UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 28 | Number 1 Article 15

12-1-1949

Courts -- Venue -- Inconvenient Forum Considerations and Special Venue Provisions Under the New Judicial Code

John M. Simms

of stock with a view to imposing all the legal consequences generally associated with the particular label given the security. This approach may cause a decision to rest on considerations not necessarily relevant to the question before the court. *E.g.*, in the principal case the factors of intention and circumstances surrounding the issuance of the certificates do not seem to be necessarily relevant in determining whether or not the periodic payments are a definite and fixed obligation on the part of the corporation regardless of earnings.

It would appear to be a sounder approach to limit the inquiry to the characteristics of the security material to the particular question before the court and cause the judgment to depend not on the entire complex of attributes but on those aspects determined to be pertinent to the particular issue under consideration.

Under this analysis the court, in cases involving the taxability of periodic payments made by a corporation to its security holders and guaranteed by a third party, could narrow the issue to: Are these payments a definite obligation of the corporation regardless of earnings? The guaranty by the third party should be disregarded in that the corporation and the third party are taxed individually and only the tax liability of the corporation is involved.

RODDEY M. LIGON, JR.

Courts—Venue—Inconvenient Forum Considerations and Special Venue Provisions Under the New Judicial Code*

The new Judicial Code,[1] effective September 1, 1948, gave the federal courts in §1404(a)[2] the power to transfer a civil action to any other district or division where it might have been brought if necessary for the convenience of witnesses and in the interest of justice. Prior to this revised code, there was no provision in the federal statutes for the transfer of venue from one district to another district; but where more than one venue was available to a plaintiff, the federal courts could exercise the equitable right to dismiss a case without prejudice and thus force the plaintiff to sue over again somewhere else.[3] Both before and after final approval of §1404(a), there was speculation by writers as to the effect of this new power on actions arising under special venue

* For some interesting discussions of other problems presented by §1404(a), see Mangan, *Federal Legislation*, 37 GEO. L. J. 394, 400 (1949); Marcus, *The Supreme Court and the Antitrust Laws*, 37 GEO. L. J. 341, 356 (1949); Notes, 60 HARV. L. REV. 424 (1947), 23 IND. L. J. 82 (1947); and materials listed in footnote 4 *infra*.

[1] Title 28 U. S. C. C. S.

[2] "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."

[3] Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947); Koster v. Lumbermen's Mutual Casualty Co., 330 U. S. 518 (1947); Rogers v. Guaranty Trust Co., 288 U. S. 123, 130-131 (1932).

provisions[4] where the rule enunciated had been that special venue statutes created an absolute right not subject to interference either by injunction or in any other manner except legislation.[5]

Taking advantage of the new provisions of §1404(a) the federal district courts, presented with motions subsequent to September 1, 1948, to transfer the causes in several Federal Employer's Liability Act cases and an antitrust action, almost without exception[6] held that §1404(a) applied to the special venue provisions of the FELA and the antitrust law.[7]

In the early summer of 1949, the United States Supreme Court construed §1404(a) in three cases, two involving FELA actions[8] and one involving an antitrust action.[9] In all three the result was an express declaration by the majority of the court[10] that the phrase "any civil action" as used in §1404(a) is not limited as embracing only those actions for which venue requirements are prescribed in 28 U. S. C. §§1391-1406, but means just what it says—*any civil action.*

In arriving at this conclusion, the court said that "the reach of 'any civil action' is unmistakable. The phrase is used without qualification,

[4] Barnard and Zlinkoff, *Patents, Procedure and the Sherman Act—The Supreme Court and a Competitive Economy, 1947 Term,* 17 GEO. WASH. L. REV. 1, 10-18 (1949) (thought §1404(a) should not apply to antitrust suits in absence of clearer and more specific evidence of congressional intent to accomplish such a result); Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908 (1947) (if enacted and sympathetically interpreted, §1404(a) should go far to relieve the federal judiciary of self-imposed obstacles to the efficient administration of the law governing place of trial); Note, 28 N. C. L. REV. 248 (1949) (hope expressed that §1404(a) would be held applicable in cases arising under general and special venue provisions); Comment, 44 ILL. L. REV. 75 (1949) (feels that §1404(a) should apply to FELA suits); Comment, 56 YALE L. J. 1234, 1249 n. 115 (1947) (thought §1404(a), if enacted, would be a legislative overruling of the court's interpretation of special venue provisions of the FELA); Note, 56 YALE L. J. 482 (1949) (thinks §1404(a) should apply to antitrust suits); 62 HARV. L. REV. 707 (1949) (§1404(a) should apply to antitrust suits); 47 MICH. L. REV. 438 (1949) (application of §1404(a) to FELA suits is proper); 33 MINN. L. REV. 536 (1949) (§1404(a) should apply to FELA special venue provisions).

