338 (S.D.N.Y. 1957); Hill v. Upper Miss. Towing Corp., 151 F. Supp. 692 (D. Minn. 1956); Cain v. Bowater's Newfoundland Pulp & Paper Mills, Ltd., 127 F. Supp. 949 (E.D. Pa. 1954); Welch v. Esso Shipping Co., 112 F. Supp. 611 (S.D.N.Y. 1955); Mire v. Esso Shipping Co., 112 F. Supp. 612 (S.D.N.Y. 1955); and Anthony v. RKO Pictures, 103 F. Supp. 56 (S.D.N.Y. 1951). Two districts have denied transfer on ground that the transferee districts were not ones where the action "might have been brought" without discussing waivers of jurisdiction and venue by the defendant: Silbert v. Nu-Car Carriers, 111 F. Supp. 357 (S.D.N.Y. 1953); and Hampton Theatres, Inc. v. Paramount Film Distrib. Corp., 90 F. Supp. 645 (D.D.C. 1950). Two other districts have made transfers, considering irrelevant whether the defendant was amenable to process in the transferee forum: Troy v. Poorvu, 132 F. Supp. 864 (D. Mass. 1955) and McCrery v. Foster-Milburn Co., 89 F. Supp. 643 (W.D.N.Y. 1950). Three districts have held or implied that the defendant's consent to transfer is irrelevant and that the transferee districts were not courts in which the actions "might have been brought": Felchin v. American Smelting & Ref. Co., 136 F. Supp. 577 (S.D. Cal. 1955); General Elec. Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (W.D. Mo. 1955) and Tivoli Realty v. Paramount Pictures, 89 F. Supp. 278 (D. Del. 1950).

\(^76\) See text \textit{infra} at notes 4 through 6.

\(^77\) See text \textit{infra} at note 19.
the cause transferred though jurisdiction in the transferee forum could not have been acquired over the defendant's person. Now, the Hoffman decision has the collateral effect of deciding that the remedy of § 1404(a) is to be restricted to use by defendants only. For, if the plaintiff could not have initiated suit in the transferee forum, he is now precluded from transferring the case there; and, if the plaintiff did have a choice of available fora initially and chose the more inconvenient forum, he should not thereafter be heard to complain.

It seems that the Court has already found difficulty with its construction of § 1404(a). Only two weeks after the Hoffman case was decided, the Court was pushed almost to the brink of destroying the long-standing admiralty fiction of the in rem action in order to remain consistent with its holding in Hoffman. In Continental Grain Company v. The Barge FBL - 58581 the plaintiff and defendant brought cross suits against each other, one originating in a Tennessee state court and removed to a federal district court in Tennessee and the other originating in a federal district court in Louisiana. In the Louisiana suit one count of the complaint was against the barge of the defendant in rem. Admittedly, such an action could be brought in one forum only, viz., where the barge is located. The defendant barge owner moved to transfer the civil suit against him and the in rem action against the barge to Tennessee. Since the in rem action could not originally have been brought in Tennessee, the Court, in affirming the transfer, was forced to treat the civil and in rem actions as one suit, thus implying, but obstinately refusing to admit, that the in rem fiction should be overruled.

The result reached was fair because good conscience dictated that the actions should be tried together; however, the legal gymnastics involved certainly did little to clarify the status of the law. That the reasoning is strained is indicated by a realignment of the Court wherein Mr. Justice Whittaker, author of the majority opinion in Hoffman, dissenting in Continental Grain, and Mr. Justice Frankfurter concurring in Continental Grain on the basis of his dissent in Hoffman.

79. Troy v. Poorvu, 132 F. Supp. 864 (D. Mass. 1955); Dufek v. Roux Distrib. Co., 125 F. Supp. 716 (S.D.N.Y. 1954) (Prior to the enactment of 1404(a) a plea of forum non conveniens was in effect a motion to dismiss. Therefore the only party to raise it was necessarily the defendant. The doctrine of balancing convenience of forums is not in itself inconsistent with giving relief to plaintiffs.) Contra, Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950); Barnhart v. John R. Rogers Producing Co., 86 F. Supp. 595 (N.D. Ohio 1949) (1404(a) is not available to plaintiffs who voluntarily choose their own forum).

80. But see General Elec. Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (W.D. Mo. 1955) where counts in a complaint against two defendants were severed so that the plaintiff could transfer one action to a district where the plaintiff had a right to sue the defendant originally.

