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FEDERAL COURTS-CIVIL PROCEDURE-AVAILABILITY TO PLAINTIFF OF CHANGE OF VENUE UNDER TITLE 28 U.S.C.A. 1404(a)

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FEDERAL COURTS—CIVIL PROCEDURE—AVAILABILITY TO PLAINTIFF OF CHANGE OF VENUE UNDER TITLE 28 U.S.C.A. 1404(a)¹—The plaintiffs filed a complaint in the United States District Court for the Northern District of Ohio in order to obtain service on the defendant. The plaintiff then filed a motion for an order to transfer the cause to the United States District Court for the Western District of Pennsylvania under Title 28 U.S.C.A. 1404(a) on the grounds that all the plaintiffs and witnesses resided in Pennsylvania, that it would be inconvenient and expensive to transport these witnesses to Ohio, and that the cause of action arose in Pennsylvania. *Held*, motion denied. Title 28 U.S.C.A. 1404(a) is not available to plaintiffs as it is a codification of the doctrine of *forum non conveniens* which is intended to give relief to defendants by placing them in a position

¹“For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C.A. §1404(a).

equal to that of plaintiffs in selecting the place of trial. *Barnhart v. John B. Rogers Co.*, (D.C. Ohio 1949) 86 F. Supp. 595.

The construction of section 1404(a) adopted in the principal case relies on and is supported by dictum in a number of cases in which the request for change of venue was made by the defendant.² The federal courts had adopted the doctrine of *forum non conveniens* prior to the enactment of section 1404(a).³ It was normally invoked only by defendants since the remedy available under the doctrine was the dismissal of plaintiff's case.⁴ If section 1404(a) is deemed a mere codification of the doctrine of *forum non conveniens* it would have the limited effect of permitting a transfer instead of a dismissal of the cause.⁵ Although this seems to be a very limited interpretation of the section, it is supported by the Reviser's notes⁶ and the hearings before the judiciary committee.⁷ There is, however, no specific language limiting the provision to the sole benefit of defendants. Furthermore, a literal interpretation of the section in question supports a conclusion contrary to that reached in the principal case and since it is an important canon of statutory construction that external aids are not to be used when the language itself is clear⁸ this second interpretation should be examined. The provision stipulates that a district court may transfer any civil action to any other district or division "where it might have been brought."⁹ Inasmuch as the Judicial Code permits an action founded on diversity of citizenship to be brought at the residence of the defendant or of the plaintiff,¹⁰ a literal interpretation of the language of section 1404(a) would indicate that a court could transfer a case at the request of the plaintiff. Such an interpretation would

² *Hayes v. Chicago, R.I. & P.R. Co.*, (D.C. Minn. 1948) 79 F. Supp. 821. See also cases collected in the annotation in 5 A.L.R. (2d) 1239 (1949). In accord with the principal case is *Bolten v. General Motors Corp.*, (D.C. Ill. 1949) 81 F. Supp. 851 in which plaintiff attempted to transfer from Illinois to Missouri in order to take advantage of a longer statute of limitations. No question of trial convenience was presented though.

³ The federal position prior to the enactment of §1404(a) is set out in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947).

⁴ Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 (1947), where it is stated that the purpose of the doctrine is to limit the plaintiff's choice of forums in order to prevent undue hardship to defendants without, however, permitting defendants to avoid their obligations. The principal case, however, presents a situation in which the plaintiff bears all the hardship. The cause of action arose in plaintiff's district but the defendant was unavailable there. If the plaintiff cannot obtain a change of venue he is forced to sue in an inconvenient forum.

⁵ Generally, dismissal was the only remedy a court could give if *forum non conveniens* was successfully pleaded. However, the equivalent of a transfer was often achieved by conditioning the dismissal upon consent to service in the more convenient forum. See Barrett, "The Doctrine of Forum Non Conveniens," 35 CALIF. L. REV. 380 (1947).

⁶ "Subsection (a) of section 1404 was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. . . ." 28 U.S.C. CONG. SERV. p. 1853 (1948).

⁷ HEARINGS BEFORE SUBCOMMITTEE NO. 1 OF THE COMMITTEE ON JUDICIARY ON H.R. 1600 and H.R. 2055, 80th Cong., 1st sess., 29 (1947).

⁸ 70 A.L.R. 5 (1937).

⁹ See note 1, *supra*.

¹⁰ "A civil action where jurisdiction is founded on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C.A. 1391(a).

have the effect of extending district court process beyond the territorial boundaries of the district¹¹ for it would then be possible for a plaintiff to obtain service at the defendant's residence and thereafter have the cause transferred to his own district. This need not result in any injustice to defendants, however, for the matter is within the discretion of the court as guided by necessary findings that a transfer would be for the convenience of the parties and in the interests of justice.¹² Thus a defendant would not be able to escape an impecunious plaintiff who cannot afford to prosecute an action outside his own district. This interpretation was refused in the principal case because the court felt that Congress should provide for such extensions of process in a more specific manner.¹³ It is submitted, however, that such an interpretation would be valid in law and salutary in effect.

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¹¹ Rule 4(f) of the Federal Rules of Civil Procedure (1938) limits the effectiveness of district court process to the territorial boundaries of the state in which the district is located.

¹² See note 1, *supra*.

¹³ Principal case at 599, where the court says: "If some other and higher Court desires to read an intendment into the law such as is contended for . . . then it may do so. However this Court prefers to allow any such far-reaching change to rest with the legislative branch of the Government."