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FEDERAL PROCEDURE—MANDAMUS—USE TO PREVENT CHANGE OF VENUE—Petitioners instituted a suit in the District Court for the Southern District of California seeking damages for alleged patent infringement. That court ordered the case transferred to the District Court for the District of Delaware on the ground that venue was not properly laid in the Southern District of California. Then petition was made to the Court of Appeals for the Ninth Circuit for mandamus to compel the judge of the lower court to withdraw the order of transfer. *Held*: petition denied. Mandamus will issue to prevent a transfer of a case to the district court of another circuit only in extraordinary circumstances to prevent a grave miscarriage of justice. Petitioners had shown no peculiar hardship that would result from the transfer, and the error, if any, in the order of transfer would be reviewable on appeal to the Court of Appeals for the Third Circuit after final judgment had been entered. *Gulf Research & Development Co. v. Harrison,* (9th Cir. 1950) 185 F. (2d) 457.

The power of the federal courts to issue the extraordinary writs is given by statute, reading: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[1] The authority of the Supreme Court and the courts of appeals to issue mandamus extends beyond cases over which the courts have obtained jurisdiction to cases which are presently within their appellate jurisdiction, and mandamus may prevent the action of the court below from defeating such appellate jurisdiction.[2] Thus, this provision would seem to authorize a court of appeals to issue mandamus to a district court compelling the judge to withdraw an order transferring a case

[1] 28 U.S.C. (Supp. IV, 1951) §1651(a).

[2] McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501 (1910); Ex parte United States, 287 U.S. 241, 53 S.Ct. 129 (1932); Roche v. Evaporated Milk Assn., 319 U.S. 21, 63 S.Ct. 938 (1943).

to the district court of another circuit. However, when used by federal courts to control the actions of courts and judges, the nature of the writ of mandamus is said to confine its use to (1) ordering the performance of ministerial acts and (2) ordering the exercise of discretion when discretion is given to the official to act in one manner or another.[3] Although it is often stated that the writ will not issue to compel the official to perform a discretionary act in a specified manner,[4] it will issue to prevent an abuse of discretion if there is no adequate remedy by appeal or otherwise.[5] As it will not issue to review an erroneous assumption of jurisdiction, on the ground that the remedy by appeal is adequate,[6] it certainly will not issue to review an erroneous assumption of venue. However, since mandamus may issue to compel a court to take jurisdiction of a case and proceed with it if there is no other adequate remedy,[7] it would seem also to issue to compel a court to hear a case which had been dismissed on the grounds of improper venue. But where the objection is to an erroneous transfer to a district court of another circuit, it has been held that the remedy by appeal is adequate.[8] In the principal case it was stated that mandamus would issue in such a case if the petitioner could clearly show extraordinary circumstances warranting such review. The court here indicated that excessive costs and difficulty in producing witnesses and evidence are to be considered in determining whether or not such extraordinary circumstances are present.[9] Thus the court seems to be willing to permit mandamus in a case of unusual hardship, and the considerations determining whether or not mandamus will issue will be similar in kind, if not in degree, to those which the trial judge must weigh in determining whether a change of venue ought to be made under the United States Code.[10] The decision in the

[3] 35 AM. JUR., Mandamus §§249-261; Ex parte Metropolitan Water Co. of West Virginia, 220 U.S. 539, 31 S.Ct. 600 (1911); Ex parte United States, 242 U.S. 27, 37 S.Ct. 72 (1916).

[4] In re Pollitz, 206 U.S. 323, 27 S.Ct. 729 (1907); Ex parte Harding, 219 U.S. 363, 31 S.Ct. 324 (1911).

[5] Ex parte Bradley, 7 Wall. (74 U.S.) 364 (1868); Virginia v. Rives, 100 U.S. 313 (1879).

[6] Ex parte Davis, 262 U.S. 274, 43 S.Ct. 574 (1923).

[7] Ex parte Harley-Davidson Motor Co., 259 U.S. 414, 42 S.Ct. 527 (1922); McClellan v. Carland, supra note 2.

[8] Judge Learned Hand in Magnetic Engineering Co. v. Dings Manufacturing Co., (2d Cir. 1950) 178 F. (2d) 866, said that the proper time and place to determine the propriety of the transfer was upon appeal from the final judgment in the circuit to which the case was transferred.

[9] Principal case at 459-460.

[10] 28 U.S.C. (Supp. IV, 1951) §1404(a), 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." As it has been held by Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944 (1949), that the above rule is essentially a codification of the doctrine of forum non conveniens, the following statement by the Supreme Court as to the application of forum non conveniens should show the similarity to the approach of the principal case. "Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other

principal case may be viewed as one more step taken in the direction of allowing mandamus as a substitute for interlocutory appeal, though this court and other federal courts clearly state that it may not be so used.[11] It may well be argued that the exceptions to the final judgment rule[12] specified in the Judicial Code[13] cannot sufficiently mitigate the harshness of the rule and that the use of mandamus in the extreme case should be welcomed. But if the federal courts are so using mandamus as a substitute for interlocutory appeal, it is plain that as yet they are not prepared to admit it.

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practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained." Gulf Oil Corp. v. Gilbert, 330 U.S. 501 at 508, 67 S.Ct. 839 (1947).

[11] Principal case at 459; Roche v. Evaporated Milk Assn., supra note 2; Ex parte Harding, supra note 4. Many of the states are using mandamus for such a purpose. See 50 COL. L. REV. 1102 (1950), suggesting the possibilities of the use of mandamus in lieu of the final judgment rule.

[12] This rule provides that an appeal may be taken only from a "final" judgment of the lower court.

[13] 28 U.S.C. (Supp. III, 1950) §1292, providing for appeals from the federal district courts to the federal courts of appeals in cases of interlocutory orders granting, continuing, modifying, dissolving, refusing to modify or dissolve injunctions; appointing receivers; refusing to wind up receiverships; determining rights and liabilities in certain admiralty cases; certain patent infringement cases.