CIVIL PROCEDURE: SUIT AGAINST NATIONAL BANK TO CANCEL MORTGAGE AND NOTE HELD TO BE LOCAL ACTION MAINTAINABLE OUTSIDE DISTRICT WHERE BANK IS ESTABLISHED

In *Chateau Lafayette Apartments, Inc. v. Meadow Brook National Bank*[1] the Court of Appeals for the Fifth Circuit held that a suit to cancel or reform a mortgage and mortgage note was a local action which fell within an exception to the national bank venue statute[2] and thereby allowed a national bank located in New York to be sued in a federal district court in Louisiana.[3] In 1965 Chateau Lafayette Apartments executed a note payable to bearer and secured by a real mortgage on its Louisiana apartment house. Meadow Brook National Bank, located in New York, became the bearer of the note, and in 1967 Chateau Lafayette filed suit in a Louisiana district court against the bank, alleging that the interest rate charged on the loan was usurious under federal law.[4] It requested that the court order a refund of all interest paid under the note and declare all future interest payments uncollectible. The bank's motion for dismissal on grounds of improper venue under 12 U.S.C. § 94 was granted. Since the action was transitory, section 94 allowed it only in the district where the bank was established. In an amended complaint, Chateau Lafayette prayed that the mortgage note and the mortgage itself "be cancelled and erased from the public records of Lafayette Parish,"[5] or, in the alternative, that the mortgage and note be reformed to delete any encumbrance on the immovable property. The bank renewed its motion to dismiss, but this time it was denied, the court holding that in requesting cancellation or reformation of the mortgage, the amended complaint stated a local action, making venue proper. This ruling was appealed,[6] and the Fifth Circuit affirmed, one judge dissenting.

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[1] 416 F.2d 301 (5th Cir. 1969).

[2] Venue of suits

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

12 U.S.C. § 94 (1964).

For discussion of the exception to section 94 created by Casey v. Adams, 102 U.S. 66 (1880), see notes 15-18 *infra* and accompanying text.

[3] See note 10 *infra* and accompanying text.

[4] The usury provisions of the National Bank Act are 12 U.S.C. §§ 85-86 (1964).

[5] 416 F.2d at 303.

[6] The Fifth Circuit permitted an interlocutory appeal under 28 U.S.C. § 1292(b) (1964).

The venue of actions involving national banks is governed by 12 U.S.C. § 94, rather than 28 U.S.C. § 1391(c),[7] the general federal venue statute for corporations. Section 94 applies to suits in state as well as federal courts, a curious result of the fact that national banks, though privately owned and managed, are federal "instrumentalities" in that they are federally chartered and under the supervision of the United States Comptroller of the Currency.[8] A national bank is a citizen of the state where it is established only for the purposes of federal court diversity jurisdiction,[9] and it is "established" and may be sued only in "the district in which [it] has its principal place of business and which contains the place recited in its charter . . . ."[10] This venue privilege is far narrower than that enjoyed by corporations generally, as national banks are free from the "doing business" tests and multijurisdictional liability to suit confronting corporations under section 1391(c).[11] The section 94 "venue sanctuary"[12] for national banks is apparently the result of an early congressional policy to protect them from the potentially disruptive effects which suits in distant forums could have on banking operations and currency stability.[13] One of the principal effects of section 94 has been to give national banks a competitive advantage over state banks, which have no such venue protection.[14] Despite the unequivocal language of the statutory provision, the Supreme Court held in *Casey v. Adams*[15] that it applied only to transitory actions. In *Casey* a mortgagee brought suit in a state court in one Louisiana parish against the receiver of a national

[7] "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U.S.C. § 1391(c) (1964).

[8] 12 U.S.C. §§ 21-24 (1964). *See generally* Wille, *State Banking: A Study in Dual Regulation*, 31 LAW & CONTEMP. PROB. 733, 735, 742 n.27 (1966).

[9] Ch. 290, § 4, 22 Stat. 163 (1882).

[10] Leonardi v. Chase Nat'l Bank, 81 F.2d 19, 22 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *accord*, Bauffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir.), *cert. denied*, 342 U.S. 944 (1951).

[11] *See* 1 J. MOORE, FEDERAL PRACTICE ¶ 0.142 [5.-3] (2d ed. 1964) [hereinafter cited as MOORE].

[12] *See generally* Note, *An Assault on the Venue Sanctuary of National Banks*, 34 GEO. WASH. L. REV. 765 (1966).

