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Federal Jurisdiction--Removal by Third-Party Defendant to a District Court Under § 1441 of the Judicial Code (Luckenbach S.S. Co., 208 F. Supp. 544 (S.D.N.Y. 1962))

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the presence requirement ought to be strictly enforced. The conflict exists between a strict interpretation which emphasizes the personal liberty of the individual and a liberal interpretation which emphasizes the maintenance of public order and the dispensing of justice. Certainly there is something to be said for both sides. But it would appear that any hedging on the strict application of protections from the power of the state involves great risks to individual freedom. The fact that it has been contended that an estimated seventy-five per cent of arrests made today are illegal [35] indicates that many law enforcement officers are either willing to make illegal arrests, or are unaware of the requirements of a lawful arrest. If personal liberty is to be protected, the burden falls on the members of the judiciary who can preserve it by strictly enforcing the presently existing statutory requirements for a legal arrest. If this course of action makes too onerous the task of law enforcement officers, the solution lies in a modification of the laws governing arrest. This should be accomplished by legislative action, not by a failure of the courts to strictly enforce the law as presently written.

FEDERAL JURISDICTION — REMOVAL BY THIRD-PARTY DEFENDANT TO A DISTRICT COURT UNDER § 1441 OF THE JUDICIAL CODE.— In an action between two citizens of New York, not involving a federal question, defendant served a third-party complaint on a citizen of California who then had the action removed to a federal district court. The third-party defendant maintained the district court had jurisdiction on two grounds: (1) the diversity required by section 1441(b) of the Judicial Code [1] existed between the movant and the third-party plaintiff, and (2) under section 1441(c),[2]

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[35] HOUTS, FROM ARREST TO RELEASE 24 (1958).

[1] 28 U.S.C. § 1441(b) (1958). "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

[2] 28 U.S.C. § 1441(c) (1958). "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

the third-party complaint asserted a "separate and independent claim or cause of action" which would have been removable if sued on alone. *Held*: the proper construction of section 1441 "negatives the removal power in a third-party defendant." [3] *Burlingham v. Luckenbach S.S. Co.*, 208 F. Supp. 544 (S.D.N.Y. 1962).

The third-party removal question under section 1441 has resulted in considerable confusion among the federal district courts,[4] particularly in the Second and Third Circuits.[5] A careful analysis of section 1441 in light of these opinions, warrants a consideration of three distinct issues: [6] (1) is a third-party defendant a "defendant" within the meaning of the section,[7] (2) is the application of section 1441(c) limited to claims joined by the plaintiff,[8] and (3) is the third-party claim sufficiently unrelated to the main claim to be a "separate and independent cause of action." [9] The

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[3] Burlingham v. Luckenbach S.S. Co., 208 F. Supp. 544, 547 (S.D.N.Y. 1962).

[4] See Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680, 682 (W.D. Ark. 1951); 1A MOORE, FEDERAL PRACTICE ¶ 0.167[10], at 1053 (2d ed. 1961).

[5] Unlike the principal case, in President & Directors of Manhattan Co. v. Monogram Associates Inc., 81 F. Supp. 739 (E.D.N.Y. 1949), the court permitted removal by a third-party defendant finding 1) diversity and 2) that the third-party controversy was separate and distinct from that stated in the pleadings between the original plaintiff and original defendant. A similar result was reached by a New Jersey district court in Industrial Lithographic Co. v. Mendelsohn, 119 F. Supp. 284 (D.N.J. 1954). This decision was recently impliedly overruled by the same court in White v. Baltic Conveyor Co., 209 F. Supp. 716, 722 (D.N.J. 1962), the court now holding that third-party claims are not sufficiently unrelated to main claims to be separate and independent actions.

[6] 1A MOORE, *op. cit. supra* note 4, at 1049.

[7] White v. Baltic Conveyor Co., *supra* note 5, at 719. The court reasoned that "Sec. 1441(a) does not utilize the words 'third-party defendant,' but merely uses the word 'defendant.' To define the word defendant to mean not only the defendant in an original complaint but in addition a third-party defendant, would be an unwarranted act of judicial legislation." *Ibid.*; 1A MOORE, *op. cit. supra* note 4, ¶ 0.157[7], at 263-64 n.8.

[8] See Shaver v. Arkansas-Best Freight Sys. Inc., 171 F. Supp. 754, 762 (W.D. Ark. 1959), wherein Judge Miller stated: "The court is not convinced that the claims asserted by the defendants against the third party defendant are separate and independent claims, but in view of the provisions of Section 1441(c) . . . the court does not think that it is necessary to determine that question for the reason that the removal statute limits removal on the basis of a separate and independent claim to a situation where there is a joinder of claims by the plaintiff and does not authorize removal by a third-party defendant." See also 1A MOORE, *op. cit. supra* note 4, ¶ 0.167[10], at 1053; Moore & Van Dercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section* 1441(c), 46 IOWA L. REV. 489, 509 (1961).

