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Federal Jurisdiction -- Interpleader -- Cross-Claims

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(E). The final question to be considered concerns the effect of state law under the *Erie* doctrine on the administration of the subsection. Suppose the plaintiff sues in a district court where the law of the state in which it sits requires, on the alleged facts, a judgment for the plaintiff under the *Erie* rule; and the defendant moves for a transfer under §1404(a) to a district court in a state whose law is such that the defendant would win. Assuming transfer is granted, what law should the transferee forum apply? There are at least three cases[45] to the effect that the law of the transferring district applies, and that a change of venue affects the place of trial only. Or, in the terse language of the Court of Appeals for the 10th Circuit, when a removed case[46] is transferred from a New Mexico district court to a California district court under §1404(a), "there is no logical reason why it should not remain a New Mexico case, still controlled by the law and policy of that state."

Although this result places upon a transferee district court the additional burden of deciding each transferred case under a foreign law, this is an easier task than that which would be forced upon the court having to decide the question of transfer if the law of the transferee district were held to control. In this latter situation, if the motion was to transfer to a district in a state having a public policy opposed to that of the state of the instant district, the trial judge would have the unhappy duty of determining the propriety of defeating one state's policy and applying another.[47] Finally, if the law of the transferee district were to control, this would undoubtedly encourage a defendant to "shop around" the states of proper venue for the best state law available before moving for a transfer on the grounds of inconvenience. This, of course, runs counter to one of the reasons for which the *Erie* rule was adopted. Wisdom clearly lies with the existing law.

DON EVANS.

Federal Jurisdiction—Interpleader—Cross-Claims

Plaintiff insurance company (a disinterested stakeholder) brought an interpleader action to determine the proper recipient of an escrow fund placed in its possession by one of the defendant-claimants. The suit was instituted in the United States District Court for Southern

[45] Headrick v. Atchison, T. & S. F. Ry., 182 F. 2d 305 (10th Cir. 1950); Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866 (2d Cir. 1950); Greve v. Gibraltar Enterprises, Inc., 85 F. Supp. 410 (D. N. M. 1949).

[46] The removal of an action by a defendant to the federal court is no waiver of his right to move for transfer under §1404(a). White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948); Stewart v. Atchison T. &. S. F. Ry., 92 F. Supp. 172 (E. D. Mo. 1949); Chaffin v. Chesapeake & O. Ry., 80 F. Supp. 957 (E. D. N. Y. 1948).

[47] See Griffin v. McCoach, 313 U. S. 498 (1941) (fact situation where disregard of policy of transferring state would be clearly substantive).

California under the Federal Interpleader Act of 1936.[1] The two claimants, one a citizen of California (hereinafter called C-1) and the other, a corporation of Arizona (hereinafter called C-2) had made adverse claims on plaintiff for the full amount of the fund.[2] C-2 was served in Arizona under authority given for nation-wide service in interpleader actions.[3] He neither answered nor appeared, and the court awarded the fund to C-1. Meanwhile C-1 had filed a cross-claim against C-2 for money damages contending that this was permissible under Rule 13(g) of the Federal Rules of Civil Procedure since the cross-claim grew out of the same contract which had given rise to the escrow fund.[4] C-2 appeared specially and objected to the court's jurisdiction over it regarding the cross-claim.[5] The court dismissed the added controversy and on appeal the dismissal was affirmed.[6]

The majority of the court, apparently not satisfied with stating the law applicable to the facts before them, went far beyond the necessities of the case and said: "It would be a startling conclusion, we think, to give to Rule 13(g) and the Interpleader statute the effect of enlarging the jurisdiction of a court to create rights going beyond those to the fund which is the subject of the interpleader action."[7]

Since C-2 had defaulted on the interpleader action and had not appeared (other than specially), there is little ground for argument so far as the actual holding of the case is concerned.[8] However, there is

[1] 28 U. S. C. §1335 (1948).

[2] Professor Z. Chafee, Jr., in his article, *Federal Interpleader Since the Act of 1936*, 49 YALE L. J. 377 (1940) says, "The main purpose of the Federal Interpleader Act of January 20, 1936, was to give the United States courts power to protect any stakeholder who was threatened with conflicting claims asserted by citizens of different states."

[3] 28 U. S. C. §2361 (1948).

[4] Rule 13(g) of the Federal Rules of Civil Procedure states "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. . . ."