[13] The National Bank Act, so named in 12 U.S.C. § 38 (1964), was originally titled "An Act to Provide a National Currency . . . ." ch. 106, § 1, 13 Stat. 99 (1864).

[14] Wille, *supra* note 8, at 742.

[15] 102 U.S. 66 (1880).

banking association located in another parish to have erased from the public records a prior mortgage on land purchased at a sheriff's sale. Relief was granted in the state courts and the United States Supreme Court affirmed, stating that "[l]ocal actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated."[16] As its reason for fashioning this local action exception to the venue provision, the Court explained: "[W]e see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things."[17] A literal construction of the venue section would have, in effect, declared that a national bank could not be sued at all in a local action where the real property involved was not in the district where the bank was located. "Such a result could never have been contemplated by Congress."[18]

Neither the federal courts nor Congress have ever arrived at a clear definition of the terms "local" and "transitory."[19] The venue provision of the Judiciary Act of 1789[20] did not recognize any separate venue for local actions, but a distinction between local and transitory actions was judicially drawn at an early date.[21] Although the current general venue statute[22] fails to distinguish clearly between the two types of actions, the statute has nonetheless been held to apply only to transitory actions.[23] A few specific federal venue provisions do distinguish between the two types of actions[24] and actions for the forfeiture of property,[25] partition of real estate where the United States is a cotenant,[26] and condemnation of property for use by the United States[27] must be brought in the federal judicial district where the land is located. Although there is some contrary

[16] *Id.* at 68.

[17] *Id.* at 67.

[18] *Id.* at 68.

[19] *See* MOORE ¶ 0.142 [2.-1]; Note, *Local Actions in the Federal Courts*, 70 HARV. L. REV. 708 (1957).

[20] Ch. 20, § 11, 1 Stat. 73 (1789).

[21] Livingston v. Jefferson, 15 F. Cas. 660 (No. 8411) (C.C.D. Va. 1811).

[22] 28 U.S.C. § 1391 (1964).

[23] Pellerin Laundry Mach. Sales Co. v. Hogue, 219 F. Supp. 629, 637 (D. Ark. 1963); *see* Smith v. Landis, 211 F.2d 166, 167 (5th Cir. 1954). *See generally* MOORE 0.142 [5.-3].

[24] 28 U.S.C. §§ 1392, 1393, 1655 (1964).

[25] 28 U.S.C. § 1395 (1964).

[26] 28 U.S.C. § 1399 (1964).

[27] 28 U.S.C. § 1403 (1964).

authority, the federal courts in diversity cases will generally apply the law of the forum state to determine if a particular action is local or transitory.[28] The point is essentially an academic one, however, since "there is little difference between the definition in most states and that arrived at without reference to state law in such early federal cases as *Livingston v. Jefferson* . . . ."[29] The distinction between local and transitory actions is generally regarded as the distinction between actions *in rem* and *in personam*,[30] with *in rem* actions including those to "remove an incumbrance or lien or cloud upon the title to property."[31] Article 80 of the Louisiana Code of Civil Procedure[32] is typical of state procedural rules requiring that *in rem* actions be brought in the county or district where the land is situated. There is considerable authority for the general proposition that a suit to cancel a mortgage is such a local action.[33] In determining whether a given action is local or transitory, however, the courts have not confined themselves to a mechanical categorization of the action as *in rem* or *in personam*, but rather have adopted the approach that "[t]he character of the remedy sought should be determinative."[34] One court has used this approach to formulate the following test: "Whether an action is in personam or in rem is not the ultimate test as to whether an action is local . . . . The test is, does the action involve necessarily a determination of a right or interest in real estate?"[35]

Having carved the local action exception from section 94 in

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[28] MOORE ¶ 0.142 [2.-1].

[29] 70 HARV. L. REV., *supra* note 19, at 710.

[30] MOORE ¶ 0.142 [2.-1].

[31] The most notable exception to this general statement is that certain *in personam* actions involving injury to real property, such as trespass, are also local in nature. MOORE ¶ 0.142 [2.-1] & n.8.

[32] The following actions shall be brought in the parish where the immovable property is situated:

(1) An action to assert an interest in immovable property, or a right in, to, or against immovable property, except as otherwise provided in Articles 72 and 2633; and

(2) An action to partition immovable property, except as otherwise provided in Articles 81, 82, and 83.

If the immovable property, consisting of one or more tracts, is situated in more than one parish, the action may be brought in any of these parishes. LA. CODE CIV. PROC. ANN. art. 80 (West 1960).

[33] *E.g.*, Casey v. Adams, 102 U.S. 66 (1880); Whalen v. Ring, 224 Iowa 267, 276 N.W. 409 (1937); Kommer v. Harrington, 83 Minn. 114, 85 N.W. 939 (1901).

[34] MOORE ¶ 0.142 [2.-1].

[35] Whalen v. Ring, 224 Iowa 267, 272, 276 N.W. 409, 412 (1937).

Casey v. Adams, the Supreme Court has not since addressed itself to the same question. In *Bank of America v. Whitney Central National Bank*[36] a New York state bank sued a Louisiana national bank in a New York federal court. The district court held that the national bank was not suable in New York because it had no place of business, resident officers, or employes there. The United States Supreme Court affirmed on jurisdictional grounds, expressly avoiding the venue question.[37] In its most recent pronouncements on section 94, the Court has resolved a different controversy, holding that the provisions of section 94 are mandatory rather than permissive. In 1963 the Court found the statutory language "appropriate . . . for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit . . ."[38] and, in language difficult to reconcile with *Casey*, stated that "we believe Congress intended that *in those courts alone* could a national bank be sued against its will."[39] This case made no mention of the local action exception, but three weeks later in *Michigan National Bank v. Robertson*[40] the Court confined *Casey* to its facts by distinguishing *Robertson* from *Casey* and commented that "by its very nature, this is a considerably different suit from the one to determine interests in property at its situs which was involved in *Casey v. Adams*."[41] Congress, the Court continued, "clearly intended 12 U.S.C. § 94 to apply to suits involving usury and the related matters at issue here."[42] Thus, although the Court has not overruled *Casey*, the above recent cases suggest that a restrictive approach should be taken in applying the *Casey* doctrine.

Despite the implications of this recent trend, the Fifth Circuit in *Chateau Lafayette* determined that section 94 was inapplicable and upheld local venue. In addressing itself to the issue of whether the amended complaint stated a local action, the court noted initially that it was "*Erie*-bound to apply Louisiana substantive and procedural concepts (this being a nonfederal case, and achievement

[36] 261 U.S. 171 (1923).

[37] *Id.* at 173.

[38] Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 560 (1963).

[39] *Id.* (emphasis added). Although *Langdeau* narrowly concerned a national bank being sued in a *state* court, the holding was applied equally to federal court actions in Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir. 1968).

[40] 372 U.S. 591 (1963).

[41] *Id.* at 594.

[42] *Id.*

of nationwide uniformity being thus of no moment) . . . ."[43] The court reasoned that the amended complaint, in praying for cancellation or reformation of a real mortgage, asserted "an interest in immovable property, or a right in, to, or against immovable property"[44] and that under state law[45] the action could only be brought in the parish where the land was located. The court also observed that the effect of the remedy sought was "virtually . . . the same"[46] as the remedy sought in *Casey*, and that to constitute a local action, it was sufficient that "*one* of its primary effects . . . be upon the real property subject to the mortgage."[47] The bank argued that, under Louisiana law,[48] a mortgage is accessory to the debtor's obligation to repay the loan evidenced here by the mortgage note and that when the debt obligation is extinguished the mortgage disappears with it. The court conceded this but concluded that a partial extinguishment of the debt does not mean that the entire mortgage disappears, nor does it mean that a mortgage-debtor cannot sue to cancel or reform a mortgage note and concurrently erase the mortgage from the public records in whole or in part. The court refused to consider that the plaintiff could simply have sued on the note, rendering the action transitory, and refused to consider what relief was actually sought by the remedy requested; rather, the court looked strictly at the wording of the amended complaint. The dissenting judge noted[49] that the relief sought affected real property but concluded that the test of whether an action is local or transitory should not be the ultimate effect on real property but rather whether the action was *in rem*. The dissent's view was that the action was principally one to alter a contractual relationship, not to alter the nature of a cloud on title to real estate. Moreover, the considerations relevant in *Casey* were found by the dissent to be absent in *Chateau Lafayette*, since in the principal case a New York federal court could have granted the relief actually sought without having jurisdiction over the real property incidentally involved.[50]

The *Chateau Lafayette* decision is a significant liberalization of

[43] 416 F.2d at 305 n.13.
[44] *Id.* at 304.
[45] See note 32 *supra* and accompanying text.
[46] 416 F.2d at 304.
[47] *Id.* at 305 (emphasis added).
[48] *See generally* LA. CIV. CODE ANN. arts. 1771, 3284-85, 3371-85 (West 1952).
[49] 416 F.2d at 306 (Ainsworth, J., dissenting).
[50] *Id.*

the statutory venue restrictions on litigation involving national banks and could destroy in large part the "sanctuary" established by section 94. Here, a case initiated purely as a usury action and which would normally be governed by the provisions of section 94 was allowed to escape those provisions by a careful rewording of the complaint. Although there is uniform authority that a suit to cancel a real mortgage is a local action,[51] on which basis the *Chateau Lafayette* decision may appear to be proper, there is no authority directly on the specific point raised by the amended complaint. The instant case presents a *mixed* rather than a *real* action under Louisiana law,[52] having been brought to effect cancellation of both the note, a personal action, and the mortgage, a real action. The court passes lightly over this obstacle, claiming that "no Solomonic split of the action's two prime components—(1) nullifying usury and (2) effecting reformation of the note *and* mortgage—can be effected,"[53] and then announces the new doctrine, totally without precedent, that to qualify as a local action it is only necessary that *one* of the primary effects of the action will be on interests in real property.[54] With respect to the *Chateau Lafayette* situation it is instructive to note that some courts have drawn the line between local and transitory actions on the basis of whether the action was founded, respectively, on privity of estate or privity of contract.[55] Furthermore, it has been widely recognized that where rights to real property depend on the outcome of a controversy concerning a personal obligation, the fact that the judgment sought will incidentally affect those rights will not make the action local,[56] nor will the form of process used to initiate an action change its nature.[57] The dissenting judge is rightfully troubled by the fact that, despite the wording of the amended complaint, the "[a]ppellee seeks only to alter the nature of his contractual relationship with appellant . . . ."[58] Certainly the dissent is also correct in observing

[51] See note 33 *supra*.

[52] LA. CODE CIV. PROC. ANN. art. 422 (West 1960).

[53] 416 F.2d at 305.

[54] See text accompanying note 47 *supra*. *See also* text accompanying notes 33-35 *supra*.

[55] *E.g.*, N.Y. Cent. R.R. v. Hudson County, 117 N.J. L. 534, 537, 189 A. 400, 402 (1937); *accord*, Mutzig v. Hope, 176 Ore. 368, 374, 158 P.2d 110, 113 (1945).

[56] *See* Laurel Crest, Inc. v. Superior Court, 235 Cal. App.2d 69, 74, 44 Cal. Rptr, 867, 871 (1965); Vaughan v. Roberts, 45 Cal. App. 2d 246, 255-56, 113 P.2d 884, 889-90 (1941); Jarvis v. Hamilton, 73 Idaho 131, 133-34, 246 P.2d 216, 217-18 (1952).

[57] Burns v. Duncan, 23 Tenn. App. 374, 385, 133 S.W.2d 1000, 1006 (1939).

[58] 416 F.2d at 306.

that the considerations present in *Casey* are absent in *Chateau Lafayette*: should the Louisiana district court rule adversely to plaintiff, he is free to travel to New York and prosecute his usury allegations there,[59] whereas the plaintiff in *Casey* had no such option. In light of the significant percentage of bank loans which are secured by mortgages or security deeds on realty lying outside of the judicial district in which the bank is located, the effect of *Chateau Lafayette* is to allow numerous actions against a national bank to be prosecuted in a forum more convenient to the plaintiff than section 94 would allow. The propriety of this result is at best questionable in view of the Supreme Court's apparent determination to give section 94 a literal reading and rigidly confine the *Casey* doctrine to its fact situation. The underlying policy of section 94[60] appears to be outdated and subject to argument,[61] gives national banks a competitive advantage over state banks,[62] and produces possible inconvenience to a plaintiff if applied literally. Nevertheless, legislative debate and honest discussion of the issues by the courts seem preferable to the silent negation of federal legislation present in the *Chateau Lafayette* decision.

[59] See note 50 *supra* and accompanying text.

[60] 34 GEO. WASH. L. REV., *supra* note 12, at 772.

[61] *See* Michigan Nat'l Bank v. Robertson, 372 U.S. 591, 595 (1963) (Black, J., concurring).

[62] See note 14 *supra* and accompanying text.