[9] American Fire & Cas. Co. v. Finn, 341 U.S. 6, 11 (1951); Harper v. Sonnabend, 182 F. Supp. 594, 595 (S.D.N.Y. 1960); Hart-Bartlett-Sturtevant Grain Co. v. Aetna Ins. Co., 108 F. Supp. 757, 762 (W.D. Mo. 1952).

great majority of courts do not decide removability on all three of these bases but usually limit their consideration, assuming either diversity or a federal question exists, to whether or not there is a separate and independent cause of action involved in the third-party suit. If a court determines that such an ancillary suit must comply with all three of the above prerequisites, it is indeed applying a very strict test for removal and is, in effect, limiting the right of removal. Congress has indicated that it favors such limitation.

Prior to the revision of the Judicial Code in 1948, a third-party suit was removable to a federal court, assuming diversity or a federal question existed, if there was a "separable controversy." [10] Congress, desiring to abridge the right of removal,[11] passed section 1441(c) which authorized such removal whenever there is a "separate and independent claim or cause of action." [12] In interpreting this new section in 1951, the Supreme Court in *American Fire & Cas. Co. v. Finn* [13] stated that there is no doubt that "separate cause of action" restricts removal more than did the phrase "separable controversy." [14] The construction thus placed upon section 1441 by the Supreme Court acknowledged the congressional purpose of limiting the number of cases to be removed from state courts.[15] It is clear that such a policy of preserving state jurisdiction has long been implemented by the federal courts.[16] Therefore, it would be in furtherance of the congressional intent to adhere to a rigid test for removal.

There has been little uniformity of construction by the district courts of section 1441 with regard to third-party practice. As to the first consideration, *i.e.*, does the word "defendant" include third-party defendant, the courts are generally silent.[17] The fore-

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[10] Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227, 232-33 (5th Cir. 1945); Habermel v. Mong, 31 F.2d 822 (6th Cir.), *cert. denied*, 280 U.S. 587 (1929); see Moore & Van Dercreek, *supra* note 8.

[11] American Fire & Cas. Co. v. Finn, *supra* note 9, at 10.

[12] 28 U.S.C. § 1441(c) (1958).

[13] *Supra* note 9, at 11.

[14] American Fire & Cas. Co. v. Finn, *supra* note 9, at 12. The Supreme Court expounded that there may be only one cause of action and yet there could be a number of separable controversies. *Ibid.*

[15] 1 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 105, at 491 (Rules ed. 1960).

[16] In St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938), Mr. Justice Roberts remarked that "the intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts." See McCoy v. Siler, 205 F.2d 498, 500-01 (3d Cir.), *cert. denied*, 346 U.S. 872 (1953); Hill v. Branscum, 208 F. Supp. 360, 363-64 (W.D. Ark. 1962).

[17] Dowell Div. of Dow Chem. Co. v. Ormsby, 204 F. Supp. 38 (E.D. Ky. 1962). This court adopted Professor Moore's thesis that no third-party suit affords the basis for removal.

most commentator on this question is Professor Moore who urges that the reference to "defendant" is only to plaintiff's defendant and "does not include such defendants as third-party defendants. . . ." [18] This view, if generally accepted, would of course make unnecessary any discussion of the other two considerations, viz., (1) what is a separate and independent cause of action, and (2) can it be joined only by the original plaintiff? Since the courts do not generally deal with this contention, a discussion of the second problem of what constitutes a separate and independent cause of action is of greater significance.

The Supreme Court in *Finn* seems to have conclusively settled the question of what is "separate and independent." In that case, a Texas resident brought suit against two foreign insurance companies and a Texas agent of the companies for breach of an insurance contract. One of the non-resident insurance companies had the court remove the suit into a federal court but the Supreme Court did not permit such removal, holding that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under section 1441(c)." [19] The federal courts have consistently adhered to this construction of the phrase.[20] There are some commentators who argue that such an interpretation renders the phrase rather meaningless by contending that a basis for removability will rarely exist because most state procedural statutes and rules[21] on joinder of parties permit such joinder only upon a showing of a common question of law or fact arising out of the same transaction.[22] Consequently, they point out, if such claims must involve common questions

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[18] See 1A MOORE, FEDERAL PRACTICE ¶ 0.157[7], at 264 n.8 (2d ed. 1961).

