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Procedure -- Federal Procedure -- Minimum Jurisdictional Amount

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intestate had no control over the driver, even though it varied the conventional definition by saying, in absence of such control, that there was a joint enterprise.

FRANKLIN S. CLARK.


A citizen of Kentucky, beneficiary under a $15,000 accident insurance policy, brought suit in the state courts against the insurer, a non-resident company. To avail itself of the fact that the Federal courts would enforce the provision of the policy requiring suit to be brought within two years from the expiration of the time within which proofs of loss were to be made whereas the Kentucky courts would not, defendant removed the case to the Federal District Court. Plaintiff took a non-suit without prejudice and brought a new suit in the state courts but limited his prayer for relief to $2,999.99. Defendant again removed the cause and plaintiff, after his motion to remand was overruled, allowed a judgment by default in favor of defendant. Plaintiff appealed, and the Circuit Court of Appeals held that the prayer for relief determined the amount involved for jurisdictional purposes, and since it was less than $3,000, the motion to remand should have been granted.¹

For reasons similar to those motivating the plaintiff in the principal case there are frequent resorts to devices either to confer² jurisdiction on the Federal courts or to prevent its attaching.³ It is generally deducible from the decisions that the device will be approved provided it is bona fide and some substantial right is in fact relinquished. Since the principal case involves a liquidated claim, it presents, it seems, merely a more obvious variation of the generally sanctioned limitation of unliquidated claims.⁴ But since the amount

of a liquidated claim clearly must show on the face of the pleadings, whereas in an unliquidated claim it must of necessity be conjectural, it seems that the court missed an excellent opportunity to take advantage of the patent nature of the device and pierce it. The apparent desire to protect Federal jurisdiction by facilitating removal, evinced by the recent celebrated Black and White Taxicab Co. case, would lead one to anticipate a different result in the principal case.

The present decision makes for uniformity in that any type of claim may be limited to defeat federal jurisdiction. But it also involves inconsistencies. In cases involving unliquidated claims the prayer controls jurisdiction so long as the pleadings by inspection do not show inability to recover the jurisdictional amount. But in other cases the "court will look to the face of the complaint and upon the facts as there disclosed, decide what the actual demand for recovery is." Here apparently in order to recover anything at all the plaintiff would have to plead the 15,000 policy upon which he based his claim. Then, applying the rule last noted, the court would find that $15,000 was the amount involved. But in the principal case it departed from the rule and accepted the prayer as conclusive. This is further inconsistent with the Federal practice which, once a suit is in the Federal courts, permits a recovery of any amount the facts, as proved, demand, whether more or less than prayed for and whether less than the $3,000 minimum limitation on Federal jurisdiction.

Since, however, the Federal courts follow state court rules in assessing damages in default judgments, in many cases of default judgments, Texas and Vermont apparently make the nature of the claim the criterion of the right to remit for jurisdictional purposes. Fuller v. Sparks, 39 Tex. 137 (1873); Pecos and N. T. R. Co. v. Canyon Coal Co., 102 Tex. 478, 119 S. W. 294 (1909); Perkins v. Rich, 12 Vt. 595 (1840).

Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. ed. 84 (1900); Fernandina Shipbuilding and Dry Dock Co. v. Peters, 283 Fed. 621 (S. D. Fla. 1922); Dobie, Federal Procedure (1928) §56, at 144.


17 Stat. 197 (1872), 28 U. S. C. A. §724 (1926); cases infra note 16.


ment the prayer would probably be conclusive of the amount recovered.\textsuperscript{12}

A more important and more striking inconsistency in Federal practice is made evident by the principal case. There the court approved a reduction of the claim to prevent Federal jurisdiction attaching when accomplished by means of a non-suit in the Federal court and a new suit in the state courts upon a limited demand. Yet the general rule is that, once in the Federal courts, the plaintiff will not be permitted to amend his complaint so as to reduce his claim to less than $3,000 and thus force the court to remand the case, unless the demand was excessive through a bona fide error.\textsuperscript{13}

Should the plaintiff attempt to recover the full $15,000 in his suit in the state court by amending his prayer for relief the defendant could petition for removal.\textsuperscript{14} The prayer would be evident on the pleadings, which with the record at the time of the motion, determine removability.\textsuperscript{15}

But there seems a possibility that the plaintiff might recover $15,000 in the state courts by taking advantage of a common rule of state court practice: any relief demanded by the facts will be granted.\textsuperscript{16} To recover anything at all plaintiff would have to prove the $15,000 policy. Thus at the close of the evidence the jury would be instructed to render a judgment consistent with the facts as they found them proved. If the defendant attempted to remove prior to judgment in such a case, it is likely that he would be denied because

\textsuperscript{12} This would be true in North Carolina. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE (1929) §632; see Orsinger v. Consolidated Flour Co., \textit{supra} note 11.


\textsuperscript{14} \textit{36 Stat.} 1095 (1911), 28 U. S. C. A. §72 (1926) (the removal petition must be filed "... in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff."). But where by amendment during the trial plaintiff for the first time sets out a case within Federal jurisdiction defendant can petition for removal. Northern Pac. R. Co. v. Austin, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. ed. 218 (1890); Bagenas v. Southern Pac. Co., 180 Fed. 887 (N. D. Cal. 1910); Key v. West Kentucky Coal Co., 237 Fed. 258 (W. D. Ky. 1916).

\textsuperscript{15} Herbert v. Roxana Petroleum Corp., 12 F. (2d) 81 (E. D. Ill. 1926); Kelly v. Alabama-Quenelda Graphite Co., 34 F. (2d) 790 (N. D. Ala. 1929).

