NORTH CAROLINA LAW REVIEW

Volume 24 | Number 1 Article 14

12-1-1945

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of deeds within six days after date said documents were excuted, constructive notice shall date from the time of execution, otherwise from the time of receipt as shown by the endorsement of the register of deeds thereon.

5. The holder or owner of every mortgage, deed of trust, conditional sale or title retention contract or other lien or encumbrance on any vehicle registered in another state and filed or recorded in that state shall within ninety days after such vehicle is removed to this state file with the department of motor vehicles the original or a certified copy of such mortgage or other instrument. Every mortgage or other such instrument not so filed shall be subject to any lien or encumbrance against such vehicle thereafter filed with the department according to this act, provided said vehicle shall have continuously remained in this state for said period of ninety days.

6. This act shall be in full force and effect from and after the date of its ratification, except that it shall not affect the validity of any mortgage, deed of trust, conditional sale or title retention contract, or other lien or encumbrance on a motor vehicle which was executed and registered according to law at the date of such ratification. But all such mortgages and other instruments not filed with the department within a period of six months after said date of ratification shall be subject to liens and encumbrances thereafter filed against such vehicle.

WALLACE C. MURCHISON.

Federal Jurisdiction—Removal of Causes—Removal by an Automobile

A considerable contribution to legal animism is made by a recent opinion of a Federal District Court sitting in South Carolina.[1] A state statute[2] provides that when a motor vehicle is operated in violation of law or negligently one thereby sustaining personal injuries or property damage has a lien on the vehicle for his damages and may attach it in the manner provided for other attachments.[3] A native son was killed in an automobile accident and his administrator brought action in the State Court for $25,000 against the car's owner (who was apparently also its driver) and, pursuant to South Carolina practice, against the car itself. The owner was served personally and the car was attached. The car was licensed in Pennsylvania, of which state

[1] Weatherford v. Radcliffe *et al.*, 63 F. Supp. 107 (D.C.S.C. 1945). The "al." is "one Sport Model four-door Ford Automobile, 1944 Pennsylvania License No. IFC76."

[2] Code of Laws of S. C. (1942) §8792.

[3] This statute has been in force, without amendment, since 1912. It refers to damages to "a buggy or wagon or other property."

the individual defendant was a citizen. The individual defendant secured removal to Federal District Court. The Judge of that Court remanded, the controlling factor being that the automobile had not joined in the removal petition.

The result thus rests upon the concept of the motor vehicle as a legal person. Once this hurdle is taken, the opinion lays down the propositions: (1) that the individual defendant and the automobile were joint tort feasors; (2) that there was thus no separable controversy;[4] and (3) that the rule applying in such cases is that all defendants must join in the removal petition.[5]

Considerable attention is devoted to the fact that the suit against the car is an *in rem* proceeding, the opinion pointing out that libels in admiralty and under forfeiture statutes are such proceedings with which Federal courts are familiar. "In an *in rem* case the thing sued may be represented and appear in court and defend and exercise all rights it may have. I am, therefore, of the opinion that the defendant automobile would have had a right to file a petition or join in a petition for removal."[6] The creation of personality for the vehicle is then carried to its logical conclusion: "I hold: 1. That there is diversity of citizenship between the plaintiff and defendants. . . ."[7]

Wisely, the opinion makes no attempt to draw an analogy between the automobile and a corporation. While concededly there are intellectual difficulties in clothing a corporation with citizenship for diversity purposes, its normally recognized powers to sue and be sued, to own property, to enter into contracts and to carry on business generally, present a much stronger claim for the privilege than can be made for the automobile. However, the Court's apparent reliance on an analogy to admiralty and forfeiture cases furnishes even less support for the result. No ship has yet been made a citizen of a State and when the United States sues 75 tubs of butter it does not endow either the tubs or the butter with citizenship. Obviously diversity jurisdiction is not involved in such cases.[8] To concede that an inanimate object may be

