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Robert P. Hobson

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FORUM NON CONVENIENS UNDER THE  
UNITED STATES JUDICIAL CODE

ROBERT P. HOBSON\*

Section 1404(a) of the Judicial Code of the United States 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.”<sup>1</sup>

The compelling reason for the passage of this particular section of the Code may be found in the rule first announced by the Supreme Court in the case of *Baltimore & Ohio R. Co. v. Kepner*.<sup>2</sup> In that case, Kepner, an employee of the B & O and a resident of Ohio, was injured in an accident occurring in Butler County, Ohio, and asserted his cause of action under the Federal Employers' Liability Act<sup>3</sup> against the railroad company in the District Court of the United States for the Eastern District of New York. The B & O instituted an action in the Common Pleas Court of Hamilton County, Ohio at Cincinnati seeking to enjoin the process of the action by Kepner in the District Court of the United States for the Eastern District of New York upon the ground that there were open and convenient forums in Ohio for the prosecution of his case and the cost of trying the case in New York would be heavy and would place an unjust burden on the defendant and unduly burden interstate commerce. The trial court dismissed the action, and its judgment was successfully affirmed by the Court of Appeals and the Supreme Court of Ohio. On appeal by the railroad company to the Supreme Court of the United States in a majority opinion by Mr. Justice Reed, the Court concluded that Section 6 of the Federal Employers' Liability Act, the venue section, providing that the action may be maintained in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencement

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\*Member of the Kentucky Bar.

<sup>1</sup>62 Stat. 937 (1948), 28 U. S. C. § 1404(a) (1950). Section 1406 governs the procedure where a case is filed laying venue in the *wrong* (not merely a less convenient) jurisdiction: “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it could have been brought.”

<sup>2</sup>62 Stat. 937 (1948) amended 63 Stat. 101 (1949), 28 U. S. C. § 1406 (1950).

<sup>3</sup>314 U. S. 44, 62 S. Ct. 6, 86 L. ed. 28 (1941).

<sup>4</sup>45 U. S. C. § 51-60 (1948).

of the action, conferred upon the injured employee the right to maintain his action in any district court where the defendant was doing business; and accordingly, the judgment was affirmed.

Apparently recognizing the practical objection to this decision, as well as the injustice to the defendant by reason of the exacting language of the venue section of the Federal Employers' Liability Act, the majority opinion observed: "If it is deemed unjust, the remedy is legislative . . ."<sup>4</sup>

It should be borne in mind that although the doctrine of forum non conveniens was urged upon the Court in this case, the decision does not touch this question, but only decides that a state court may not enjoin its resident from prosecuting a right given to him under a Federal Act. Nor does the decision attempt to decide the question of whether the District Court of the United States for the Eastern District of New York could properly refuse to assume venue in this case when requested to do so upon timely application by the defendant. Later, the Supreme Court, in the case of *Miles v. Illinois Central Railroad Company*,<sup>5</sup> passed upon the identical question as applied to a state court proceeding under the Federal Employers' Liability Act. In that case, Mrs. Miles was appointed administratrix of the estate of her husband who was killed in an accident occurring at Memphis, Tennessee, and instituted a suit in the state court in Missouri to recover damages against the railroad company. The latter sought by injunction in the Chancery Court of Shelby County, Tennessee, to prevent the prosecution of the action by Mrs. Miles in St. Louis. Upon the issuance of the temporary injunction, Mrs. Miles, dismissing the Missouri action, was discharged as administratrix in the Tennessee Probate Court, and a Missouri administrator was then appointed who instituted another action in the State Court in Missouri. Thereupon, the railroad company filed an amended bill making the decedent's children defendants and seeking to enjoin the widow and the children from furthering the Missouri suit or receiving the proceeds of any judgment, and the temporary injunction was issued on the ground of the inconvenience and expense to the defendant and the necessary resulting burden upon interstate commerce. This judgment was affirmed by the Supreme Court of Tennessee and certiorari having been granted to the Supreme Court, it reversed the judgment. In an opinion by Mr. Justice Reed, the Court held that

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<sup>4</sup>Baltimore & Ohio R. Co. v. Kepner, 314 U. S. 44, 54, 62 S. Ct. 6, 10, 86 L. ed. 28, 32 (1941).

