FEDERAL CIVIL PROCEDURE: SUPREME COURT AUTHORIZES TRANSFER BY A COURT LACKING PERSONAL JURISDICTION

SECTION 1406(a) of the Judicial Code[1] permits a federal district court to cure a defect in venue by transferring an action to a forum where proper venue exists. The decisions of lower federal courts have conflicted concerning the validity of a transfer under section 1406(a) when the transferring court not only has a venue defect but also lacks jurisdiction over the defendants.[2] In *Goldlawr, Inc. v. Heiman*,[3] the Supreme Court resolved his conflict by holding that a district court which failed to meet venue requirements and lacked personal jurisdiction over the defendants could nevertheless transfer the action to a district court in which both could be satisfied.

Plaintiff brought a private antitrust action for treble damages and injunctive relief in a Pennsylvania district court under Section 4 of the Clayton Act[4] for alleged violations of Sections 1 and 2 of the Sherman Act.[5] Defendants moved to dismiss the suit on the grounds of improper venue and lack of personal jurisdiction. The court found venue to be improperly laid as to two of the corporate defendants,[6] but declined to dismiss. Instead it transferred the action to an appropriate New York forum by authority of section 1406(a).[7]

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[1] 28 U.S.C. § 1406(a) (1958).

[2] For federal courts allowing transfer under § 1406(a) absent personal jurisdiction, see, *e.g.*, Hayes v. Livermont, 279 F.2d 818 (D.C. Cir. 1960); Amerio Contact Plate Freezers, Inc. v. Knowles, 274 F.2d 590, 591 (D.C. Cir. 1960); Orion Shipping & Trading Co. v. United States, 247 F.2d 755 (9th Cir. 1957); Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 516 (4th Cir. 1955); Orzulak v. Federal Commerce & Nav. Co., 168 F. Supp. 15 (E.D. Pa. 1958); United States v. Welch, 151 F. Supp. 899 (S.D.N.Y. 1957); Lumbermens Mut. Cas. Co. v. Mohr, 87 F. Supp. 727 (S.D. Tex. 1949); *cf.* Schiller v. Mit-Clip Co., 180 F.2d 654 (2d Cir. 1950), which has been cited as authority for allowing transfer without personal jurisdiction, but which actually does not reach the point. For courts not allowing transfer, see *e.g.*, Atlantic Ship Rigging Co. v. McLellan, 288 F.2d 589 (3d Cir. 1961); Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961); Hohensee v. News Syndicate, Inc., 286 F.2d 527 (3d Cir. 1961); Goldlawr, Inc. v. Shubert, 175 F. Supp. 793 (S.D.N.Y. 1959); Independent Prods. Corp. v. Loew's, Inc., 148 F. Supp. 460 (S.D.N.Y 1957).

[3] 369 U.S. 463 (1962).

[4] 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

[5] 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. §§ 1-2 (1958).

[6] The alternative prerequisites for venue under § 12 of the Clayton Act are that defendant inhabit, be found, or transact business in the state in which the action is brought. 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958).

[7] Goldlawr, Inc. v. Shubert, 169 F. Supp. 677, 680 (E.D. Pa. 1958).

Upon transfer, defendants renewed their motion to dismiss on the ground that the Pennsylvania district court lacked personal jurisdiction and thus had no power to invoke section 1406 (a). The New York district court granted defendants' motion[8] and the Court of Appeals for the Second Circuit affirmed.[9] The Supreme Court reversed the dismissal, holding that the language of section 1406 (a) is broad enough to allow transfer regardless of whether the transferring court had personal jurisdiction.

In the majority opinion, Mr. Justice Black stated that section 1406 (a) was enacted to rectify the injustice resulting from dismissal of an action brought by a plaintiff who in good faith had chosen a district in which venue was improper. The statute of limitations had run on a number of the alleged violations in the present case, the Court noted, and dismissal would result in plaintiff's losing a substantial part of its claim merely because it had mistakenly believed the defendant corporations could be found in Pennsylvania.[10] In such a situation, the majority continued, an interpretation allowing courts lacking personal jurisdiction to toll a statute by transferring the action is in keeping with the modern procedural trend away from justice-defeating technicalities.

Prior to 1948, an action commenced in a federal district court where venue was improperly laid was dismissed upon seasonable motion by defendant.[11] The resulting hardship to the plaintiff led Congress to enact in that year a statute reversing the common law practice and making mandatory transfer of the action to an appropriate forum.[12] Subsequent to the 1949 amendment resulting in a compromise between these two positions, transfer has been author-

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

[9] Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961).