[4] That there is no separable controversy when it appears from the complaint that defendants are joint tort feasors is the general rule in negligence cases. HUGHES, FEDERAL PRACTICE (1931) §2377. The South Carolina Court has held that when an individual and car are sued jointly, the individual can remove the case against him to the county of his residence, leaving the case against the car in the county of attachment. Ackerman v. One Mack Truck and Trailer, 191 S. C. 74, 3 S. E. (2d) 684 (1939); Mahon v. Burkett, 160 S. C. 48, 158 S. E. 141 (1931). Despite discussion of jurisdiction in these opinions, the Federal Court in the principal case correctly held that they actually dealt with venue, not jurisdiction.

[5] This is the general rule. DOBIE, HANDBOOK ON FEDERAL JURISDICTION AND PROCEDURE (1928) §93.

[6] 63 F. Supp. 107, 111.

[7] 63 F. Supp. 107, 112.

[8] *Cf.* Boom Company v. Patterson, 98 U. S. 403, 25 L. ed. 206 (1878), approving removal, on diversity grounds, of a condemnation proceeding brought by a corporation clothed by state statute with power of eminent domain. The diversity found, of course, was between the plaintiff corporation and the property owner.

treated for some purposes as a defendant in a law suit is one thing. To say that it thus acquires citizenship is under some suspicion of being a *non sequitur*.

When a result like this is reached, some search for an explanation outside of the reasoning in the opinion is in order, but in this case it is none too fruitful.

One possibility is that the Judge was led astray by defendant's counsel. The opinion indicates, without intimating the tactical reason, that the individual defendant's counsel believed the case against the car should remain in the State Court.[9] Thus apparently neither side was attempting to have the entire case litigated in Federal Court (though it also appears that the answer filed in Federal Court by the same counsel was a joint answer for the individual and the car). In this somewhat confused situation it is doubtful that tactics of counsel should be seized upon to absolve the Court of so patent a departure from reality.

A second possibility is that the Judge was enforcing a policy of restricting diversity jurisdiction to the maximum extent possible. There is some language which might be so construed.[10] However, if this was the objective, a much more adequate solution would have been to say flatly that the automobile, though a party, cannot be a citizen of a state and hence there could be no removal.[11] Further, the opinion purports to confine itself to the specific facts; and it will not operate to

[9] Counsel may possible have had in mind some notion of getting two bites at the cherry, while confining the opposition to one, by some non-mutual application of *res judicata*. However, the joint answer in Federal Court seems inconsistent with such a notion. The petition for removal alleged that there was a separable controversy and counsel so argued in opposition to the motion to remand, relying on the distinction between an action *in personam* against the individual and one *in rem* against the car. This, also, is inconsistent with the position that the case against the car should remain in State Court, as ordinarily the entire case is removed when a separable controversy is found to exist.

[10] "The Removal Statutes must be strictly construed and due regard for the rightful independence of the state governments requires that federal courts scrupulously confine their own jurisdiction to the precise limits of their statutory authority." 63 F. Supp. 107, 111.

[11] Prior to the April 20, 1940, amendment to 28 U. S. C. A. §41 citizens of the District of Columbia could not qualify as citizens of a State for diversity purposes. And in Ralya Market Co. v. Armour & Co., 102 F. 530 (C. C. Iowa 1900), it was held that a partnership, sued in the firm name under authority of a state statute, was not a citizen and the case could not be removed, at least in the absence of an application to the State Court by the individual partners to be substituted for the firm as defendants. In McLaughlin v. Hallowell, 228 U. S. 278, 33 Sup. Ct. 465, 57 L. ed. 835 (1913), a similar result was reached by the lower Federal Court and the State Court subsequently denied the application of the partners to be substituted as defendants. Thus no removal was ever permitted, but the U. S. Supreme Court did not pass on the merits of the lower Federal Court's order of remand. The more usual result in partnership cases is to allow the citizenship of the partners to govern. Raphael v. Trask, 194 U. S. 272, 24 Sup. Ct. 647, 48 L. ed. 973 (1904); Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 499, 20 Sup. Ct. 690, 44 L. ed. 842 (1900).