<sup>5</sup>315 U. S. 698, 62 S. Ct. 827, 86 L. ed. 1129 (1942).

"The Missouri Court here involved must permit this litigation,"<sup>6</sup> and directed that the Tennessee action be dismissed.

Again, it should be observed that the doctrine of forum non conveniens was not applied in this case, although much language in the opinion indicates that the writer would not have approved it if the question had been raised. It should be borne in mind that the *Miles* case decides only that a Tennessee court may not enjoin its citizens from prosecuting an action under the Federal Employers' Liability Act in a proper jurisdiction although the effect of it would be to put the defendant to excessive and unreasonable expense.

Having once pointed out in the *Kepner* case that the remedy for the venue section of the Federal Employers' Liability Act is legislative and not judicial, the Court does not refer to it again in the *Miles* case.

The work of revising the entire Judicial Code was begun in 1943. Its purpose was not to amend existing laws but to revise the entire Judicial Code so as to furnish an adequate and complete system of procedure. One of the problems which confronted the Judiciary Committee charged with this responsibility was the manifestly unjust and unreasonable venue provision of Section 6 of the Federal Employers' Liability Act, and the committee and its advisers recognized the advisability of putting into the new Code a practical provision embodying the doctrine of forum non conveniens. This was felt to be necessary not only because of the apparent need for such a provision but also because its inclusion in the Judicial Code or other legislative act had been suggested by the Supreme Court in Mr. Justice Reed's opinion in the *Kepner* case as the only solution to the manifest injustice resulting from the decision of that case.

In showing the purpose of enacting Section 1404(a) the revisers submitted the following statement:

"Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, 1941, 62 S. Ct. 6; 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and

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<sup>6</sup>*Miles v. Illinois Central Railroad Company*, 315 U. S. 698, 704, 62 S. Ct. 827, 830, 93 L. ed. 1129, 1134 (1942).

witnesses, and further, that it is in the interest of justice to do so."<sup>7</sup>

In 1945 the second draft of the entire Code, with the revisers' notes, was circulated to the Advisory Committee and the Judicial Consultants, Judge Parker, Judge Holtzoff and Professor James W. Moore. The revisers' note attached to the second draft states:

"Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of 'forum non conveniens' permitting transfer to a more convenient forum, even though the venue is proper."

Regarding the provisions of Section 1404(a), Professor Moore in his work on Federal Practice, published in December, 1948, says:

"The Judicial Code Revision did not change the underlying basic principles of venue. It did, however, make some substantial changes and certainly put venue on a more workable basis. It adopts the principle of forum non conveniens, but provides for a transfer, not dismissal of *any* action to a proper and more convenient forum."<sup>8</sup>

The case of *Ex Parte Joseph Collett*<sup>9</sup> interprets Section 1404(a). In 1943, Joseph Collett sustained a severe injury while employed by the Louisville & Nashville Railroad Company at Irvine, Kentucky, in the Eastern District. He brought a suit in the District Court of the United States for the Eastern District of Illinois against the railroad company under the Federal Employers' Liability Act to recover for his injuries. Defendant moved to transfer that case to the Eastern District of Kentucky in accordance with the provisions of 1404(a) by showing that it was for the convenience of the parties and witnesses and in the interest of justice, and the Court so adjudged.

Collett then instituted an original proceeding in the Supreme Court by moving for leave to file a petition for a writ of mandamus against the Judge of the District Court for the Eastern District of Illinois and a writ of prohibition against the Judge of the District Court for the Eastern District of Kentucky, requiring the former to retain the action and prohibiting the latter from trying it, upon the ground that Section 1404(a) did not apply to a cause of action under the Federal Employers' Liability Act. The case was assigned by the Supreme Court for hearing on the motion. The motion was denied

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<sup>7</sup>28 U. S. C. § 1404 (a) (1950), Historical and Revision Notes.

