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VENUE-INTERPRETATION OF TITLE 28, UNITED STATES CODE, SECTION 1406(a)

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VENUE—INTERPRETATION OF TITLE 28, UNITED STATES CODE, SECTION 1406(a)—A tort action for injuries sustained in Wyoming was commenced in an Illinois state court and removed to the proper United States District Court in Illinois. Defendant interposed the Illinois statute of limitations as a defense. In order to take advantage of the longer Wyoming statute of limitations, plaintiff moved to transfer the suit to the United States District Court for Wyoming under authority of Title 28, United States Code, section 1406(a), providing for the transfer of actions from district courts where venue was improperly laid.¹ The motion to transfer was denied and the complaint was dismissed. *Held*, section

¹ Title 28, United States Code, §1406 (1948): "(a) The District court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought. (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

1406(a) does not authorize transfer of a suit from a district wherein venue was properly laid. Dismissal affirmed. *Riley v. Union Pac. R. Co.*, (7th Cir. 1949) 177 F. (2d) 673.²

Prior to the enactment into law of revised and codified Title 28, United States Code, an action commenced in a district court of the United States where venue was improperly laid could be dismissed only upon a seasonable motion by defendant.³ Dismissal often worked a hardship upon the plaintiff, who was forced to commence his suit anew in the proper district or division. If the statute of limitations had run on his cause of action or if it had become impossible to serve process again upon the defendant, the dismissal ended plaintiff's opportunity for recovery. In order to relieve this hardship, the revisers embodied a new section in Title 28 requiring that the district court in which venue is improperly laid "shall transfer" the cause to any district or division in which the action could have been brought.⁴ The mandatory language of section 1406(a) seemed greatly to increase the opportunities for plaintiffs to secure adjudication of their causes of action in federal tribunals. Prior to the enactment of the section, a plaintiff was often prevented from bringing suit in a district court with proper venue by his inability to serve process on the defendant within the territorial limits of the state where the court sits.⁵ Section 1406(a) was broad enough to allow the suit to be commenced in a federal court in any state where personal jurisdiction could be acquired and the court would be required to transfer the cause to a district or division where venue was proper.⁶ It was considered necessary to amend the section to prevent plaintiffs from using the transfer provision in this manner.⁷ Less than a year after Title 28 became effective, section 1406(a) was amended to allow district courts where venue was improperly laid to ". . . 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."⁸ The amendment places the fate of a lawsuit commenced in the wrong district within the discretion of the court. It seems inevitable that the choice between dismissal and transfer will depend on a showing by plaintiff that there was a good faith commencement in the wrong district and that hardship or injustice will result from dismissal.⁹ In the present case, it is obvious that section 1406(a) cannot be used as a basis for transfer. The cause was one removed to a federal court and the

² Certiorari was denied by the Supreme Court, 338 U.S. 911, 70 S.Ct. 350 (1950). After dismissal, plaintiff brought his suit anew in the United States District Court for Wyoming, but the action was dismissed as barred by the Wyoming statute of limitations. *Riley v. Union Pac. R. Co.*, (D.C. Wyo. 1950) 88 F. Supp. 391. Dismissal affirmed, *Riley v. Union Pac. R. Co.*, (10th Cir. 1950) 182 F. (2d) 765.

³ *Camp v. Gress*, 250 U.S. 308, 39 S.Ct. 478 (1919).

⁴ Sec. 1406(a), note 1 supra.

⁵ Rules of Civil Procedure for the District Courts of the United States, Rule 4(f).

⁶ S. Rep. 303, 81st Cong., 1st sess., p. 6 (1949); Savage, "The New Federal Judicial Code," 26 *DIGTA* 209 (1949).

⁷ S. Rep. 303, 81st Cong., 1st sess., p. 6 (1949).

⁸ 28 U.S.C. (1950) §1406(a).

⁹ MOORE, COMMENTARY ON UNITED STATES JUDICIAL CODE 196-7 (1949).

general venue requirements for commencement of suits are not applicable.¹⁰ Venue for removed causes is proper in one court only: the district court of the United States for the district and division wherein the action is pending.¹¹ In foregoing his right to commence his suit in a federal court, the plaintiff subjected himself to defendant's right to secure a removal. When the defendant exercised this right by removing the cause to the district court for the district in which the action was pending, the venue requirements were met and plaintiff could raise no valid objection.¹² In refusing the transfer, the court reaches the only possible conclusion by holding that section 1406(a) cannot be the basis of a transfer when venue is properly laid. The language of the section negatives any other interpretation. Although the opinion deals with the section as originally enacted, the holding is equally applicable to the section as amended.

Nolan W. Carson

¹⁰ *General Investment Co. v. Lake Shore & Mich. Southern Ry. Co.*, 260 U.S. 61, 43 S.Ct. 106 (1922); *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 43 S.Ct. 230 (1923); *Moss v. Atlantic Coast Line R. Co.*, (2d Cir. 1946) 157 F. (2d) 1005.

¹¹ 28 U.S.C. (1948) §1441(a).

¹² Note 10 *supra*.