81. 80 Sup. Ct. 1470 (1960).
WHAT PROCEDURES ARE INVOLVED IN HAVING AN ACTION TRANSFERRED?

As noted before,\textsuperscript{82} the wording of § 1404(a)\textsuperscript{83} is such that transfer is a matter discretionary with the court and not a matter of right. In securing transfer there is little likelihood that the court will act sua sponte. It is, therefore, incumbent upon the party desiring transfer to move the court to that effect, and the motion should be addressed to the transferor and not the transferee court.\textsuperscript{84}

One administrative problem is always present, however, namely that a transferor order is not binding upon the transferee court. Consequently, if the transferee court disagrees with the conclusion of the transferor forum, the former may remand the case to the latter.\textsuperscript{85}

A liberal attitude exists in most courts with respect to entertaining motions to transfer. Thus, it has been held that removal by the defendant from a state court is no bar to a subsequent motion by the same party to transfer from the court to which removal was had.\textsuperscript{86} A motion to dismiss on the ground of inconvenient forum has been treated as a motion to transfer.\textsuperscript{87} And a defendant has been allowed to renew his motion to transfer if the facts initially lacking can be supplied.\textsuperscript{88}

While courts liberally entertain such motions, they are not freely granted when mere convenience may serve to prejudice the opposition. Keeping in mind the factor of the “interest of justice,” courts have originated an approach which might be termed conditional transfer in order to protect the non-movant by exacting concessions from the movant. Thus, in some instances, the burden of compensating the plaintiff for expenses and counsel fees has been shifted to the defendant as a condition precedent to transfer.\textsuperscript{89}

The Erie-Klaxon\textsuperscript{90} doctrine, which raises its head in almost every aspect of diversity cases must also be discussed. The reader’s indulgence in the use

\textsuperscript{82} See note 65 supra.
\textsuperscript{83} “[A] district court may transfer . . . .” (Emphasis added.)
\textsuperscript{84} Facen v. Royal Rotterdam Lloyd S.S. Co., 12 F.R.D. 443 (S.D.N.Y. 1952) (application for transfer must be made in the district where the case is pending, not the district to which the cause is to be transferred).
\textsuperscript{85} Wilson v. Kansas City So. Ry., 101 F. Supp. 56 (W.D. Mo. 1951) (case brought in state court, removed to federal court and transferred to another district, remanded to transferor district); Note also Hoffman v. Blaski, 363 U.S. 335 (1960) where five courts passed on the matter of transfer before the case came to a hearing on the merits.
\textsuperscript{86} Chicago R.I. & Pac. R.R. v. Igoe, 212 F.2d 378 (7th Cir. 1954) (The fact that the cause is in the district by removal from a state court has no bearing on a motion to transfer. Once removed, the action proceeds as if it had been brought in the federal court originally.); Accord, Stewart v. Atchison, T. & S.F. Ry., 92 F. Supp. 172 (D. Mo. 1949).
of the terms "procedural" and "substantive" is asked for the purpose of
brevity. In the procedural area, a federal court sitting in diversity will apply
the statute of limitations of the state in which it sits. If, after transfer
to a court in another state, the transferee court does the same, the action may
be barred.\textsuperscript{91} Since this is one of the perils of forum non conveniens that
\textsection{1404}(a) was designed to avoid,\textsuperscript{92} the transferor courts have adopted a policy
of conditioning transfer upon the stipulation of the movant that the statute
of limitations of the transferor forum will be applied after transfer.\textsuperscript{93} The
same holds true where differences in the substantive law of the transferor and
transferee fora may affect the substantive rights of the parties. Hence,
transfer has again been conditioned upon agreement by the movant that the
law of the transferor forum will be applied if transfer is granted.\textsuperscript{94}

The \textit{conditional transfer} serves an important function then in preserving
the rights of the parties status-quo-ante-transfer. However, when the trans-
ferce forum must apply transferor law, the former must then deal with foreign
law and conflict of laws problems. Yet, one of the purposes of the prede-
cessor of \textsection{1404}(a), forum non conveniens, was to obviate this difficulty by
allowing a court to decline jurisdiction altogether so that a more convenient
court could deal with its own law.\textsuperscript{95} Thus, a paradox has arisen: while
\textsection{1404}(a) reduces the harshness of the forum non conveniens dismissal
requirement, the evolution of the \textit{conditional transfer} concept has reinstated
the foreign law and conflict of laws problems which forum non conveniens
was utilized to militate against.\textsuperscript{96}

