Michigan Law Review

Volume 61 | Issue 2

1962

Federal Courts-Jurisdiciton-District Court Transfer of Action Under Section 1406(a) Without Jurisdiction Over Person of Defendant

J. Patrick Martin S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Courts Commons, and the Jurisdiction Commons

Recommended Citation

J. P. Martin S.Ed., *Federal Courts-Jurisdiciton-District Court Transfer of Action Under Section 1406(a) Without Jurisdiction Over Person of Defendant*, 61 MICH. L. REV. 393 (1962).
Available at: https://repository.law.umich.edu/mlr/vol61/iss2/9

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FEDERAL COURTS—JURISDICTION—DISTRICT COURT TRANSFER OF ACTION UNDER SECTION 1406(a) WITHOUT JURISDICTION OVER PERSON OF DEFENDANT —In 1956 plaintiff corporation brought a private antitrust action against various persons and corporations in a federal district court in Pennsylvania. Service was made upon defendant corporations by means of alias summonses[1] in New York where they were amenable to suit. Since defendant corporations were not inhabitants of, "found," or transacting business in Pennsylvania, venue was improper there and the extraterritorial service-of-process provision of the Clayton Act[2] was not available to plaintiff. Defendant corporations moved to dismiss for lack of in personam jurisdiction. Instead, however, the court, invoking section 1406(a) of the Judicial Code,[3] transferred the action in 1958 to a federal district court in New York.[4] The latter court granted defendants' motion to dismiss on the ground that the transfer was unauthorized because the Pennsylvania court lacked personal jurisdiction over defendants.[5] The United States Court of Appeals for the Second Circuit affirmed, with one judge dissenting.[6] On certiorari to the Supreme Court, *held*, reversed, two Justices dissenting. When it is "in the interest of justice," section 1406(a) authorizes the transfer of cases whether the transferor court has personal jurisdiction over the defendants or not. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962).

1 A summons used to commence an action where the original writ has failed to effect its purpose because of a defect in form or manner of service, and when issued, it supersedes the original writ. Schmidt v. Schmidt, 108 Mont. 246, 89 P.2d 1020 (1939); Mansur v. Pacific Mut. Life Ins. Co., 136 Mo. App. 726, 118 S.W. 1193 (1909); McGuire v. Montvale Lumber Co., 190 N.C. 806, 131 S.E. 274 (1925). Apparently, in the instant action, the original writ was defective as to the parties defendant; thus a second writ was necessary.

2 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958). This section, which deals with both venue and personal jurisdiction in antitrust actions against corporations, provides that suit may be brought in the judicial district where the defendant is an inhabitant, may be found, or transacts business, and that all process may be served where defendant is an inhabitant or wherever it may be found.

3 28 U.S.C. § 1406(a) (1958).

4 169 F. Supp. 677 (E.D. Pa. 1958).

5 Goldlawr, Inc. v. Shubert, 175 F. Supp. 793 (S.D.N.Y. 1959).

6 Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961).

Until 1948, a federal district court was compelled to dismiss any action whenever a timely objection was made to improperly laid venue.[7] This procedure was completely reversed in 1948 by the enactment of section 1406(a) which provided that an action brought where venue was improper "shall" be transferred to another forum in which it could have been brought.[8] To protect against potential abuse[9] from such a radical change[10] in the law, Congress amended the section in 1949 to provide that such actions may be either transferred or dismissed "in the interest of justice."[11] At first, the main issue litigated under section 1406(a) and its companion transfer provision, section 1404(a),[12] was the construction of the phrase "where it might have been brought."[13] Recently, the Supreme Court resolved the conflict among the circuits by holding that the place where an action might have been brought does not depend on the wish or waiver of the defendant, but rather on whether the transferee district was one in which the action might originally have been brought by plaintiff.[14]