[5] As pointed out in Stitzel-Weller Distillery v. Norman, 39 F. Supp. 182 (W. D. Ky. 1941) the civil process of a Federal District Court does not run outside the district, and service outside the district is void except where specifically authorized by a Federal statute. The court also points out that, although the Interpleader Act will confer jurisdiction over those served outside the district with respect to their claims against the subject matter of the interpleader, it does not confer jurisdiction over those defendants for purposes of a personal judgment.

Rule 4(f) provides for service anywhere within the *state* in which the district court sits.

[6] Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502 (9th Cir. 1950).

[7] Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502, 503 (9th Cir. 1950).

[8] "A special appearance, while not regarded as an appearance at all for some purposes, is one which is made for the sole purpose of objecting to the jurisdiction of the court over the person of defendant." Hale v. Campbell, 40 F. Supp. 584 (N. D. Iowa 1941), *rev'd on other grounds*, 127 F. 2d 594 (8th Cir. 1942).

"By repeated decisions in this Court it had been adjudged that the presence of the defendant in a suit *in personam* . . . is an essential element of the jurisdiction of a district court . . . and that in the absence of this element the court is powerless to proceed to an adjudication." Employers Reinsurance Corp. v. Bryant, 299 U. S. 374 (1937).

ground on which to question the breadth of the language quoted above. Especially is this true if such language has as its only basis a restrictive attitude regarding the controversial question of permitting adjudication of other matters than the res at the second stage of interpleader.[9]

The first ground for criticism is that set forth in the concurring opinion of the principal case: It is simply that the fact situation which was before the court did not call for a determination of the question of whether the Interpleader Act and Federal Rule 13(g) could ever be used in conjunction to secure jurisdiction over a defendant-claimant to a cross-claim. The opinion suggests that an entirely different problem might have been before the court had there been any necessity for a determination of the claimants' rights and obligations under the escrow instructions which had set up the fund.[10]

A second ground upon which to question the broad language of the majority is found in *Bank of Neosho v. Colcord*,[11] a prior decision by a district court. In that case both claimants had formally asserted their claims in the fund which was the subject of the interpleader action. One of the defendant-claimants had filed a cross-bill for specific performance of the contract which had given rise to the entire proceeding. The court refused the other defendant's motion to dismiss the cross-bill for lack of jurisdiction. The basis for refusal was solely that the subject matter of the cross-claim arose out of the transaction that was the subject matter of the original action. This court, taking an opposite view from the position set forth in the principal case said, "Federal Rules of Civil Procedure, rule 22, 28 U. S. C. A., provides inter alia that all actions of interpleader 'shall be conducted in accordance with' the Rules of Civil Procedure promulgated by the Federal District Courts. The effect of such provision in Rule 22, is to make said Rules of Civil Procedure, and particularly Rule 13(g) relating to cross-claims against co-parties, applicable to interpleader actions."[12]

The majority opinion in the principal case distinguishes the *Neosho* case on the valid ground that the parties had already appeared to claim the fund deposited by the stakeholder. But then, apparently in support of its own attitude, the opinion states, "But the court in that case [*Neosho*] gave broader scope to Rule 13(g) than we think proper."[13]

[9] A strict interpleader action may be said to have two stages. The first includes the plaintiff and all defendant-claimants; the second includes only the defendant-claimants, the plaintiff having dropped out. During this second stage the court decides which of the claimants is entitled to the *res*, or thing, which was the subject of the interpleader.

[10] *See* Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502, 505 (9th Cir. 1950) (concurring opinion).

[11] 8 F. R. D. 621 (W. D. Mo. 1949).

[12] Bank of Neosho v. Colcord, 8 F. R. D. 621, 622, 623 (W. D. Mo. 1949).

[13] *See* footnote 6 in Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502, 506 (9th Cir. 1950).

The only other decisions cited by the majority opinion are one English case,[14] and *Stitzel-Weller Distillery, Inc. v. Norman*.[15] The *Neosho* case distinguished the *Stitzel* case by saying that there the court was not concerned with the effect of Rule 13(g) on interpleader proceedings.[16] Whether this is accepted as completely accurate or not, it can safely be said that the *Stitzel* case does not stand for the proposition that a district court could not, under any circumstances, be faced with a situation in which the combination of the Interpleader statute and Rule 13(g) would confer jurisdiction over a cross-claim arising in the second stage of an interpleader action between defendant-claimants of different states.[17]