\textsuperscript{91} Headrick v. Atchison, T. \& S.F. Ry., 182 F.2d 305, 309 (10th Cir. 1950)
(in this case where transfer was sought from New Mexico, where the statute of limitations
had run, the court stated: "Upon removal to the federal court in New Mexico, the
case would remain a New Mexico case controlled by the law and policy of that state,
and if \textsection{1404}(a) is applicable and a transfer to the California court is ordered for the
convenience of the parties, the witnesses and in the interest of justice, there is no
logical reason why it should not remain a New Mexico case still controlled by the law
and policy of that state.").

\textsuperscript{92} Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F.2d 360 (4th Cir.),
cert. denied, 338 U.S. 947 (1949) (transfer does not end an action but preserves it against
the running of the statute of limitations and for all other purposes); accord, Brown

\textsuperscript{93} Curry v. States Marine Corp., 118 F. Supp. 234 (S.D.N.Y. 1953) (where
the statute of limitations in the transferor court is no bar, but the statute of
limitations in the transferee court is a bar, unless the defendant agrees to use the statute
of limitations of the transferor court after transfer, no transfer will be granted); accord,
Hokanson v. Helene Curtis Indus., Inc., 177 F. Supp. 701 (S.D.N.Y. 1959);
Greve v. Gibraltar Enterprises, 85 F. Supp. 410 (D.N.M. 1949) (when the defendant
agrees not to invoke the shorter statute of limitations of the transferee court as a con-
dition of transfer, after transfer he will be estopped to violate the agreement).

\textsuperscript{94} Deepwater Exploration Co. v. Andrew Weir Ins. Co., 167 F. Supp. 185 (E.D.
La. 1958) (The plaintiffs had originally opposed the transfer because they would be
prejudiced by the possible application of Texas law to a Louisiana insurance contract.
This objection was removed when the defendants agreed that Louisiana law would apply
in the Texas court.)

\textsuperscript{95} Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

\textsuperscript{96} For an intensive examination of this area see Currie, \textit{The Erie Doctrine and
I. Appeal

In order to secure review of a cause by appeal it is required that there be a *final* decree or order from a lower court. An order of dismissal under forum non conveniens terminates the action and is final and appealable. However, an order granting or denying a motion to transfer a cause under § 1404(a) is interlocutory and not appealable.

II. Interlocutory Appeals Act

The fact that appeal is not available to review a transfer order has caused litigants to seek other avenues to gain access to the Courts of Appeals. One avenue of approach has been to resort to the Interlocutory Appeals Act. However, the limitation of this route is that there must be a "substantial ground for difference of opinion" on "a controlling question of law." But most transfer cases primarily involve *facts* as to "convenience" and the "interest of justice." Nevertheless, it does appear that when a question of jurisdiction or venue of the transferor or transferee court is involved, questions of *law* arise which would bring the case within the purview of § 1292(b). It is suggested, moreover, that there is a further inherent limitation in § 1292(b) which restricts its availability as a vehicle for review. That limitation lies in the requirement that the trial court judge must state in the order that he is of the opinion that there is a basis for an immediate appeal. A trial court judge who feels constrained to expedite the judicial process may be chary about being a party to excessive judicial review. Without such a statement in the transfer order, the Court of Appeals is without power to entertain an application.

97. 28 U.S.C. § 1291 (1958): "The courts of appeals shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." (Emphasis added.)
100. 28 U.S.C. § 1292(b) (1958): "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."
for a § 1292(b) appeal, even if it felt constrained to do so as a matter of its discretion.

III. Mandamus and Prohibition

The second avenue of approach is to seek a writ of mandamus or prohibition from the Court of Appeals under the All Writs Section of the Judicial Code.102 The purpose of such a writ, in this context, is either to direct the district judge to grant or prohibit him from granting an order of transfer; or, after transfer has been granted, to order or prohibit remand to the transferor court. This vehicle for review is more frequently used than the Interlocutory Appeals Act. However, this area is one of considerable confusion. “[T]he expressions of the various circuits with respect to the reviewability of orders of transfer under § 1404(a), through the use of [the All Writs section], are in hopeless conflict.”103 There are two basic problem areas: First, do the Courts of Appeals have the power to issue the writs? Second, assuming the existence of the power, should the writs issue as a matter of policy?