[10] Defendants were subsidiary corporations which provided a central bookkeeping and service department for a parent corporation operating in Pennsylvania through other wholly owned subsidiaries. The Pennsylvania district court decided that the business transacted in Pennsylvania was insufficient to warrant holding that the defendants were doing business there for venue purposes. See Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (E.D. Pa. 1958).

[11] See, *e.g.*, Camp v. Gress, 250 U.S. 308 (1919), where the Court voided a judgment and dismissed a suit against a defendant who properly objected to the venue. It was held that when one or more of several defendants are not found in the district, they cannot be compelled to submit to the jurisdiction of the court. See also Schoen v. Mountain Producers Corp., 170 F.2d 707, 713 (3d Cir. 1948) (complaint dismissed upon seasonable motion).

[12] 28 U.S.C. § 1406 (a) (1948), provided that "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." (Emphasis added.)

ized only in the interest of justice. In all other cases, the action must be dismissed.[13]

When the question has arisen as to whether section 1406 (a) can be invoked in the absence of personal jurisdiction, one line of federal authority has permitted transfer, while another has refused to do so.[14] The specific wording of section 1406 (a), the general canons of statutory interpretation, and the legislative history of the statute, have all been relied upon by advocates of both positions.

Since section 1406 (a) speaks only of defective venue and does not mention jurisdiction, it has been argued that there can be no transfer under that section if there is a defect of personal jurisdiction.[15] This argument cuts both ways, for nothing in the language of section 1406 (a) indicates that it was intended to be operative *only* when the transferring court has personal jurisdiction.[16] Equally inconclusive are the canons of statutory interpretation which require that a remedial statute be broadly construed[17] and that a revolutionary statute be narrowly construed.[18] Section 1406 (a) is both remedial and revolutionary. The only congressional text touching on the statute[19] is a Senate report explaining the purpose of the 1949 amendment.[20] Though this report does not address itself to a situation where no service can be obtained by the transferring court, it was interpreted by the court of appeals in the instant case as showing an implicit congressional intent to make section 1406 (a)

[13] 28 U.S.C. § 1406 (a) (1958).

[14] See cases cited note 2 *supra*.

[15] See, *e.g.*, Hohensee v. News Syndicate, Inc., 286 F.2d 527, 530 (3d Cir. 1961). In this case it was also argued that if a defendant is improperly served and fails to appear specially to contest jurisdiction and venue, a court has no means of ascertaining the interests of justice and therefore cannot transfer. This argument is irrelevant, for venue must be challenged by a litigant before § 1406 (a) will be invoked. If defendant does not appear, a default judgment will be rendered against him.

[16] This observation was made by the dissent in the instant case in the court below. See Goldlawr, Inc. v. Heiman, 288 F.2d 579, 589 (2d Cir. 1961).

[17] See, *e.g.*, Lambur v. Yates, 148 F.2d 137, 139 (8th Cir. 1945). See generally, BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS § 113 (2d ed. 1911); 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 573-75 (2d ed. 1904).

[18] See, *e.g.*, Hoffman v. Blaski, 363 U.S. 335 (1960); Goldlawr, Inc. v. Heiman, 288 F.2d 579, 582 (2d Cir. 1961).

[19] 94 CONG. REC. 8498-501 (1948); Comment, 1962 WIS. L. REV. 342.

[20] S. REP. No. 303, 81st Cong., 1st Sess. 6 (1949), stated:

> It is thought that this provision may be subject to abuse in that a plaintiff might deliberately bring a suit in a wrong division or district where he could get service on the defendant, and when the question of venue is raised the court is required to transfer the case to the court where it 'could have been brought.' However, in the meantime, service has been perfected on a defendant in the wrong venue, and it will carry over into the new (and proper) venue.

operative only after valid service of process is obtained.[21] The dissent, on the other hand, stated that a careful reading of the legislative history suggests no such restriction.[22]

The Supreme Court paid little attention to the technical considerations which plagued the lower courts. Indeed, the brief majority opinion in *Goldlawr* is based almost exclusively on policy grounds and adherence to the liberal trend in federal procedural matters. As a result, this decision implicitly raises two diverse problems. The first involves the effect of this holding on actions controlled by state statutes of limitation; the second, whether to apply this holding to actions arising under section 1404 (a),[23] the other transfer statute.