<sup>8</sup>Moore, Federal Practice (2d ed. 1948) 2141.

<sup>9</sup>337 U. S. 55, 69 S. Ct. 944, 93 L. ed. 1207 (1949).

in an opinion by the Chief Justice on May 31, 1949 which held that Section 1404(a) did apply to causes of action arising under the Federal Employers' Liability Act and that the transfer of the action from the Eastern District of Illinois to the Eastern District of Kentucky was proper.<sup>10</sup>

While the *Collett* case decides only the question of the application of 1404(a) to cases arising under the Federal Employers' Liability Act, there can be no doubt of its application to cases under other Acts of Congress containing similar provisions as to venue.<sup>11</sup>

It should be borne in mind that this section applies only to suits brought in the Federal Courts, and of course, has no application to suits in the State Courts, whether under the Federal Employers' Liability Act, or otherwise.

Attention also should be called to the point that this section authorizes the transfer of an action only to a district or division where it might have been brought originally. The word "originally" does not appear in the Act but this is the manifest intent of it. This means that if an action is brought in New York, it cannot be transferred to another district if it could not originally have been brought in such other district even though it would be much more convenient to try it in the other district.

It will be noted that the section authorizes the transfer, where it is for the convenience of the parties and witnesses and in the interest of justice, but it does not compel it. It is clear that the burden is upon the party seeking the transfer to make a satisfactory showing of the existence of these facts. On the question of convenience if the equities are equally balanced, or indeed, unless the balance is strongly in favor of the transfer, it should be denied. This question was squarely raised in the case of *Ford Motor Company v. Ryan*,<sup>12</sup> where an anti-trust suit was brought against the Ford Motor Company in New York and it sought a transfer to the District Court for the Eastern District of Michigan at Detroit. The District Court for the Southern District of New York overruled this motion and the Ford Motor Company sought by mandamus in the Court of Appeals to compel the transfer. The majority of the Court of Appeals held that mandamus was available, but that the trial court did not abuse his discretion in refusing to order the transfer. In its well-considered and brief opinion the

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<sup>10</sup>Ex Parte Joseph Collett, 337 U. S. 55, 69 S. Ct. 944, 93 L. ed. 1207 (1949).

<sup>11</sup>United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 93 L. ed. 1226 (1949) (Sherman Anti-Trust Act).

<sup>12</sup>182 F. (2d) 329 (C. A. 2d, 1950).

court said that the transfer of cases under 1404(a) should rest upon the same basis as justified the refusal of a court to take jurisdiction under the doctrine of forum non conveniens, and that 1404(a) merely applied this doctrine to certain cases to which it was not theretofore applicable. It adhered to the rule announced in *Gulf Oil Corporation v. Gilbert*, that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."<sup>13</sup> In other words, the party seeking the transfer "has the burden of making out a strong case for a transfer," and the plaintiff's privilege of choosing a proper forum in which to begin his action "is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties.'"<sup>14</sup>

The final analysis of the situation seems to be:

(1) The doctrine of forum non conveniens has been consistently recognized by the Federal Courts even before the enactment of 1404(a), but the enforcement of that doctrine resulted in the dismissal of a given case because the court had no power to transfer it to another district prior to the enactment of 1404(a).

(2) Section 1404(a) simply empowers the trial court to transfer a civil action of which admittedly it had venue to another district, when such transfer is found to be in the furtherance of justice and for the convenience of the parties and witnesses.

(3) The burden is on the party seeking the transfer to make a strong case of inconvenience and injustice by the retention of the case in the court where the case originated.

(4) Under the doctrine of the *Kepner* and *Miles* cases a Federal Court could not, under forum non conveniens, dismiss an action properly brought under the venue section of the Federal Employers' Liability Act; but now, under the provisions of Section 1404(a), it may on a proper showing transfer such action for trial to another district where it might originally have been brought.

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<sup>13</sup>330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. ed. 1055, 1062 (1946).

<sup>14</sup>*Ford Motor Co. v. Ryan*, 182 F. (2d) 329, 330 (C. A. 2d, 1950).

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