On the question of power, it is clear that the writs will issue to compel a judge “to exercise a jurisdiction which the law has made it his duty to exercise . . . or to prevent a judge from exercising a power that he clearly does not have.”104 Thus, mandamus or prohibition will lie to compel the district judge to exercise his discretion under the transfer statute.105 Clearly, the writ is in “aid of jurisdiction” in such cases. However, when the district judge has exercised the discretion granted him under § 1404(a), either affirmatively or negatively, the question of power to issue a writ thereafter arises.

This power problem must be viewed in three aspects:106 First, if the district court grants an order transferring the case out of the circuit, the effect of the order is that the district court will not decide a case which eventually could be appealed to the Court of Appeals of that circuit. Therefore, issuing a writ to review such an order is clearly “in aid of” potential appellate “jurisdiction” which the All Writs section requires. A contrary view has been expressed, however, to the effect that the power to protect jurisdiction does not extend to protecting it against other federal courts of equal jurisdiction, but only against state courts.107

102. 28 U.S.C. § 1651(a) (1958): “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”
104. Ibid.
106. In re Josephson, 218 F.2d 174 (1st Cir. 1954).
107. Magnetic Eng’r & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866, 868 (8d Cir. 1950): “We do not believe that our power to protect our own jurisdiction extends to protecting it as against the jurisdiction of another federal court of equal jurisdiction. . . .”
Second, if the district court denies an order for transfer, such action preserves, and does not frustrate, potential appellate jurisdiction of the Court of Appeals within the circuit. Thus, in the power sense, the writ should not issue because it cannot “aid jurisdiction” of the issuing court.

Finally, if the district court grants an order transferring the case to another district within the same circuit, it appears that the result should be the same as in the instance of denial of transfer.\(^{108}\)

Unfortunately, however, few of the Courts of Appeals have indulged in this analysis of their statutory powers,\(^ {109}\) the result being that they pass immediately to the second question, viz., whether the writs should issue as a matter of policy. On this point the circuits are in conflict once more. The Supreme Court has not resolved the question thus far,\(^ {110}\) although it has implied that the writs are available to review § 1404(a) orders.\(^ {111}\)

In those circuits which will review the interlocutory orders granting or denying transfer\(^ {112}\) the arguments for granting the writs are basically twofold: (1) “to hold . . . orders of transfer to lie beyond [the] control [of the Courts of Appeals], the effect would be to deprive litigants of forums to which they are entitled.”\(^ {113}\) (2) to postpone review of transfer orders is to make them virtually irreversible on appeal. The appeal thus becomes illusory because it is difficult to show that a different result would have obtained had transfer been granted (or denied) and trial held in another district. Moreover, the additional expense of an inconvenient trial can not be recovered as costs.\(^ {114}\)

The liberality of those circuits which grant the writs freely even extends to treating an incorrect appeal as a petition for mandamus.\(^ {115}\) Although emphasis is laid on the fact that review is granted for *abuse* of discretion only, it is frequently difficult to determine whether the trial

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108. Carr v. Donohoe, 201 F.2d 426 (8th Cir. 1953); but see Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950) where the court treated an appeal as a petition for mandamus without discussing whether mandamus would lie on a motion to transfer between districts within the same circuit.

109. Where problems of power were considered, see Lemon v. Druffel, 253 F.2d 680, 684 (6th Cir. 1958); “[W]e are of the opinion that considering solely the power of the Court to act, the question is correctly settled in this circuit that the Court has such power.”; and In re Josephson, 218 F.2d 174 (1st Cir. 1954).


112. Blaski v. Hoffman, 260 F.2d 317 (7th Cir. 1959), 363 U.S. 335 (1960); Lemon v. Druffel, 253 F.2d 680 (6th Cir. 1958); In re Josephson, 218 F.2d 174 (1st Cir. 1954); Wiren v. Laws, 194 F.2d 873 (D.C. Cir. 1951); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950); Atlantic Coast Line R.R. v. Davis, 185 F.2d 766 (5th Cir. 1950); Magnetic Eng'r & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866 (2d Cir. 1950).