However, as soon as this issue was settled another equally perplexing

7 See Suttle v. Reich Bros., 333 U.S. 163 (1948); Camp v. Gress, 250 U.S. 308, 316 (1919); Riley v. Union Pac. R.R., 177 F.2d 673, 675 (7th Cir. 1949) (dictim), *cert. denied*, 338 U.S. 911 (1950); Schoen v. Mountain Producer Corp., 170 F.2d 707, 713 (3d Cir. 1948); Kibler v. Transcontinental & W. Air Co., 63 F. Supp. 724, 725 (E.D.N.Y. 1945); Brown v. Heinen, 61 F. Supp. 563 (D. Minn. 1945); Billings Util. Co. v. Federal Reserve Bank, 40 F. Supp. 309, 311 (D. Mont. 1941); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 950 (1953); 1 MOORE, FEDERAL PRACTICE ¶ 0.146[2], at 1904 (2d ed. 1960).

8 28 U.S.C. § 1406(a) (1958). See generally Stamatiou v. Miller, 88 F. Supp. 556 (E.D. Pa. 1949).

9 H.R. REP. No. 352, 81st Cong., 1st Sess. 14 (1949); S. REP. No. 303, 81st Cong., 1st Sess. 4 (1949).

10 See HART & WECHSLER, *op. cit. supra* note 7, at 951; 1 MOORE, *op. cit. supra* note 7, ¶ 0.146[4], at 1905; MOORE, COMMENTARY ON THE JUDICIAL CODE 195 (1949).

11 28 U.S.C. § 1406(a) (1958) reads: "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 case to any district or division in which it could have been brought."

12 28 U.S.C. § 1404(a) (1958) reads: "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."

13 The majority of courts held that it was improper to transfer on plaintiff's motion to a forum in which defendant would not be amenable to process or in which venue was lacking. See, *e.g.*, Blackmar v. Guerre, 190 F.2d 427 (5th Cir. 1951), *aff'd on other grounds*, 342 U.S. 512 (1952); Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950); Shapiro v. Bonanza Hotel Co., 185 F.2d 777 (9th Cir. 1950). However, since personal jurisdiction and venue requirements exist for the benefit of the defendant, and may be waived, it was held by several courts that upon defendant's express consent the action could be transferred from a court of proper jurisdiction and venue to a forum that otherwise lacked either or both of these requirements. *E.g.*, Paramount Pictures, Inc. v. Rodney, 186 F.2d 111 (3d Cir. 1950), *cert. denied*, 340 U.S. 953 (1951); Anthony v. RKO Radio Pictures, 103 F. Supp. 56 (S.D.N.Y. 1951).

14 Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960). Actually, this case dealt with § 1404(a), which is ostensibly a codification of the judicial doctrine of forum non conveniens. But the language is quite similar to § 1406(a), the former allowing transfer when venue is correct, the latter when it is not. Thus for all purposes the language "might have been brought" is equally affected by the *Hoffman* decision.

jurisdictional question involving 1406(a) came before the Court. In the principal case, the essential problem presented was whether a federal court, lacking jurisdiction over a defendant, may nevertheless transfer the action to a district where service could be effected. The majority,[15] per Mr. Justice Black, agreed with plaintiff that the decisions below requiring personal jurisdiction before transfer read into 1406(a) an unnecessary restriction which was neither expressed in the language of the statute nor justified by its legislative history.[16] The Court stated that the primary purpose of 1406(a) was to avoid the injustice to plaintiff in losing his cause of action under a statute of limitations merely because he had, in good faith, made an erroneous guess with regard to some elusive and uncertain fact upon which venue and personal jurisdiction happened to turn. The Court felt that the phrase "in the interest of justice" was amply broad to authorize the transfer of cases regardless of how wrong the plaintiff may have been as to venue and personal jurisdiction, as long as the transferor court feels that plaintiff has made an honest mistake. The Court maintained that such a construction was in accord with the current procedural philosophy of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on the merits. This, the majority opinion concluded, would protect plaintiff from being penalized by "time-consuming and justice-defeating technicalities."[17]

In complete sympathy with this general objective, the dissent, per Mr. Justice Harlan, nevertheless felt that the situation was one to be remedied by legislative,[18] not judicial, means. In a brief opinion, the dissent emphasized both the lack of legislative history and prior case law supporting the novel theory that a court may affect a defendant's substantive rights without first having personal jurisdiction.