\textsuperscript{16} Dean v. Shingle, 198 Cal. 652, 246 Pac. 1049 (1926); Smith v. Smith, 67 Kans. 841, 73 Pac. 56 (1900); Caldwell v. Ewanks, 326 Mo. 185, 39 S. W. (2d) 976 (1930); Syracuse v. Hogan, 234 N. Y. 457, 138 N. E. 406 (1923); Jones v. Atlantic and Western R. Co., 193 N. C. 590, 137 S. E. 706 (1927).
the pleadings would remain precisely as they were when the Federal court previously denied removal, and the record would be in accord with the pleadings.\textsuperscript{17} A motion to remove after judgment would come too late because there would be no case pending on which the removal order could act.\textsuperscript{18}

\textit{Whitcomb v. Smithson} affords an interesting speculation on the possibilities of removal which would arise in the case last supposed when the judge instructed the jury to grant any relief the facts demanded.\textsuperscript{19} There it was held that a suit hitherto outside Federal jurisdiction because of the joinder of a resident defendant was not made removable by the judge's instructing the jury to find in favor of the resident defendant thus leaving the petitioner, a non-resident, the only interested defendant. The rationale of the decision was that the judge, and not the plaintiff by his voluntary act,\textsuperscript{20} brought the case within the scope of Federal jurisdiction. Would it be the act of the plaintiff in proving a $15,000 claim, or the act of the judge applying the law in his instructions which would bring the present supposed case within the limits of Federal jurisdiction?

Assuming that the plaintiff had recovered a judgment for $15,000 in the state courts could the defendant obtain an injunction from the Federal courts against enforcement of the judgment? By Section 265 of the Judicial Code\textsuperscript{21} the Federal courts are prohibited from staying proceedings of a state court or its officers. By judicial decisions\textsuperscript{22} the Federal courts today have apparently succeeded in circumventing the statute and will enjoin proceedings prior to judgment and subsequent thereto. The cases imply the limitation that the injunction must operate upon the parties and not the court, and that

\textsuperscript{17} But see: City of Chicago v. Mills, 204 U. S. 321, 328, 27 Sup. Ct. 286, 51 L. ed. 304 (1907) citing Kirby v. Am. Soda Fountain Co., 194 U. S. 141, 24 Sup. Ct. 619, 48 L. ed. 911 (1904) as authority for the proposition: ("The question of jurisdiction must be decided having reference to the attitude of the case at the date the bill was filed."); Fielding v. Toledo and O. C. R. Co., 33 F. (2d) 994 (N. D. Ohio, 1928).

\textsuperscript{18} 36 STAT. 1095 (1911), 28 U. S. C. A. §72 (1926); see State \textit{ex rel} Hall v. Kelley, 220 Mo. App. 388, 286 S. W. 724 (1926).

\textsuperscript{19} Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. ed. 303 (1900).

\textsuperscript{20} Great Northern Ry. Co. v. Alexander, 246 U. S. 276, 316, 38 Sup. Ct. 237, 62 L. ed. 713 (1918). "It must appear, to make the case a removable one as to a non-resident defendant, because of dismissal as to resident defendants, that the discontinuance as to such defendants was voluntary on the part of the plaintiff."); Moeller v. Southern Pacific Co., 211 F. 239 (N. D. Cal. 1913).

\textsuperscript{21} 36 STAT. 1162 (1911), 28 U. S. C. A. §379 (1926).

\textsuperscript{22} See Taylor and Willis, \textit{The Power of Federal Courts to Enjoin Proceedings in State Courts} (1933) 42 \textit{Yale L. J.} 1169.
a judgment which is unconscionable for fraud, accident, or mistake whereby defendant was prevented from setting up a meritorious defense will be enjoined. But the power does not extend to relieve from judgments on account of errors or irregularities on which the judgment was founded. Although it would seem that the Federal court could hardly expect, by accepting the prayer for relief as conclusive of the amount involved, to limit the state courts to this interpretation, the language of the principal case suggests that a recovery for more than the amount prayed for at the time removal was denied would be deemed a fraud on the jurisdiction of the Federal courts. For this reason the judgment might be enjoined.

JOE EAGLES.

Suretyship—Extent of Liability on Sheriff's Official Bond.

In State of North Carolina ex rel. Wimmer v. Leonard the relator was wrongfully shot by a North Carolina sheriff. Action was brought in a Federal court on the sheriff's official "process bond," which contains a clause for the faithful execution of office. Held, a demurrer to the complaint was properly sustained. Such a general clause of faithfulness in all things in an official bond is limited to the specific duties mentioned therein, i.e. in the "process bond" the due execution and return of process, and the payment of money and fees collected.

Wrongful acts of a public official which render him personally liable to a person injured thereby have been placed in three categories: acts done by virtue of office, acts done under color of office, and those done by the official in his private capacity. All courts hold that the sureties on the officer's official bond are not liable for acts of the latter type. Many courts hold that a bond conditioned for the faith-

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168 F. (2d) 228 (C. C. A. 4th, 1934).

2 Feller v. Gates, 40 Ore. 543, 67 Pac. 416 (1902) (constable received money from execution debtor under contract not to serve execution, the constable to repay money on reversal of judgment on appeal. Held, a personal act, so sureties on his official bond not liable for conversion of the money.) Citizen's State Bank of Wheeler v. American Surety Co., 65 S. W. (2d) 778 (Tex. 1933) (sheriff filed list of fees, including several unlawful ones and received...