115. Magnetic Eng'r & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866 (2d Cir. 1950); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950). These cases, however, were termed extraordinary.
court has clearly abused its discretion or the appellate court is merely
substituting its own discretion after its re-evaluation of the merits.116

In the circuits which will not review transfer orders even where
discretion is abused,117 the courts follow the classic judicial attitude toward
restriction of appellate review embodied in § 1291. These courts support
their position on several bases: First, that transfer orders are like other
types of orders that are not reviewable, such as orders to remand cases
to state courts after removal.118 Second, it is generally recognized that
these writs are extraordinary remedies, and controversies over transfer are
not really extraordinary.119 Third, if interlocutory review is permitted, the
purpose of § 1404(a) is undermined in that convenience and justice are
not served because of the delay and expense of an additional appeal.120
Finally, the illusory nature of an appeal after a final order is treated as
being a lesser consideration than those above enumerated.121

Needless to say, it is vital that these conflicting policies be rectified
in the interest of uniform nationwide judicial administration.

IV. Double Review and Impasse

The final problem of major importance in the appellate area is:
Which Court of Appeals is to review the transfer order when transfer is

116. Panhandle E. Pipe Line Co. v. Thornton, 267 F.2d 459 (6th Cir. 1959); In re First Nat'l Bank, 253 F.2d 876 (5th Cir. 1956); General Portland Cement Co. v. Perry, 304 F.2d 316 (7th Cir. 1953).
117. The second circuit appears to have gone both ways; see Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950) (granting mandamus) and Torres v. Walsh, 221 F.2d 319 (2d Cir. 1955) (denying both mandamus and prohibition), and note Swan, J., concurring in Ford Motor Co. v. Ryan, supra; Carr v. Donohoe, 201 F.2d 426 (8th Cir. 1953); All States Freight v. Modarelli, 196 F.2d 1010 (3d Cir. 1952).
118. 28 U.S.C. § 1447(d) (1958): “An order remanding a case to a state court from which it was removed is not reviewable on appeal or otherwise.” (Emphasis added.)
119. Torres v. Walsh, 221 F.2d 319, 321 (2d Cir.), cert. denied, 350 U.S. 836 (1955) (whether transfer is an abuse of discretion does not present “really extraordinary” questions within the power of the Courts of Appeals to grant mandamus or prohibition); Samborn, J., in Great No. Ry. v. Hyde, 238 F.2d 852, 857 (8th Cir. 1956), pointed out: “The Supreme Court has said: ‘Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . As extraordinary remedies, they are reserved for really extraordinary causes. . . . We do not regard controversies between litigants and between their counsel as to where a case can most conveniently, fairly, efficiently and economically be tried as ‘really extraordinary.’”
120. All States Freight v. Modarelli, 196 F.2d 1010, 1011 (3d Cir. 1952): “[A]n order either making a transfer or refusing a transfer is not appealable. Now the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus. . . .

“We think this practice will defeat the object of the statute (1404(a)). Instead of making the business of courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.

“[T]he risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are subjected to interlocutory review by mandamus.”
121. In re Josephson, 218 F.2d 174, 180 (1st Cir. 1954): “We have given little or no weight to one consideration advanced by petitioner, viz., that unless the transfer order is reviewed now by us it will as a practical matter never be reviewed at all.”; See also Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950).
granted? Is it to be the Court of Appeals of the transferor circuit or that of the transferee circuit, or both? Judge Hand of the Second Circuit expressed the view that:

The review of any order of the district court in a transferred cause, made before transfer, is within the jurisdiction of the court of appeals of the [transferee] circuit and if the [transferee] circuit decides that the transfer was erroneous, it has jurisdiction to direct the [transferee district] court to transfer the action back to [the transferor circuit], just as it was transferred out of that district.122

However, in the recent case of Hoffman v. Blaski123 the paralyzing result was reached that two circuits each determined that a district court of the other should hear the case.124 This circumstance was permitted to arise on the supposition of the transferee circuit, concurred in by the Supreme Court, that although both circuits reviewed the identical question of law between identical parties, the principles of res judicata were not applicable.125 In consequence, neither the transferor nor the transferee district court could try the case without one circuit deferring to the wisdom of the other. To extricate the circuits from the dilemma, the Supreme Court was obliged to grant certiorari.126 However, in so doing it resolved only the substantive point of the controversy leaving the