Of course, refusing to allow removal because of non-citizenship of the automobile would still emphasize the legal entity of the vehicle as contrasted with the citizenship of the owner.

prevent removal in any case duplicating its facts, provided only that the car joins in the petition. So, if this confinement of the reach of the opinion is to be taken at face value, a desire to restrict diversity jurisdiction was not the motivating cause of the result. However, the reasoning involved might operate to prohibit removal of cases with different facts—for instance, when the car is registered in South Carolina. (This is just a suggestion, as the available data do not yet furnish reliable criteria for determination of the citizenship of an automobile.)

Probably the most important factor in the decision is the simple fact that the South Carolina practice sanctions naming the car as a defendant. This apparently lead the Judge to overlook the obvious analogy to actions in which, while only individuals are named as defendants, property is attached, either as a basis for jurisdiction or as ancillary to personal service.[12] In fact, it is difficult to see why the principal case is not controlled by the express language of 28 U. S. C. A. §79: "When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced." This statute is not cited in the opinion.

On the facts of the instant case it seems reasonably clear that the only true defendant is the individual, that the car is attached simply as an aid to collection of damages or to encourage settlement, and that the state practice of naming the car as a defendant should not entail consideration of its citizenship or its participation in the removal petition.

The obvious next question is how to treat a case in which the driver and owner of the car are different people. Even there, if both are sued for personal judgment, the owner being joined on a theory of imputed negligence, or if the owner is sued on such an imputation without joinder of the driver, attachment should not prevent consideration of the removal question solely on the basis of the citizenship of and requests made by the individual defendants or defendant.

If the non-driving owner is not named as a defendant,[13] other questions are raised.[14] It still seems reasonably clear that, as far as the

[12] It has been held that when the State Court's jurisdiction is based on attachment, the case can be removed to Federal Court even though, had the case originated in Federal Court, jurisdiction could not have been predicted solely on the attachment. Clark v. Wells, 203 U. S. 164, 27 Sup. Ct. 43, 51 L. ed. 138 (1906). See also Rorick v. Devon Syndicate, Ltd., 307 U. S. 299, 59 Sup. Ct. 877, 83 L. ed. 1303 (1939).

[13] The South Carolina Court has held that the car may be sued without making the owner, operator or other person a party defendant. Tolbert v. Buick Car, 142 S. C. 362, 140 S. E. 693 (1927)

[14] Where driver and car are joined, there is perhaps an argument that the

action against the car is concerned, the governing citizenship should be that of the owner, just as it would be in an ordinary attachment case in which an individual defendant, though named as such, cannot be personally served.[15] However, will shifting the inquiry from citizenship of the car to that of the owner: (1) influence the decision as to existence of a separable controversy? (2) influence the finding as to jurisdictional amount?

The principal case would still answer the first question by saying that there is a joint tort. It is, therefore, necessary to go one step further in depersonalizing the automobile. What is needed here is an approach typified by the old gag about the sheep's legs. Question: "If you call a sheep's tail a leg, how many legs will it have?" Answer: "Four. You can't make a tail a leg by calling it one." That the car is the instrument by which a tort is committed is obvious, but that it can be a tort feasor, joint or several, for the purpose of determining removability does not follow. (At least, it is assumed that we are unlikely to arrive at a rule of law that an automobile is liable if, under all the circumstances, it fails to conduct itself as would a reasonably prudent automobile.)

What the South Carolina legislature has actually done is to provide that a car owner whose car is driven negligently to plaintiff's damage is liable to the plaintiff to the extent of his interest in the car, regardless of whether he could be adjudged negligent or otherwise held respon-

attachment is merely ancillary and the driver alone can remove. If it prevailed, it would furnish a relatively simple rule, eliminating further questions as to separable controversy and jurisdictional amount. However, since the property attached would not be the property of the removing defendant, and the action against it is in reality one to foreclose the rights of its owner, the attachment seems hardly to be ancillary to the case against the driver. It is doubtful, indeed, if it would be so held if the owner appears, either for himself or in the name of the car, and objects to removal or his citizenship would, if controlling, prevent removal. On the other hand, wherever personal judgment is sought against the owner, the attachment is probably properly regarded as ancillary to the case against him, though the question may be of no practical importance in the absence of other claimants to rights in the car.

