Michigan Law Review

Volume 52 | Issue 7

1954

FEDERAL PROCEDURE-MANDAMUS-REVIEW OF FEDERAL DISTRICT COURT ORDER OF SEVERANCE AND TRANSFER PURSUANT TO 28 U.S.C. §1406 (a)

Judson M. Werbelow S.Ed.
University of Michigan Law School

FEDERAL PROCEDURE—MANDAMUS—REVIEW OF FEDERAL DISTRICT COURT ORDER OF SEVERANCE AND TRANSFER PURSUANT TO 28 U.S.C. §1406 (a)—Petitioner instituted a treble damage suit alleging violation of the antitrust laws in the Federal District Court for the Southern District of Florida, naming the insurance commissioner of Georgia, the insurance commissioner of Florida, and four insurance companies residing and doing business in the Southern District of Florida as defendants. The Georgia insurance commissioner, who was personally served in the Northern District of Florida, entered a special

appearance to dismiss the action for improper venue. Petitioner contended that the Georgia commissioner was "found or has an agent"[1] in the Southern District of Florida on the theory that co-conspirators are each other's agents, and since other members of the alleged conspiracy were in the Southern District of Florida, venue in that district was proper as to all defendants. Respondent judge held that as to the Georgia commissioner venue was improper and ordered a severance and transfer of the action against him to the Northern District of Georgia where said commissioner resided.[2] A petition to the Court of Appeals for the Fifth Circuit for a writ of mandamus to compel the district court in Florida to vacate and set aside the order of severance and transfer was dismissed as an inappropriate remedy.[3] On certiorari the Supreme Court *held,* affirmed. The writ was not necessary or appropriate in aid of the court's jurisdiction and it was not clear that appeal provided an inadequate remedy. Justices Frankfurter, Jackson, and Minton dissented on the ground that the respondent judge appeared to be so clearly correct that certiorari should not have been granted and therefore the case should have been dismissed without opinion. *Bankers Life and Casualty Co. v. Holland,* 346 U.S. 379, 74 S.Ct. 145 (1953).

The federal courts are empowered to issue writs of mandamus when necessary or appropriate in aid of their respective jurisdictions,[4] but will do so only when the remedy of appeal is clearly inadequate.[5] Judicial interpretation of the phrase "in aid of their respective jurisdictions" has been so inconsistent that the cases would seem to be irreconcilable.[6] It appears that when a petitioner convinces a federal court that review by appeal is extremely inadequate the writ will be granted and the requirement that it aid the court's jurisdiction will be found to be satisfied.[7] Although this requirement is often

[1] 15 U.S.C. (1946) §15: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent. . . ."

[2] 28 U.S.C. (Supp. V, 1952) §1406(a): "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."

[3] In re Bankers Life & Casualty Co., (5th Cir. 1952) 199 F. (2d) 593.

[4] 28 U.S.C. (Supp. V, 1952) §1651(a): "The Supreme Court and all courts established by Act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[5] Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558 (1947).

[6] 50 COL. L. REV. 537 (1950); 31 MICH. L. REV. 996 (1933); 33 COL. L. REV. 366 (1933); 34 COL. L. REV. 899 (1934); BLUME AND JOINER, CASES ON JURISDICTION AND JUDGMENTS 201 (1952).

[7] In C-O-Two Fire Equipment Co. v. Barnes, (7th Cir. 1952) 194 F. (2d) 410, affd. 344 U.S. 861, 73 S.Ct. 102 (1952), a petition for mandamus was granted ordering a federal district court to exercise its discretion by either dismissing the case or transferring it to another district or division. The court said that the question of its power to issue mandamus need not be discussed because it was not contested by the respondent. A writ of mandamus was issued in Paramount Pictures v. Rodney, (3d Cir. 1951) 186 F. (2d) 111, cert. den. 340 U.S. 953, 71 S.Ct. 572 (1951), ordering the federal district court in Delaware to transfer certain actions to a district court in Texas. Wiren v. Laws, (D.C. Cir. 1951) 194 F. (2d) 873, indicated that the court had power to issue a writ to prevent a

relied on to deny a petition for an extraordinary writ,[8] the central issue before a court when considering a petition for mandamus is thus apparently the adequacy of review by appeal. Where appellate review is totally unavailable it is clearly an inadequate remedy.[9] The difficult cases are those in which the ruling alleged to be erroneous causes practical problems and inconvenience in trying a particular cause or in which the challenged ruling will not be corrected by appeal because of practical considerations. The separate trial of complex antitrust issues caused by the order of severance and transfer in the principal case would seem to be a sufficient inconvenience to both the courts and the petitioner to provide grounds for interlocutory review by extraordinary writ. In addition, if the petitioner wins on the merits he probably will be unable to collect his additional costs,[10] and if he loses on the merits it will be extremely difficult to show that the order of severance and transfer was a reversible error.[11] Thus the petition for mandamus was dismissed in the present case despite the fact the appellate process appears to be a most inadequate method of review. In *Magnetic Engineering Co. v. Dings Co.*[12] it was stated that mandamus might have been available if the order being challenged were clearly erroneous even though it would eventually be reviewable by appeal.[13] The dissent in the *Magnetic Engineering* case pointed to this language as an indication that the decision denying the writ might have been otherwise if the impropriety of the order in question were "sufficiently glaring."[14] In the principal case the petitioner's conspiracy theory of agency for venue purposes was described by the majority opinion as having "all the earmarks of a frivolous albeit ingenious attempt to expand the statute."[15] The dissent hinges its argument that certiorari was improper on the apparent soundness of the ruling by the respondent judge. Thus it would seem that mandamus may still be available as a means of reviewing an order of severance and transfer pursuant to 28 U.S.C. §1406(a) in a situation where review by appeal is clearly inadequate and the order is based on a plainly erroneous ruling that venue is improper.

Judson M. Werbelow, S.Ed.

transfer of venue because of forum non conveniens but held that the particular circumstances did not warrant issuance of the writ. In Ford Motor Co. v. Ryan, (2d Cir. 1950) 182 F. (2d) 329, it was held that mandamus would lie to review an interlocutory order of the Federal District Court for the Southern District of New York refusing to transfer the cause to the Federal District Court for the Eastern District of Michigan. However, the writ was refused on the ground that the petitioner had not made out a strong enough case for transfer. Cf. Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944 (1949).

[8] Gulf Research and Development Co. v. Leahy, (3d Cir. 1951) 193 F. (2d) 302, affd. 344 U.S. 861, 73 S.Ct. 102 (1952); Magnetic Engineering Co. v. Dings Co., (2d Cir. 1950) 178 F. (2d) 866; Roche v. Evaporated Milk Assn., 319 U.S. 21, 63 S.Ct. 938 (1943).

[9] Gulf Research and Development Co. v. Harrison, (9th Cir. 1950) 185 F. (2d) 457.

[10] Ford Motor Co. v. Ryan, note 7 supra.

[11] Magnetic Engineering Co. v. Dings Co., note 8 supra.

[12] Ibid.

[13] Id. at 870.

[14] Id. at 871.

[15] Principal case at 384.