123. 363 U.S. 335 (1960).
124. The District Court for the Northern District of Texas granted the defendant's motion to transfer the case to the Northern District of Illinois. The Fifth Circuit Court of Appeals examined the merits and denied the plaintiff's petition for mandamus to require the Texas District Court to set aside the transfer. After the case was docketed in the Illinois District Court, the plaintiff moved to remand the case to Texas. Upon denial of the motion, the plaintiff sought mandamus from the Seventh Circuit Court of Appeals directing the Illinois District Judge to remand, which, in rehearing, was granted.
125. Hoffman v. Blaski, 363 U.S. 335, 340 (1960): “Several reasons why principles of res judicata do not apply may be stated in a few sentences. The orders of the Texas and Illinois District Courts on the respective motions to transfer and to remand, like the orders of the Fifth and Seventh Circuits on the respective petitions for mandamus, were (1) interlocutory, (2) not upon the merits, and (3) were entertained in the same case by courts of coordinate jurisdiction. Here the sole basis of the right of the Fifth Circuit to entertain the petition for a writ of mandamus was to protect its appellate jurisdiction... and by denying leave to file the petition, it forsook such right, but it did not thereby determine that the Illinois District Court had jurisdiction of the action. The question of the court's jurisdiction still remained subject to attack as of right on appeal to the Seventh Circuit from any final judgment in the action. When therefore, jurisdiction of the District Court was assailed by the petition for mandamus, that Court surely had power to determine whether it would hold, on such an appeal, that the Illinois District Court did or did not have jurisdiction of the action, and, if not, to say so and thus avoid the delays and expense of a futile trial.”
126. 359 U.S. 904 (1959). In the opinion of the Court after full hearing, Mr. Justice Frankfurter in dissent explained the dilemma, 363 U.S. 335, 348: “Unless and until this Court acts, the litigants have no forum in which trial may go forward. Each Court of Appeals involved has refused to have the District Court in its Circuit hear the case and has sent it to a District Court in the other.”
127. The Court determined only the meaning of the words “where it might have been brought” in § 1404(a).
way open for a recurrence of the event. It is submitted that, rather than allowing both transferor and transferee circuits to review the identical questions involving identical parties, res judicata should apply as between the circuits on issues of fact and law raised on motions for transfer.

CONCLUSION

While § 1404(a) was allegedly created for a specific purpose, i.e., to relieve the hardship of inconvenient trials in specific cases, its wording is broad in two respects. First, it applies to all civil actions. Second, its terminology lends to the apparent belief that transfer is available to overcome inconvenience whenever justice will be served.

While the historical purpose of venue provisions generally is that they promote suits in convenient fora, the practical problems of service of process, when combined with venue requirements, often make the initiation of suit impossible, difficult and, to say the least, inconvenient.

Section 1404(a) stood for twelve years as an apparent means of obviating the unintended but nevertheless existent inconveniences of venue requirements by allowing transfer for convenience whenever justice would be served. However, the purpose of its creation was not to increase the number of places where suit could be brought; that is, it was not a general liberalization of federal venue requirements.

Recent Supreme Court construction has refocused attention upon its original purpose. Thus, while its broad wording lent itself to liberal construction for a short period of time, judicial liberality has again been restricted.

Hence, the initiative has been given back to Congress so that if venue requirements are to be liberalized at all, Congress and not the courts must act.

128. Mr. Justice Frankfurter again in his dissent pointed out at 345: "[W]hile the court today settles one problem arising in the application of § 1404(a), other questions involving that section may readily give rise to conflicting views among the eleven Circuit Courts of Appeals. . . . We ought to forestall in other situations of potential controversy the kind of judicial unseemliness which this case discloses."

129. Mr. Justice Frankfurter dissenting at 348: "[T]he Court [referring to the majority opinion] decides that the review in the Fifth Circuit was so much wasted motion, properly ignored by the Court of Appeals for the Seventh Circuit in arriving at a contrary result. The case is treated just as if the Fifth Circuit had never considered the questions involved in it. I am at a loss to appreciate why all the considerations bearing on the good administration of justice which underlie the technical doctrine of res judicata did not apply here to require the Court of Appeals for the Seventh Circuit to defer to the previous decision. Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522, 525-526, 51 S.Ct. 517, 75 L.Ed. 1244. One would suppose that these considerations would be especially important in enforcing comity among federal courts of equal authority."