Filing a complaint will toll the statute of limitations applicable to actions in a federal court under federal statutes.[24] Many states, however, specify that valid service of process is necessary to toll statutes of limitation applicable to state created rights.[25] The Court in *Goldlawr* did not differentiate between the two situations, stating that filing a complaint indicates a plaintiff's desire to toll *whatever* statutes of limitation apply.[26] The wisdom of this broad generalization is questionable, for to apply *Goldlawr* to situations involving state statutes of limitation would entail a reversal of the recognized rule[27] that a district court, in a diversity action, must apply both the state statute of limitations and the state rule governing the manner in which it is tolled. Such an application would also be in disharmony with the present extension of the *Erie* doctrine permitting federal procedural law to be applied only when it does not override a significant state policy.[28]

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[21] Goldlawr, Inc. v. Heiman, 288 F.2d 579, 583 (2d Cir. 1961).

[22] *Id.* at 589.

[23] 28 U.S.C. § 1404 (a) (1948).

[24] See, *e.g.*, Bomar v. Keyes, 162 F.2d 136, 140 (2d Cir. 1947), where the court stated that rules 3 and 4 of the Federal Rules of Civil Procedure have "with some modification adopted the practice which was apparently general in equity: i.e., that the filing of the complaint . . . will toll the statute."

[25] See, *e.g.*, Ragan v. Merchants' Transfer & Warehouse Co., 337 U.S. 530 (1949).

[26] 369 U.S. at 467.

[27] See, *e.g.*, the leading case of Ragan v. Merchants' Transfer & Warehouse Co., 337 U.S. 530 (1949).

[28] For a discussion concerning present day extension of the basic holding in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), see Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 548 (1949). The Court there stated that *Erie* and its progeny have wrought a far reaching effect whereby in diversity cases the federal court administers the state system of laws in all except details. See also Ragan v. Merchants' Transfer & Warehouse Co., 337 U.S. 530 (1949), where the court held that since a cause of action in a diversity suit is created by local law, it is subject to the same burdens and defenses in the federal court as in a state court, and consequently,

The second problem raised by the opinion involves section 1404 (a),[29] the legislative sibling of section 1406 (a). Under section 1404 (a), an action may be transferred by a court which has proper venue if such transfer is demanded for the convenience of parties and witnesses and is in the interest of justice. Federal courts have overwhelmingly disallowed transfer under section 1404 (a) when personal jurisdiction was lacking in the transferring court.[30] In his dissenting opinion in *Goldlawr*,[31] Mr. Justice Harlan argued that it was incongruous to allow transfer under section 1406 (a) by a court having neither venue nor personal jurisdiction but not to allow it by a court having venue but lacking personal jurisdiction.[32] It seems that *Goldlawr* allows, if not demands, an interpretation of section 1404 (a) which would authorize a court having venue but lacking personal jurisdiction to transfer an action. Though section 1406 (a) remedies defects in venue, and section 1404 (a) authorizes transfer where venue is proper but a different forum is more desirable, there are strong indications that they are not to be distinguished.[33] There is no logical reason for requiring personal jurisdiction under one but not the other.[34]

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a cause of action cannot be given a "longer life in the federal court than it would have had in the state court without adding something to the cause of action." *Id.* at 533-34.

[29] 28 U.S.C. § 1404 (a) (1948), provides that "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." (Emphasis added.)

[30] The lone case allowing transfer without personal jurisdiction under § 1404 (a) was Petroleum Financial Corp. v. Stone, 116 F. Supp. 426 (S.D.N.Y. 1953). For cases holding contra see Hargrove v. Louisville & Nashville R.R., 153 F. Supp. 681 (W.D. Ky. 1957); Cogburn v. MacFadden Publications, Inc., 129 F. Supp. 535 (E.D.S.C. 1955); Brock v. Jenkins, 120 F. Supp. 879 (M.D. Ga. 1954); Burns v. Chubb, 99 F. Supp. 581 (E.D. Pa. 1951); Scarmardo v. Mooring, 89 F. Supp. 936 (S.D. Tex. 1950).

[31] 369 U.S. at 468.

[32] Mr. Justice Harlan did not mention § 1404 (a), though that section has been applied to situations where a court has venue but lacks personal jurisdiction. See cases cited in note 30 *supra*. The dissenter instead relied on cases decided prior to the enactment of either § 1406 (a) or § 1404 (a). See footnote, 369 U.S. at 468.

