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# FEDERAL PROCEDURE-CHANGE OF VENUE ON MOTION OF THE PLAINTIFF

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FEDERAL PROCEDURE—CHANGE OF VENUE ON MOTION OF THE PLAINTIFF—Plaintiff, a resident of California, was injured on defendant corporation's premises in Nevada. Being unable to serve defendant in California, plaintiff started a negligence action in the Federal District Court in Nevada and then moved for a change of venue to the proper Federal District Court in California under section 1404(a) of the Judicial Code.[1] The Federal District Court of Nevada overruled plaintiff's motion. On appeal, *held*, affirmed. The requirement under 1404(a) that the action be transferred to any district "where it might have been brought" precludes transfer to a forum where the defendant was not amenable to process. *Shapiro v. Bonanza Hotel Co.*, (9th Cir. 1950) 185 F. (2d) 777.

Section 1404(a), added to the Judicial Code in 1948, is based on the doctrine of forum non conveniens.[2] The courts have been reluctant to allow a change of venue under this new section on the motion of the plaintiff; it has been

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

[2] See Revisor's notes, 28 U.S.C. (Supp. III, 1950) §1404(a).

"The doctrine of forum non conveniens is bottomed upon the right of the Court in the exercise of its equitable powers to refuse the imposition upon its jurisdiction of the trial of cases, even though venue is properly laid, if it appears that, for the convenience of the litigants and the witnesses, in the interest of justice, the action should have been instituted in another forum where the action might have been brought." Hayes v. Chicago, R.I. & P.R. Co., (D.C. Minn. 1948) 79 F. Supp. 821 at 824.

held that the section is per se not available to plaintiffs.[3] This is put on the grounds that forum non conveniens was invoked only by defendants, and, since plaintiff has voluntarily chosen his forum, he should not be allowed to change it, especially over defendant's objection.[4] As to the first ground, it should be noted that there is nothing in the language of section 1404(a) that restricts its application to defendants, and the section has been held to apply where forum non conveniens does not.[5] Also, since the remedy under section 1404(a) is transfer rather than dismissal as under forum non conveniens, the limitations of the latter should not be binding on section 1404(a) transfers. As to the contention that the plaintiff has voluntarily chosen his forum, there may be cases where developments after the commencement of the action make a second forum more convenient. In addition, the plaintiff will be most likely to invoke section 1404(a) when for some reason he has been unable to maintain his action in the more convenient forum. This raises the most serious problem the courts have met in applying section 1404(a) to motions by the plaintiff. The principal case denies plaintiff the right to transfer the action to a forum where defendant could not be served. The court finds two principal objections to allowing such a transfer. The first is the requirement that the action be transferred to a district in which it "might have been brought." The court holds that unless service could have been obtained in the more convenient forum, the action could not have been brought there within the meaning of section 1404(a). An approach which was rejected in the principal case, but which there is some authority for, interprets "brought" as "commenced" and, since an action is commenced when the complaint is filed,[6] allows the action to be brought in any district of proper venue.[7] The second ground urged by the court in the principal case is that allowing a transfer to a forum in which defendant could not have been served would circumvent the limitation on service of process to the state in which the district court is sitting.[8] As a matter of interpretation of the statute, the court is no doubt correct in holding that Congress did not have in mind a change, even indirectly, in service requirements. There is a well established congressional policy in favor

[3] Barnhart v. John B. Rogers Producing Co., (D.C. Ohio 1949) 86 F. Supp. 595.

[4] Bolten v. General Motors Corp., (D.C. Ill. 1949) 81 F. Supp. 851.

[5] Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944 (1949) (FELA actions); United States v. National City Lines, Inc., 337 U.S. 78, 69 S.Ct. 955 (1949) (anti-trust actions).

[6] Rule 3, Federal Rules of Civil Procedure, 28 U.S.C.A. (1950).

[7] Otto v. Hirl, (D.C. Iowa 1950) 89 F. Supp. 72. Plaintiff's motion allowed on the basis of this construction of the section. There is good authority for this interpretation in other connections. Goldenberg v. Murphy, 108 U.S. 162, 2 S.Ct. 388 (1883) (statute of limitations); Rawle v. Phelps, 2 Flip. 471, 20 Fed. Cas. 320 (1879) (removal).

[8] The court refers to Foster-Milburn Co. v. Knight, (2d Cir. 1950) 181 F. (2d) 949, where it is said that allowing such circumvention in this case would give a preference to diversity suits over all other actions which must be brought in the district wherein the defendant resides [28 US.C. (Supp. III, 1950) §1391(b)], and that Congress would not have intended such a result. In answer it may be said that the reason this would create a preference is that Congress has already given plaintiffs a preferential treatment as to venue in diversity actions. 28 U.S.C. §1391(a).

of limited scope of process,[9] and the federal rules seem to require that Congress clearly indicate any intent to change these limitations.[10] However, as a matter of policy a different result might have been reached. There is no doubt that Congress has the power to change service limitations,[11] and the need for some relief to plaintiffs who cannot afford to carry on a trial in a distant forum has long been recognized.[12] The danger of harassing defendants by allowing nationwide service would be nullified by the requirement that the district court exercise its discretion only upon a showing that the transfer will be in the interest of justice[13] and supported by a preponderance of convenience.[14] Since this relief could be extended to plaintiffs without too strained a construction of the statute,[15] it is submitted that justice would be better served by doing so.

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[9] Robertson v. Railroad Labor Board, 268 U.S. 619, 45 S.Ct. 621 (1925).

[10] Rule 4(f), Federal Rules of Civil Procedure, 28 U.S.C.A. (1950). See Foster-Milburn Co. v. Knight, supra note 8.

[11] Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 66 S.Ct. 242 (1946). Congress has done so in anti-trust acts, 15 U.S.C. (1946) §25.

[12] Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 (1945); Braucher, "The Inconvenient Federal Forum," 60 HARV. L. REV. 908 (1947).

[13] Where the defendant would lose a defense, the transfer would not be in the interest of justice. Bolten v. General Motors Corp., supra note 4.

[14] Mere balance of convenience is not enough to call for a transfer. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947); Skultety v. Pennsylvania R. Co., (D.C. N.Y. 1950) 91 F. Supp. 118; Adler v. McKee, (D.C. N.Y. 1950) 92 F. Supp. 613.

[15] See Otto v. Hirl, supra note 7; McCarley v. Foster-Milburn Co., (D.C. N.Y. 1950) 89 F. Supp. 643, reversed sub nom Foster-Milburn Co. v. Knight, supra note 8.