The most recent federal case in which there appears an objection to the court's jurisdiction over a cross-claim defendant in the second stage of interpleader is *Coastal Air Lines, Inc. v. Dockery*.[18] In this case plaintiff insurance company, a Pennsylvania firm, brought interpleader to settle claims made upon it for the insured value of an airplane which had crashed while in possession of a lessee (Coastal Airlines). Both the owner, who was a citizen of Arkansas, and the lessee claimed the insurance, the owner cross-claiming against the lessee for back rent on the contract of lease which also included the option to buy. At trial the claimants stipulated the questions to be decided. They were: (1) Whether the lessee had exercised his option to buy, and (2) whether lessee owed lessor any rent. After the decision went for the lessor on both points, the lessee appealed on grounds, among others, that the District Court of Arkansas had no jurisdiction over the cross-claim. The court of appeals held, after quoting extensively from the principal case, and considering the *Neosho* and *Stitzel* cases, that the stipulations and lack of objection waived any objections the lessee might have raised to venue, or to jurisdiction over the person. This case, as pointed out in the opinion, is clearly distinguishable from both the principal case and the *Neosho* case, but if the decision could be said to lean in either direction it seems to be toward the *Neosho* case.[19]

[14] Eschger, Ghesquirer and Co. v. Morrison, Kekewich and Co., 6 T. L. R. 145 (C. A. 1890).

[15] 39 F. Supp. 182 (W. D. Ky. 1941). So far as is determinable, this is the only other federal case on the point which had been decided prior to the principal case.

[16] Bank of Neosho v. Colcord, 8 F. R. D. 621, 624 (W. D. Mo. 1949).

[17] The Stitzel case does, however, stand for what the court cited it (the precise point); and on the same reasoning. There the court stressed the point that since the cross-claim defendants had not appeared there could be no jurisdiction of the person conferred by the Interpleader statutes as regards personal judgments on cross-claims. Rule 13(g) was not specifically mentioned.

[18] 180 F. 2d 874 (8th Cir. 1950).

[19] In language strikingly similar to that found in the Neosho case the court said, "Both claims arose 'out of the transaction or occurrence' which was 'the subject matter . . . of the original action' within the meaning of Rule 13(g) of the Federal Rules of Civil Procedure." 180 F. 2d 874, 877 (8th Cir. 1950).

An extensive argument has been made in favor of permitting the trial judge to exercise his discretion in deciding whether added controversies should be decided between the defendant-claimants at the second stage of interpleader.[20] One of the most appealing reasons given in support of this solution is that such a policy would be in the 'spirit' of the Federal Rules of Civil Procedure, a spirit which would ". . . adjudicate all phases of litigation involving the same parties . . . and avoid multiplicity of suits. . . ."[21]

Whether the solution offered in the aforementioned argument is ever accepted, the very existence of such an argument by such a highly respected writer should be sufficient to demonstrate that the problem does not lend itself to solution by any blanket rule. In the absence of clarity on the point under the Federal Rules, perhaps the best solution is for the courts to restrict their decisions to the facts before them; and not attempt in one stroke to eliminate all possibility of claimants ever combining Rule 13(g) and the Federal Interpleader Act to secure settlement of cross-actions between themselves.

PAUL A. JOHNSTON.

Federal Jurisdiction—Political Question—Justiciability of Political Rights

As a working hypothesis for carrying out the doctrine of "separation of powers" which is implicit in the Constitution,[1] the United States Supreme Court early adopted the "political question" guide.[2] That is, when the issue is one on which final decision rests with the executive or legislative branches, the Court will not take jurisdiction. The controversy is non-justiciable, for the reason that it is a question for the "political departments" and not for the judiciary to decide.[3] It is

[20] Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929 (1943).

[21] H. F. G. Co. v. Pioneer Publishing Co., 7 F. R. D. 654, 656 (N. D. Ill. 1947). Rule 1 of Federal Rules of Civil Procedure states ". . . They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." Although Rule 82 forbids any construction of the Federal Rules which would extend the jurisdiction of the district courts, it is by no means certain that to permit settlement of cross-claims in interpleader actions between claimants of different states would be an extension of jurisdiction.

[1] In the Federal Constitution it is an implicit rather than express doctrine. The North Carolina Constitution has an express provision: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." N. C. CONST. Art. I, §8.

[2] Ware v. Hylton, 3 Dall. 199 (U. S. 1796). See Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

[3] The fact that a case has been labelled non-justiciable as involving a "political question" does not necessarily mean that a partisan political struggle is intimately involved in that case. For example, it is extremely doubtful that party politics was involved in the case which led the court to say that it is up to Congress to determine the end of a war. See Citizens Protective League v. Clark, 155 F. 2d