[33] See, *e.g.*, Goldlawr, Inc. v. Shubert, 175 F. Supp. 793, 797 (S.D.N.Y. 1959); Petroleum Financial Corp. v. Stone, 116 F. Supp. 426, 428 (S.D.N.Y. 1953). See generally, 1 MOORE, FEDERAL PRACTICE ¶ 0.146[5] at 1097 (2d ed. 1951). Courts have probably refused to allow transfer in such situations because § 1404 (a) is the codification of the forum non conveniens doctrine which demands personal jurisdiction as a prerequisite to transfer. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). However, § 1404 (a) differs from the common law doctrine and its words should be considered for what they say, not with preconceived limitations. See Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955). In this connection, see Bankruptcy Act § 32, ch. 10, 30 Stat. 554 (1898) (amended by 52 Stat. 857 (1938), as amended, 11 U.S.C. § 55 (1958)). Subsections (b) and (c) incorporate respectively the general substance of § 1406 (a) and § 1404 (a). See H.R. REP. No. 2320, 82d Cong. 2d Sess. (1952). These two sub-

The liberal *Goldlawr* transfer rule will aid plaintiffs who honestly but erroneously believe that they have chosen the proper forum. The holding, however, will not permit a plaintiff indiscriminately and in bad faith to institute suit in any forum and then move for a transfer when it is determined that venue and jurisdiction over defendant are lacking. Since transfer is permitted only in the interest of justice, it is clear that the plaintiff is required to act diligently and in good faith. Furthermore, the defendant must be neither harassed nor prejudiced, and the transferee court must not be unduly burdened.[35] Few plaintiffs will risk losing a meritorious claim merely to harass a defendant; furthermore, personal jurisdiction will have to be obtained by the court to which the action is transferred,[36] thus affording additional protection from harassment to the defendant. A transfer rather than a dismissal will prevent the time consuming process of reinstituting suit in another district, and the court dockets will be relieved, for plaintiffs will have less reason to commence simultaneous actions in a number of district forums.

Section 1406(a) is only one of the procedural rules necessary to bring together proper litigants in courts qualified to adjudicate their controversies. While some of these rules are clear, even skilled advocates cannot foresee what a court will decide in a close case in-

sections have been interpreted liberally and in the light of each other. See, *e.g.*, In the Matter of Eatherton, 271 F.2d 199 (8th Cir. 1959); In the Matter of Martinez, 241 F.2d 345 (10th Cir. 1957).

[34] Prior to Hoffman v. Blaski, 363 U.S. 335 (1960), the trend had been toward a liberal interpretation of § 1404(a). See 1961 DUKE L.J. 349, 352. Though the Court refused to allow a transfer in *Blaski*, the facts were readily distinguishable from the situation in *Goldlawr*. In *Blaski*, a defendant moved for a transfer from a district court where both venue and personal jurisdiction were *proper* to a district where venue was improper at the time of the commencement of the suit. Mr. Justice Harlan, the dissenter in the liberal opinion in *Goldlawr*, also joined in the dissent against strict interpretation in *Blaski*.

[35] The factual situation in *Goldlawr* illustrates these elements. Plaintiff instituted suit within the statutory period in a district in which it believed defendant could be found. Defendant New York corporations were not harassed by a suit instituted in the nearby Eastern District of Pennsylvania, nor did they even claim to be prejudiced. The court was not burdened unduly, for had no transfer been allowed, plaintiff might have commenced a new action in the New York district court for the part of the claim not barred by the statute of limitations.

[36] When a transfer is authorized under § 1406(a), a plaintiff may avoid subsequent dismissal only by making service upon defendant without further delay. See 5 MOORE, FEDERAL PRACTICE ¶ 41.11 at 1039 (2d ed. 1951). The issuance of process has no bearing on the determination of the time when a suit is commenced under a federal statute. U.N. Relief & Rehabilitation Administration v. The Mormacmail, 99 F. Supp. 552, 554 (S.D.N.Y. 1951).

volving venue or jurisdiction.[37] It is apparent that the Supreme Court in *Goldlawr*, by allowing transfer by a court lacking personal jurisdiction, has shown impatience with procedural technicalities which destroy the remedy of a diligent plaintiff. Although in the future the Court should limit the doctrine to cases arising under federal statutes of limitation, *Goldlawr* probably will have far reaching side effects in the revamping of judicial interpretation in similar cases arising under section 1404 (a).

[37] Difficulties frequently arise in determining where corporations can be found or transact business. See, *e.g.*, Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Kilpatrick v. Texas & P. Ry., 166 F.2d 788 (2d Cir. 1948).