[19] American Fire & Cas. Co. v. Finn, *supra* note 9, at 14; Gray v. New Mexico Military Institute, 249 F.2d 28, 31 (10th Cir. 1957); see 1 BARRON & HOLTZOFF, *op. cit. supra* note 15, § 105; Note, *Removal Under Section 1441(c) of the Judicial Code*, 52 COLUM. L. REV. 101, 106-07 (1952).

[20] Durham v. Irish Shipping, Ltd., 204 F. Supp. 68 (E.D. Pa. 1962); Anderson v. Union Pac. R.R., 200 F. Supp. 465 (D. Kan. 1962); Marshall v. Navco Co., 152 F. Supp. 50 (S.D. Tex. 1957). A recent decision went so far as to declare that if twelve insurance companies insure plaintiff against the *same risk* even though for varying amounts, this would not constitute a separate and independent cause of action under § 1441(c) because the claim against each was based on the *same loss*. Lancer Indus. Inc. v. American Ins. Co., 197 F. Supp. 894, 900 (W.D. La. 1961).

In another interesting fact situation, a court stated that the fact that some of plaintiff's claims are in tort and some in contract does not serve automatically to make them separate and independent. It requires a separate and independent claim, not merely a separate and independent theory. Knight v. Chrysler Corp., 134 F. Supp. 598, 601 (D.N.J. 1955).

[21] See, *e.g.*, N.Y. CIV. PRAC. ACT § 212; N.J. STAT. ANN. §§ 2:27-34, 2:27-38 (1939).

[22] 1 BARRON & HOLTZOFF, *op. cit. supra* note 15, § 105, at 494.

arising from the same transaction they will seldom comply with the Supreme Court's interpretative norm of "separate and independent cause of action."

The third problem which has, by far, resulted in the greatest disagreement among those courts which have considered it, is whether the phrase "is joined with" in section 1441(c) refers exclusively to claims joined by the original plaintiff or does it also contemplate "claims introduced by a defendant through third-party practice." [23] It is this precise question which is closely considered in the principal case. There are two lines of cases, one permitting removal even though there be no joinder by the original plaintiff and one denying removal, claiming that the statute has no reference at all to joinder by other than such a plaintiff.

A New York district court in construing section 1441, shortly after its enactment, in *President & Directors of Manhattan Co. v. Monogram Associates Inc.*[24] avoided any discussion of limiting joinder to the original plaintiff and the result was removal by the third-party defendant.[25] Five years later, a New Jersey district court in *Industrial Lithographic Co. v. Mendelsohn* [26] likewise permitted removal by such a defendant and similarly ignored the problem of the construction of the phrase "is joined with." In at least one case previous to the principal case, the Southern District of New York had assumed sub silentio the right of removal by a third-party defendant.[27]

The contrary judicial approach is best represented by two Arkansas district court opinions written by Chief Judge Miller.[28] In *Sequoyah Feed & Supply Co. v. Robinson*,[29] the Arkansas court adopted Professor Moore's view that the joinder "may properly be confined to a joinder of claims by the plaintiff. . . ." [30] The court indicated that it believed Congress did not intend to extend the right to claims not joined by the original plaintiff

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[23] Burlingham v. Luckenbach S.S. Co., 208 F. Supp. 544, 546 (S.D.N.Y. 1962).

[24] 81 F. Supp. 739 (E.D.N.Y. 1949).

[25] *Ibid.* The court permitted removal on the ground of diversity and the existence of a controversy completely separate and distinct from that stated in the pleadings between plaintiff and defendant. *Ibid.*

[26] 119 F. Supp. 284 (D.N.J. 1954). This court argued that § 1441 should be uniformly applied. If New Jersey practice had not permitted third-party joinder, the third-party defendant would have been brought into another court as an ordinary defendant and would have had an unquestionable right of removal based on diversity of citizenship.

[27] See Chemical Corn Exch. Bank v. Hause, 159 F. Supp. 148 (S.D.N.Y. 1958).

[28] Shaver v. Arkansas-Best Freight Sys. Inc., 171 F. Supp. 754 (W.D. Ark. 1959); Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680 (W.D. Ark. 1951).

[29] 101 F. Supp. 680 (W.D. Ark. 1951).

[30] *Id.* at 682.

and that had Congress so intended, it would have used language clearly evidencing its intent to extend the jurisdiction of federal courts.[31] The court in *Sequoyah* expressly refused to follow the New York approach set down in *Monogram Associates*. In 1959, this same court in *Shaver v. Arkansas Best Freight Sys. Inc.*[32] again referred to the *Monogram* decision and labelled it erroneous.[33] It refused to permit removal because the third-party defendant was not joined as a party by the original plaintiff but by the third-party plaintiff.[34]

The principal case is the first in which a New York district court has passed on the joinder problem. The Court squarely faced the issue by stating "the problem arises from the words 'is joined with. . . .'" [35] The Court, after considering both classes of cases aforementioned, stated that "the more persuasive reasoning lies with those denying the power of a third party to remove" [36] because it is only ancillary to the main action. In adopting this position the Court is echoing the position long taken by Professor Moore, who believes that third-party suits are "too ancillary to the main action to be classified as separate and independent claims." [37] A third-party claim should not, said the Court, be able to confer federal jurisdiction upon the main suit where the main suit is not otherwise within federal jurisdiction,[38] and to allow such removal "is an unwarranted extension of the federal judicial power." [39] The Court concluded that removal must be limited

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[31] *Ibid.*

[32] 171 F. Supp. 754 (W.D. Ark. 1959).

[33] The Arkansas court pointed out that the New York court did not discuss the problem of joinder of claims.

A Recent Decision appearing in 51 MICH. L. REV. 115 (1952) considers the *Sequoyah* and *Monogram Associates* cases and concludes that the *Sequoyah* interpretation of § 1441 is the correct one. The author based his conclusion mainly on Congress' avowed policy of limiting removal jurisdiction. *Id.* at 117.

[34] Shaver v. Arkansas-Best Freight Sys. Inc., *supra* note 28, at 763.

[35] Burlingham v. Luckenbach S.S. Co., 208 F. Supp. 544, 546 (S.D.N.Y. 1962).

[36] *Ibid.*

[37] 1A MOORE, FEDERAL PRACTICE ¶ 0.167[10], at 1052 (2d ed. 1961). Professor Moore argues that if the original defendants have no right to remove plaintiff's suit or if the original defendants have chosen not to exercise such a right, no reason exists why an ancillary defendant to an ancillary claim should, absent express granting of such a right by Congress, have the power to remove and consequently to defeat the main litigants' choice of the state forum. *Ibid.*

[38] In reality this is not, as the Court states, akin to "the tail wagging the dog" because under 28 U.S.C. § 1441(c), "the district court . . . may remand all matters not otherwise within its original jurisdiction." See Breslerman v. American Liberty Ins. Co., 169 F. Supp. 531, 533 (E.D.N.Y. 1959).

[39] Burlingham v. Luckenbach S.S. Co., *supra* note 35, at 547.

to the original plaintiff's defendant and thus can only affect those claims joined by the original plaintiff. The right of removal is a purely statutory right and in light of the avowed congressional purpose to limit removal, the statute must be strictly construed.[40]

The Court in the principal case is the first federal district court in New York to consider the interpretation of the phrase "joined by" in section 1441. This holding is indeed significant in that it is the only New York district court to expressly deny the right of removal by a third-party defendant based on a strict construction of section 1441(c). Such a treatment of "ancillary" third-party claims is consistent with the present federal trend.[41]

It is interesting to note that the liability of the third-party defendant was contingent upon the original defendant's liability to the plaintiff. Both causes of action arose from the identical transaction, and, under the rule of the *Finn* case, such circumstances do not result in "separate and independent" actions. Since the Court in the principal case could have conveniently denied removal on this basis, it could be said that the Court desired to determine the applicability of section 1441 to third-party practice. Such a broad holding now makes a determination of what constitutes "separate and independent" unnecessary since removal is precluded *ab initio*.

JUDGMENTS — RES JUDICATA HELD INOPERATIVE IN INTERSTATE LAND CONTROVERSY. — A change in the flow of the Missouri River — the borderline between Missouri and Nebraska — caused the jurisdictional location of certain river bottom land to become

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[40] *Ibid.*

[41] Approximately one month after the principal case was decided, a New Jersey district court in White v. Baltic Conveyor Co., 209 F. Supp. 716 (D.N.J. 1962) rendered a decision denying the third-party defendant's right to remove. The basic reasoning employed by the court in *Baltic* is substantially that used in the principal case, but the court in *Baltic* offers additional arguments by suggesting that if the ancillary suit were removed and the transactions were interrelated, one court might have to await the outcome of the other's trial and this would defeat "the prompt, economical, and sound administration of justice." *Id.* at 721. A second argument offered is that if *one* court controls a main claim and a third-party claim, it will be considerably easier to promote settlement possibilities. *Ibid.*

The court here expressly refused to follow the decision in Industrial Lithographic Co. v. Mendelsohn, 119 F. Supp. 284 (D.N.J. 1954), which was rendered by a federal court of the same jurisdiction and whose holding was *contra*.