[5] United States v. National City Lines, 334 U. S. 573 (1948); Baltimore & Ohio R. R. v. Kepner, 314 U. S. 44 (1941).

[6] Pascarella v. New York Cent. R. R., 81 F. Supp. 95 (E. D. N. Y. 1948) (held that §1404(a) was applicable only to actions brought under §§1391-1406 of Title 28 and not to actions under special venue statutes).

[7] United States v. E. I. Du Pont De Nemours & Co., 83 F. Supp. 233 (D. D. C. 1949) (antitrust suit); Brainard v. Atchison T. & S. F. Ry., 81 F. Supp. 211 (N. D. Ill. 1948) (court accepted application of §1404(a) to a FELA suit, but exercised its discretion to decide that the case should not be delayed by transfer to another forum); Scott v. New York Cent. R. R., 81 F. Supp. 815 (N. D. Ill. 1948) (FELA suit); Nunn v. Chicago, M., St. P. & P. Ry., 80 F. Supp. 745 (S. D. N. Y. 1948) (FELA suit); United States v. National City Lines, 80 F. Supp. 734 (S. D. Cal. 1948) (antitrust suit); White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948) (FELA suit); Hayes v. Chicago, R. I. & P. Ry., 79 F. Supp. 821 (D. Minn. 1948) (FELA suit).

[8] *Ex parte* Collett, 69 Sup. Ct. 944 (1949); Kilpatrick v. Texas & P. Ry., 69 Sup. Ct. 953 (1949).

[9] United States v. National City Lines, 69 Sup. Ct. 955 (1949).

[10] 7 to 2 decisions, Justices Black and Douglas dissenting in all three cases.

without hint that some should be excluded."[11] The majority also used the legislative history of §1404(a) and the Reviser's Notes to show that FELA actions were within the scope of the new power.[12] As to why there was no reference in the Reviser's Notes to the court's decision that the antitrust law special venue provisions created an absolute right, the court pointed out that the Reviser's Notes were printed in 1947 and the first ruling by the court on the absolute right of the antitrust venue provisions was handed down on June 7, 1948.[13] Further, it was held that §1404(a) did not repeal the special venue provisions of the FELA[14] as those provisions defined the proper forum and §1404(a) deals with the right to transfer an action properly brought.[15] Said the court, "An action may still be brought in any court, state or federal, in which it might have been brought previously."[16]

The dissenting justices felt that to follow the holding of the majority would work too drastic a change in too many statutes to be the product of a mere revision of the code. *E.g.*, the special venue provisions of the Sherman Act, FELA, Suits in Admiralty Act, Jones Act, Merchant Marine Act of 1936, Securities Act, Securities Exchange Act, Public Utility Holding Company Act, Investment Company Act, and perhaps other statutes too. Therefore, the dissent would make §1404(a) applicable only to any civil action as to which venue provisions are codified in revised Title 28.[17]

Three cases dealing with only two special venue situations may not be grounds for a final answer to the problem, but from the rationale of these decisions it would seem that the new transfer provisions would apply to all special venue statutes. Thus, while an action can still be brought as it might have been brought previously, the power given in §1404(a) may be used to transfer the action to another district or division whether the venue is prescribed by general or special venue provisions.

JOHN M. SIMMS.

[11] *Ex parte* Collett, 69 Sup. Ct. 944, 946 (1949).

[12] *Id.* at 947-952. In the Reviser's Notes to §1404(a), the *Kepner* case, *supra* note 5, was cited as an example of the need for such a provision.

[13] United States v. National City Lines, 334 U. S. 573 (1948).
The concurring opinion of the late Justice Rutledge, 69 Sup. Ct. 959 (1949), expressed his doubts as to congressional knowledge of the effect of §1404(a) on antitrust suits, but notwithstanding his doubts that Congress intended to go so far as the majority held, he acquiesced in the court's decision.

[14] 36 STAT. 291 §6 (1910), 45 U. S. C. §56 (1946).

[15] "Section 1404(a) does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district." *Ex parte* Collett, 69 Sup. Ct. 944, 947 (1949).

[16] *Ex parte* Collett, 69 Sup. Ct. 944, 947 (1949).

[17] United States v. National City Lines, 69 Sup. Ct. 955, 958 (1949) (dissenting opinion).