Although personal jurisdiction is generally held to be necessary for a court to render a valid judgment against a defendant, this requirement may be waived[19] or, in some instances, dispensed with whenever it is necessary to prevent irreparable injury.[20] In antitrust and other complex

15 This was a five-two decision with newly-appointed Mr. Justice White and ailing Mr. Justice Frankfurter not taking part.

16 Brief for the Petitioner, pp. 5-6, Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962). See S. REP. No. 303, 81st Cong., 1st Sess. 4 (1949), for the legislative history.

17 The late Judge Parker speaking in Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 517 (4th Cir. 1955).

18 The dissent preferred to have the Judicial Conference of the United States express its views on the subject before any congressional action was taken. *Cf.* Miner v. Atlass, 363 U.S. 641, 650-52 (1960).

19 See, *e.g.*, Paramount Pictures, Inc. v. Rodney, 186 F.2d 111 (3d Cir. 1950), *cert. denied*, 340 U.S. 953 (1951); Fleming v. Black Warrior Copper Co., 15 Ariz. 1, 136 Pac. 273 (1913); Ferguson v. Oliver, 99 Mich. 161, 58 N.W. 43 (1894). The theory is that it is a mere privilege of the defendant to insist that he be personally served within the jurisdiction of the court and that he may readily consent to personal jurisdiction without observing the usual legal formalities. Springer v. Shavender, 118 N.C. 23, 23 S.E. 976 (1895).

20 See FED. R. CIV. P. 65(b) which was taken from Act of Oct. 15, 1914, ch. 323,

and expensive actions against multiple corporate defendants, it is quite possible that a plaintiff may make a bona fide mistake in believing that certain contacts are sufficient to support both venue and jurisdiction. In fact, such a question may be so extensively litigated that all applicable statutes of limitations are exhausted and any further action by plaintiff is barred. Fearing this result because of the short statute of limitations in certain admiralty actions, the court in *Internatio-Rotterdam v. Thomsen*,[21] the chief precedent relied upon by the majority in the principal case, made the plaintiff's good faith rather than the transferor court's acquisition of personal jurisdiction the controlling consideration in transferring an action brought in a place where venue was improperly laid. In building upon and extending these principles, the principal case has made "in the interest of justice" a good faith standard that will expedite the orderly administration of justice in the federal system by preventing procedural snarls which sometimes may result in the destruction of substantive rights. Since a defendant will still have to be properly served in the transferee district before his substantive rights can be affected and since the courts still have the discretionary prerogative to refuse transfer, no abuse should result from this liberal construction of 1406(a). Moreover, it is hoped and expected that the courts will quickly extend the philosophy of the principal case to 1404(a), thus allowing these transfer-of-venue statutes to be realized to their full potential in permitting a plaintiff, in good faith, to bring an action in any federal court and thereby toll the applicable statute of limitations.

J. Patrick Martin, S.Ed.

§ 17, 38 Stat. 737, allowing temporary restraining orders to be granted without notice to the adverse party when the specific facts show that irreparable damage will occur before notice could be served and a hearing had thereon. For judicial origin of this doctrine, see Irwin v. Dixson, 50 U.S. (9 How.) 10, 28-29 (1850); Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).

21 218 F.2d 514 (4th Cir. 1955). Although this case was an admiralty action, its principles would seem to apply to all civil actions, since the basic theory involved is avoiding the sacrifice of the spirit of the law for its letter, often encrusted with procedural technicalities of a former era. See also Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F.2d 590 (D.C. Cir. 1960); Schiller v. Mit-Clip Co., 180 F.2d 654 (2d Cir. 1950); Petroleum Financial Corp. v. Stone, 116 F. Supp. 426 (S.D.N.Y. 1953); 1 MOORE, *op. cit. supra* note 7, ¶ 0.146[5], at 1910.