The statute, 28 U. S. C. A. §79, quoted in the text, does not authorize removal by driver alone, as it presupposes a proper basis for removal, and the question at issue is whether such basis is present when the car owner can not or does not join in the petition. Further, its reference to the property of the defendant probably means property of the defendant requesting removal.

[15] If the owner does not appear in the case, it might be treated in the same way as a case in which two defendants are named, but one is not served and does not appear. The rule there is that if the defendant not served is a non-resident, the other (also a nonresident) may remove alone; but if he is a resident, the other may not remove in the absence of a separable controversy. Pullman Co. v. Jenkins, 305 U. S. 534, 59 Sup. Ct. 347, 83 L. ed. 334 (1939). That this rule might apply even where the property of the defendant not served has been attached, is indicated by Hunt v. Pearce, 284 F. 321 (C. C. A. 8th, 1922). However, even if these cases apply generally in the situation under discussion, their rule could not apply when the owner appears or is a co-citizen with plaintiff. An appearance nominally made on behalf of the car should be treated, for this purpose, as an appearance by the owner.

sible under common law principles.[16] Plaintiff's rights against the owner may still turn on his rights against the driver, since he has no lien unless the car was being driven negligently or in violation of law. But that dependence does not alone render the driver and owner joint tort feasors or create a master-servant or principal-agent relation between them in the common law sense. The separable controversy decision should turn on these considerations rather than on the pat assumption that driver and car are joint tort feasors.[17]

As to the jurisdictional amount, the instant case holds that removal can be had, if the car joins in the petition, regardless of the fact that the car is not worth more than $500. "Both defendants have been served and the amount of damages alleged is over the sum of $3,000, and although one defendant can not respond in payment of a verdict that may be obtained of more than $3,000, that does not alter the fact that the amount sued for is the amount actually in controversy whatever may be the financial responsibility or the liability of the respective defendants."[18] This, except for the word "liability," sounds like a further personalization—an analogy to an insolvent individual. If that is to be followed, it would apply equally well (and equally inappropriately) to the case of the non-driving owner. The opinion apparently approves an unreported decision from the same District holding that where the only individual sued was not served, and bond of $1,000 was substituted for the vehicle, the jurisdictional amount was not present. However, the opinion furnishes no clue to whether that rule would also be applied to the case of the non-driving owner if the defendant driver is personally served.

Again the only realistic approach is to look at the owner of the car. He is obviously not in the situation of an insolvent defendant. The only relief sought against him is the application of the value of the car; and this is pretty clearly the "amount in controversy" as between plaintiff and the owner.[19] The case should be decided in the same way

[16] The statute contains an exception for cases in which "the motor vehicle shall have been stolen by the breaking of a building under a secure lock, or when the vehicle is securely locked."

[17] Though there are master and servant cases holding that a separable controversy is present when one defendant's liability is predicated on a statute and the other's liability on the common law—see HUGHES, FEDERAL PRACTICE (1931) §2381—the rule announced by the Supreme Court seems to be that if State decisions hold the defendants jointly liable there is no separable controversy, regardless of this feature. Chicago, R. I. & P. Ry. Co. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. ed. 473 (1913); Southern Ry. Co. v. Miller, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. ed. 732 (1910). *Cf.* concurring opinion of Mr. Justice Black in Pullman Co. v. Jenkins, *supra* note 15.

[18] 63 F. Supp. 107, 111.

[19] It has been held that when jurisdiction is based on attachment the amount sued for controls, even though the value of the property attached is less than the jurisdictional amount. