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Restricted Venue in Suits Against National Banks: A Procedural Anachronism

COMMENTS

RESTRICTED VENUE IN SUITS AGAINST NATIONAL BANKS: A PROCEDURAL ANACHRONISM

Section 94 of the National Bank Act[1] has been interpreted to restrict venue in most actions brought against national banks to the district or county in which the bank is headquartered. The statutory provision and judicial engraftments thereon have been the subject of continuing criticism, prompted primarily by the advent of modern banking practices.[2] The policy question at the heart of the controversy is whether a bank conducting geographically diffuse operations[3] should be made amenable to suit in forums coextensive with its sphere of operations rather than being shielded from suits instituted away from its home office.

In the century since its enactment, the bank venue restriction has been applied almost uniformly in favor of the banks, as, with but minor exceptions, courts have sustained objections to venue where a suit against a national bank has been brought in a district or county other than that of the bank's principal place of business. Such denial to a plaintiff of a

1. 12 U.S.C. § 94 (1970). The present statute was derived from the National Bank Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108, and the Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320. Enactment of the National Bank Act in a period of generally unsound bank performance was motivated by a broad demand for bonds left over from the Civil War and by the need to establish a uniform bank note currency. D. Carson & P. Cootner, *The Structure of Competition in Commercial Banking in the United States*, in PRIVATE FINANCIAL INSTITUTIONS 59-61 (1963). *See* L. CHANDLER, THE ECONOMICS OF MONEY AND BANKING 144 (4th ed. 1964). The venue provision was intended to prevent the interruption of business of national banks which might result from their being forced by process to send their books to distant forums. First Nat'l Bank v. Morgan, 132 U.S. 141 (1889).

2. A valuable commentary, Note, *An Assault on the Venue Sanctuary of National Banks*, 34 GEO. WASH. L. REV. 765 (1966), traces changes in related laws which have accompanied advances in banking practices. It also suggests that when the venue provision was enacted, Congress could not have envisioned the current level of full service branch banking and the extensive litigation resulting therefrom, since national banks originally were not permitted to maintain branches away from their charter locations. Today, national banks may establish such branches. *See* 44 Stat. 1228, *as amended*, 12 U.S.C. § 36 (1970); 48 Stat. 190, *as amended*, 12 U.S.C. § 36 (1970).

3. In 1970, 4,614 national banks operated 11,993 branch banks. RAND MCNALLY INTERNATIONAL, BANKERS DIRECTORY 70 (1971).

forum convenient to him often results in his foregoing maintenance of his action because of the prohibitive cost and inconvenience of trying the case at a distant location. The tempo of the controversy over repeal of section 94 has increased with several recent decisions, particularly that of the Court of Appeals for the Third Circuit in *Helco, Inc. v. First National City Bank*,[4] in which it was held that a bank does not waive the privilege afforded by the bank venue provision when it establishes a branch bank in a district or county other than that of its home office.

Judicial Interpretation of Section 94

Section 94 provides:

> 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.[5]

Although use of the word "may" would appear to indicate that the section is merely permissive, it is well established that operation of the venue provision is mandatory.[6]

The words "established" and "located," as used in the Act, are defined interchangeably by the courts.[7] Since the inception of the venue pro-

4. 470 F.2d 883 (3d Cir. 1972).

5. 12 U.S.C. § 94 (1970) (emphasis supplied).

6. Michigan Nat'l Bank v. Robertson, 372 U.S. 591 (1963); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963); United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970); Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); Leonardi v. Chase Nat'l Bank, 81 F.2d 19 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); Rome v. Eltra Corp., 297 F Supp. 314 (E.D. Pa. 1969); Levin v. Great W Sugar Co., 274 F Supp. 974 (D.N.J. 1967); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966); Insurance Co. of N. America v. Allied Crude Vegetable Oil Ref. Corp., 89 N.J. Super. 518, 215 A.2d 579 (1965); Brumm v. Pittsburgh Nat'l Bank, 213 Pa. Super. 443, 249 A.2d 916 (1968).

7. Reaves v. Bank of America, 352 F Supp. 745, 747 (S.D. Cal. 1973). However, the Supreme Court of North Carolina has held that Congress, having used "established" with reference to suits in federal courts and "located" with reference to actions brought in state courts, must have intended to draw a distinction between the terms. The court concluded, in Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., N.A., 281 N.C. 525, 189 S.E.2d 266 (1972), that a bank is "located" and thus subject to suit in state court in any county in which it has a branch office.

vision, the judiciary has adhered steadfastly to the view that a national bank is established in only one place—its principal place of business, as recited in its charter.[8]

It has been argued[9] that the act of Congress authorizing national banks to establish branches away from their charter locations[10] manifested an intent that banks also be considered "established" at their branch offices. Although most decisions have ignored or rejected such arguments,[11] some courts recently have suggested the desirability of holding that a bank is established at its branch offices as well as its home office. Nevertheless, even these courts have felt constrained by stare decisis to follow the traditional view, relegating to Congress the burden of taking remedial steps.[12]

Avoiding Application of the Bank Venue Provision

Local Action Exception

The single widely recognized exception to the restrictions on venue imposed by section 94 applies where an action is local, rather than transi-

8. First Nat'l Bank v. United States Dist. Court, 468 F.2d 180 (9th Cir. 1972); United States Nat'l Bank v. Hill, 434 F.2d 1019, 1020 (9th Cir. 1970); American Sur. Co. v. Bank of Cal., 133 F.2d 160 (9th Cir. 1943); Reaves v. Bank of America, 352 F Supp. 745 (S.D. Cal. 1973). *See* Cope v. Anderson, 331 U.S. 461, 467 (1947); Buffum v. Chase Nat'l Bank, 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); Leonardi v. Chase Nat'l Bank, 81 F.2d 19, 22 (2d Cir.), *cert. denied,* 298 U.S. 677 (1936); Berman v. Thomson, 284 F Supp. 521, 524 (N.D. Ill. 1968); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699, 703 (S.D.N.Y. 1966); National Union Fire Ins. Co. v. Lippert Bros., 233 F Supp. 650, 653 (D. Neb. 1964).

9. Helco, Inc. v. First Nat'l City Bank, 333 F Supp. 1289, 1292 (D.V.I. 1971), *rev'd,* 470 F.2d 883 (3d Cir. 1972).

10. *See* note 2 *supra.*

11. *See* cases cited note 8 *supra.* In General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966), the court stated:

> The further argument that Congress did not intend to prohibit suit in the district where the branch was located, since such branches were not authorized when the predecessor statutes to 12 U.S.C. § 94 were passed, is fully answered by the failure of Congress, in the years since such branches were authorized to amend the venue provisions of the National Bank Act to enlarge them accordingly.

Id. at 703 n.4.

12. *See* Helco, Inc. v. First Nat'l City Bank, 470 F.2d 883 (3d Cir. 1972); United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970); *cf.* Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968). In *Hill* it was stated: "The decision reached by the judge may reflect the more desirable position, but if the national banks and the courts are to be placed in that position, it must be the Congress that puts them there." 434 F.2d at 1020-21.

tory, in nature. The local action exception permits a suit required by law to be instituted in a particular district or county to be maintained against a bank even though the forum is not that where the bank is established within the meaning of section 94.[13]

The Supreme Court has noted that local actions, which generally involve interests in real property, are "in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are founded is situated." [14] The rationale for the exception arises from recognition that the venue provision would preclude entirely suit against a national bank if the action were one which, by its nature, could be brought only in a forum apart from where the bank is established.[15] In conformity with this reasoning, the Supreme Court has held the local action exception inapplicable where a statute permits an action, although local in nature, to be brought in any county where the defendant bank can be found.[16]

The concept of a local action apparently was expanded in the 1969 decision of the Court of Appeals for the Fifth Circuit in *Chateau Lafayette Apartments, Inc. v. Meadow Brook National Bank*.[17] The plaintiff, alleging usury, sought cancellation or reformation of a mortgage and mortgage note on certain immovable property State law provided that an action to reform a mortgage on immovables could be brought only in the parish where the mortgaged property was located. The bank, however, asserted that the suit should be viewed as an in personam action seeking cancellation of the underlying mortgage note. The dissent agreed, arguing that because the relief sought was alteration of a contractual relationship, the action was not in rem and a federal court in the

13. The exception was first enunciated by the Supreme Court in Casey v. Adams, 102 U.S. 66 (1880), which involved a proceeding to cancel a mortgage on real property *See also* Fresno Nat'l Bank v. Superior Court, 83 Cal. 491, 24 P 157 (1890); Continental Nat'l Bank v. Folsom, 78 Ga. 449, 3 S.E. 269 (1887). Since *Casey*, however, the Supreme Court has intimated against the vitality of the local action exception to the venue rule. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963); Cope v. Anderson, 331 U.S. 461, 467 (1947); First Nat'l Bank v. Morgan, 132 U.S. 141 (1889). Nevertheless, lower federal and state courts continue to recognize the exception. *See, e.g.*, Helco, Inc. v. First Nat'l City Bank, 470 F.2d 883 (3d Cir. 1972); Chateau Lafayette Apartments, Inc. v. Meadow Brook Nat'l Bank, 416 F.2d 301 (5th Cir. 1969); Gregor J. Schaefer Sons v. Watson, 26 App. Div. 2d 659, 272 N.Y.S.2d 790 (1966).

14. Casey v. Adams, 102 U.S. 66, 68 (1880).

15. *Id. See* Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300, 304 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).

16. The Court stated: "[T]his is a considerably different kind of suit from one to determine interests in property at its situs " Michigan Nat'l Bank v. Robertson, 372 U.S. 591, 594 (1963)

17. 416 F.2d 301 (5th Cir. 1969).

state in which the bank was established could grant relief without having jurisdiction over the res. Nevertheless, the majority of the court held that the action, although "mixed under Louisiana law concepts," was to be considered local, since the effect of the action, were plaintiff ultimately successful, would "be upon real property subject to the mortgage." [18] The holding in *Chateau* thus would appear to permit a plaintiff, capable of obtaining relief by couching his suit in terms of either a local or transitory action, to take advantage of the local action exception to section 94 by appropriate framing of his complaint.

Dictum in a recent decision of the Court of Appeals for the Third Circuit indicates that a garnishment action to seize funds deposited by a debtor in a branch of a national bank might be treated as a local action.[19] The local action exception thus might extend to quasi in rem actions against personal property as well as to suits involving real property However, even in an expanded form, the local action concept could not temper the effect of operation of section 94 in the multitude of suits against national banks involving breaches of contract, frauds, securities frauds, and torts.[20]

Repeal by Implication

Arguments have been advanced that section 94 has been repealed by implication through enactment of other federal statutes containing venue provisions. Section 1391 of Title 28, for example, provides that venue in a suit against a corporation is proper in any judicial district in which the corporation is doing business.[21] However, the courts consistently have refused to permit section 1391, applicable to corporations generally, to supplant section 94, holding that the latter is specific in its application to national banks.[22] Similarly, it has been held that the pro-

18. *Id.* at 305.

19. Helco, Inc. v. First Nat'l City Bank, 470 F.2d 883, 885 n.5 (3d Cir. 1972), *citing* Chateau Lafayette Apartments, Inc. v. Meadow Brook Nat'l Bank, 416 F.2d 301 (5th Cir. 1969).

20. *See* First Nat'l Bank v. United States Dist. Court, 468 F.2d 180 (9th Cir. 1972).

21. 28 U.S.C. § 1391 (1970), provides in pertinent part: "A corporation may be sued in any judicial district in which it is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

22. Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); Levin v. Great W Sugar Co., 274 F Supp. 974 (D.N.J. 1967); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966); International Refugee Organization v. Bank of America Nat'l Trust

visions of rule 14 of the Federal Rules of Civil Procedure[23] do not affect the mandatory operation of section 94 in cases involving third party complaints against banks established outside the jurisdiction of the forum.[24]

Courts have experienced greater difficulty in determining the effect on section 94 of the specialized venue provisions of the securities acts.[25] In *Levin v. Great Western Sugar Co.*,[26] the plaintiff in an action in New Jersey attempted to join as defendants certain national banks which did no business in that state, alleging that the banks, together with other corporations, had violated the Securities Exchange Act of 1934. Under section 27 of that Act, venue is proper in any district where an illegal transaction occurred.[27] Thus, under this provision, venue would have been proper in New Jersey even though none of the defendant banks were established in that state.

Although noting that courts generally seek to avoid finding implied repeals of legislation,[28] the court in *Levin* concluded that section 27 supplanted section 94, the two venue provisions being totally repugnant

& Sav. Ass'n, 86 F Supp. 884 (S.D.N.Y. 1949) *See* Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957); Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942).

23. FED. R. CIV. P 14(a) provides in pertinent part: "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." FED. R. CIV. P 14(b) provides: "When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so."

24. Swiss Israel Trade Bank v. Mobley, 319 F Supp. 374 (S.D. Ga. 1970) (attempt to implead New York banking association in action brought in Georgia district court barred by section 94).

25. Securities Act of 1933 § 22(a), 15 U.S.C. § 77v(a) (1970); Securities Exchange Act of 1934 § 27, 15 U.S.C. § 78aa (1970).

26. 274 F Supp. 974 (D.N.J. 1967).

27. 15 U.S.C. § 78aa (1970), provides in pertinent part: "Any criminal proceeding [under this chapter] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter may be brought in any such district or in the district wherein the defendant is found or transacts business "

28. 274 F Supp. at 977 *See* United States v. Borden & Co., 308 U.S. 188, 198-99 (1939); Rome v. Eltra Corp., 297 F Supp. 314 (E.D. Pa. 1966); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966). *See also* Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); United States v. Jackson, 302 U.S. 628, 631 (1938); Pasadas v. National City Bank, 296 U.S. 497, 503 (1936); Town of Red Rock v. Henry, 106 U.S. 596 (1882).

to one another. It was reasoned that since Congress had exempted national banks from some provisions of the securities acts,[29] it would have specifically exempted the banks from securities acts venue provisions had it intended that section 94 of the National Bank Act should remain the controlling provision in suits involving banks.

The decision in *Levin*, however, is not in accord with the weight of authority[30] and was rejected specifically by the Court of Appeals for the Second Circuit in *Bruns, Nordeman & Co. v. American National Bank & Trust Co.*[31] The *Bruns* court, noting that suits involving violations of the securities laws are typically multi-defendant, recognized the inconvenience which results where each defendant bank must be sued only in the district in which it was established.[32] Nevertheless, it was held that section 94 must be given full effect, since after "seventy years of highly restricted venue of actions against national banks," [33] nothing in the legislative history of the securities acts justified a holding of implied repeal.[34]

Thus, with the exception of the persuasive holding in *Levin* that the special venue provisions of the securities acts impliedly repealed section 94, the courts have been unwilling, in the absence of clear evidence of legislative intent, to find that section 94 has been repealed by venue provisions in other statutes. Hence, the existence of apparently inconsistent statutes affords little hope for plaintiffs attempting to avoid the burden of compliance with section 94.

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29. *E.g.*, 15 U.S.C. §§ 77c(a)(2), 1(2) (1970); 15 U.S.C. § 78l(i) (1970).

30. Klein v. Bower, 421 F.2d 338 (2d Cir. 1970); Bruns, Nordeman, & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Wyndham Associates v. Bintliff, 398 F.2d 614 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966). *See* Swiss Israel Trade Bank v. Mobley, 319 F Supp. 374 (S.D. Ga. 1970); Rome v. Eltra Corp., 297 F Supp. 314 (E.D. Pa. 1969). *See also* Berman v. Thomson, 284 F Supp. 521 (N.D. Ill. 1968).

31. 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).

32. The court recognized that such multiple suits, although inconvenient, were not impossible. Casey v. Adams, 102 U.S. 66 (1880), was thus distinguished. *See* notes 14-15 *supra* & accompanying text.

33. 394 F.2d at 303.

34. It has been suggested that when Congress passed the venue provisions of the securities acts, it did not envision national banks as likely defendants thereunder. Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300, 304 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); General Elec. Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699, 707 (S.D.N.Y. 1966). *See* H. R. REP. No. 85, 73d Cong., 1st Sess. 14 (1933); 1 L. LOSS, SECURITIES REGULATION 564 n.18 (2d ed. 1961).

Waiver of Venue

Courts uniformly agree that the right conferred by section 94 can be effectively waived by a bank.[35] Defining what conduct or acts of a bank constitutes a waiver of the venue privilege, however, is problematic.[36]

It is necessary to observe the distinction between waiver occurring before or after the commencement of suit. Ordinarily a bank can preserve its venue privilege at trial by timely objection to improper venue.[37] However, certain activities engaged in by a bank *prior to the commencement of suit* might constitute a "voluntary and intentional relinquish-

35. Michigan Nat'l Bank v. Robertson, 372 U.S. 591 (1963); Nierbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939); First Nat'l Bank v. Morgan, 132 U.S. 141 (1889); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); Fisher v. First Nat'l Bank, 338 F Supp. 525 (S.D. Iowa 1972); Altman v. Liberty Equities Corp., 322 F Supp. 377 (S.D.N.Y. 1971); Exchange Nat'l Bank v. Abramson, 45 F.R.D. 97 (D. Minn. 1968) *See* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963); County of Okeechobee v. Florida Nat'l Bank, 112 Fla. 309, 150 So. 124 (1933); Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

36. In Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952), the concept of waiver was defined as follows:

> Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.

Id. at 60-61 (footnotes omitted).

37. FED. R. CIV. P 12(b)(3) There are a number of limitations upon the effectiveness of a motion to dismiss on grounds of improper venue. It has been held that the venue privilege is waived if a bank, before objecting to venue, proceeds to trial and defends on the merits. First Nat'l Bank v. Morgan, 132 U.S. 141 (1889) A similar result obtains if the bank fails to appear and defaults. Commercial Cas. Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1929) Where a bank voluntarily sought the forum and filed a bond required to maintain an action, it was held to have waived its venue privilege in an action brought against it for breach of the bond. Continental Nat'l Bank v. Folsom, 78 Ga. 449, 3 S.E. 269 (1887). Moreover, a bank that initiated its own deposition proceedings and did not object to the service of interrogatories and note of issue was held to have abandoned its right to change venue. Solum v. Farmers & Merchants Nat'l Bank, 269 Minn. 431, 131 N.W.2d 231 (1964). Finally, where a bank instituted suit as a plaintiff, it was held to have waived its venue privilege with respect to permissive or compulsory counterclaims arising out of that suit. Exchange Nat'l Bank v. Abramson, 45 F.R.D. 97 (D. Minn. 1968).

ment or abandonment" [38] of the venue privilege which cannot be cured by timely objection at trial. Thus, for example, it has been held that a bank, by seeking and accepting court appointment as a trustee, waives its venue right, but only in relation to suits arising out of the trust business.[39] However, the mere recitation in a contract that the laws of a certain state are to govern the contract is not a relinquishment of the section 94 privilege,[40] nor is carrying on business with a correspondent bank sufficient to constitute a waiver.[41] Moreover, the creation of a wholly owned subsidiary to conduct a credit card business in a foreign jurisdiction has been held not to be an abandonment of the venue privilege, even in relation to suits arising out of such business.[42]

The question of greatest interest with respect to waiver is whether a bank, by establishing a branch in another jurisdiction, thereby is conducting sufficient business in that jurisdiction to constitute a waiver of the venue privilege granted by section 94.[43] In *Frankford Supply Co. v. Matteo*,[44] it was held that a national bank, established in New Jersey, could not require that a garnishment action involving its Philadelphia branch be removed to its charter location in New Jersey The *Frankford* court relied upon the following rule stated in *Lapinsohn v. Lewis Charles, Inc.*:[45] "If a national bank avails itself of a jurisdiction by setting up a [full service] branch to conduct general banking business, it has manifested an intent to be found in that jurisdiction for purposes of suits arising out of any business conducted there." [46]

38. Buffum v. Chase Nat'l Bank, 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952).

39. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963). *See* County of Okeechobee v. Florida Nat'l Bank, 112 Fla. 309, 150 So. 124 (1933). *But cf.* Rome v. Eltra Corp., 297 F Supp. 314 (E.D. Pa. 1966).

40. Bair v. Michigan Nat'l Bank, 175 Neb. 875, 124 N.W.2d 926 (1963); Hills v. Burnett, 175 Neb. 871, 125 N.W.2d 66 (1963).

41. Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923).

42. Fisher v. First Nat'l Bank, 338 F Supp. 525 (S.D. Iowa 1972).

43. Note, *An Assault on the Venue Sanctuary of National Banks*, 34 GEO. WASH. L. REV. 765, 777 (1966). *See* Reaves v. Bank of America, 352 F Supp. 745 (S.D. Cal. 1973); Frankford Supply Co. v. Matteo, 305 F Supp. 794 (E.D. Pa. 1969); Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., 281 N.C. 525, 189 S.E.2d 266 (1972); Lapinsohn v. Lewis Charles, Inc., 212 Pa. Super. 185, 240 A.2d 90, *cert. denied*, 393 U.S. 952 (1968).

44. 305 F Supp. 794 (E.D. Pa. 1969).

45. 212 Pa. Super. 185, 240 A.2d 90 (1968), *cert. denied*, 393 U.S. 952 (1968).

46. *Id.* at 193, 240 A.2d at 94-95. In *Frankford Supply* the argument was not advanced that garnishment of a res in the hands of a branch bank should be treated as a local action creating an exception to the operation of section 94. *See* note 19 *supra* & accompanying text.

A similar result was reached in *Reaves v. Bank of America*,[47] a suit brought in the Southern District of California against a bank established in San Francisco. In holding that the bank had waived its privilege to be sued only in San Francisco, the court noted that the bank had engaged in extensive banking activity through 66 branches in the Southern District, had brought a significant number of lawsuits in that district, and had not objected to venue when sued previously in the Southern District.[48] The *Reaves* court relied on the decision of the district court in *Helco, Inc. v. First National City Bank*,[49] which involved a suit brought in the Virgin Islands against a national bank chartered in New York but engaged in full service banking in the Virgin Islands. Noting that the defendant bank was in competition with local banks, had availed itself of the local courts in enforcing rights growing out of its banking business, and had available locally any records pertinent to the suit, and that the suit posed no threat to continuity of the bank's operation at its charter location,[50] the district court in *Helco* concluded that the bank had waived its section 94 privilege.

These decisions thus stand for the proposition that a bank which operates branches and invokes the aid of the local judicial establishment is engaged in conduct likely to result in the loss of its venue privilege. Unfortunately, this waiver concept was emasculated recently by the Court of Appeals for the Third Circuit when it reversed the district court decision in *Helco*.[51] Although recognizing that its decision conflicted with the holdings in *Frankford* and *Lapinsohn*, the appellate court concluded that a bank does not waive its venue privilege by "establishing a branch in another location and doing business there."[52] Reliance was placed upon a series of cases in which it had been held that a bank does not impliedly waive its venue privilege by doing business in a foreign district.[53] However, none of these cases involved the

47. 352 F Supp. 745 (S.D. Cal. 1973).

48. It should be noted, however, that waiver in one suit does not, by itself, constitute waiver in another suit. *See* Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952).

49. 333 F Supp. 1289 (D.V.I. 1971), *rev'd*, 470 F.2d 883 (3d Cir. 1972).

50. See the discussion in note 1 *supra* of the congressional purpose of preventing the interruption of the business of national banks.

51. Helco, Inc. v. First Nat'l City Bank, 470 F.2d 883 (3d Cir. 1972).

52. *Id.* at 885.

53. Michigan Nat'l Bank v. Robertson, 372 U.S. 591 (1963); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963); United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970); Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300

conduct of business through a branch of the bank in the foreign location. They therefore provide only tenuous support to the *Helco* court's holding.

Although the reasoning in *Helco* is not compelling, the decision must be recognized as the leading authority Since the court did not concern itself with the extent of the business transacted in the foreign district,[54] its decision, in effect, licenses banks to retain their venue haven while conducting enormous business through branches in distant locations. The decision accentuates the harshness of section 94 and emphasizes the need for legislative change.

Conclusion

Although the potential for working hardship inherent in the venue provision is widely recognized by the courts,[55] the judiciary appears to be uniformly of the opinion that reform is a matter for congressional action.[56] The American Law Institute advocates total repeal of section 94, although, in deference to an argument advanced by the Comptroller of the Currency, the Institute has suggested a compromise[57] which would

(2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); Leonardi v. Chase Nat'l Bank, 81 F.2d 19 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966).

54. The *Helco* court stated: "We do not think that the requisite intent to waive this venue right can be implied merely from the act of doing business outside the district in which the bank is established." 470 F.2d 883, 885 (3d Cir. 1972).

55. *See, e.g.*, Klein v. Bower, 421 F.2d 338 (2d Cir. 1970); Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Fisher v. First Nat'l Bank, 338 F Supp. 525 (S.D. Iowa 1972); Swiss Israel Trade Bank v. Mobley, 319 F Supp. 374 (S.D. Ga. 1970).

In Reaves v. Bank of America, 352 F Supp. 745 (S.D. Cal. 1973), the court noted that if the plaintiff were forced to obtain relief in the place where the bank was established, then "the prohibitive costs of travelling and proceeding there will probably mean that the case will have to be dropped and the merits never considered." *Id.* at 750. Section 94 can also impose a burden on the judicial establishment, for example, where an action is brought against several national banks. If the banks are established in different jurisdictions, separate suits must be heard to resolve the matter.

56. United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970); Klein v. Bower, 421 F.2d 338 (2d Cir. 1970); Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374 (S.D. Ga. 1970); General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966).

57. 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, if the action arises*

provide for suit in any district in which a bank operates a branch only if the action arises out of business conducted in that district. The suggested provision also would permit suit against multiple defendant banks in any district where the action could have been brought against one of them.

The Comptroller has contended that liberalization of section 94 "would hamper the supervisory activities of his office and the operations of the national banking system." [58] The number of records whose transfer would be necessary under the Institute proposal, however, seems likely to be insignificant since, even under the present venue statute, records are often kept at the branch where a transaction occurs and not at the central office.[59] Moreover, banks presently submit to a large number of suits without asserting their venue privilege,[60] and the Comptroller is faced with the same problem whether the bank voluntarily waives its venue privilege or is denied it by legislative reform.

The underlying policy which originally prompted the enactment of the venue provision—protection of national banks from interruption of business by suits brought in distant forums[61]—is no longer viable. In this age of instant communications, computerized records, simplified duplicating, and rapid transportation, it can make little, if any, difference in terms of business interruption whether a bank defends a suit where it is headquartered or at the site of one of its outlying operations.[62] To the

out of business transacted in that district, in any district in which the association has a branch office Actions and proceedings against more than one association may be had in any district or Territorial court of the United States or State, county, or municipal court in which the action might have been brought against any one of the associations.

ALI, STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 77, 412-13 (1969).

58. Memorandum of the United States as Amicus Curiae at 14, General Elec. Credit Corp. v. James Talcott, Inc., 271 F Supp. 699 (S.D.N.Y. 1966), *cited in* Note, *An Assault on the Venue Sanctuary of National Banks*, 34 GEO. WASH. L. REV. 765, 773 (1966) *See* ALI, STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 413 (1969).

59. *See* Reaves v. Bank of America, 352 F Supp. 745 (S.D. Cal. 1973); Frankford Supply Co. v. Matteo, 305 F Supp. 794 (E.D. Pa. 1969).

60. *See, e.g.*, Reaves v. Bank of America, 352 F Supp. 745 (S.D. Cal. 1973), in which it is stated that the defendant bank had been sued 338 times in a foreign location before it made a venue objection. *Id.* at 749.

61. *See* note 1 *supra.*

62. *See* Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300, 302-03 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); Helco, Inc. v First Nat'l City Bank, 333 F Supp. 1289, 1292 (D.V.I. 1971), *rev'd on other grounds*, 470 F.2d 883 (3d Cir. 1972); Lapinsohn v. Lewis Charles, Inc., 212 Pa. Super. 185, 194, 240 A.2d 90, 95 (1968).

claimant, however, the choice of forum may have a significant and possibly controlling effect on his ability to recover from a bank. It is submitted, therefore, that section 94 has outlived its usefulness and should be either repealed or modified to conform with modern banking realities.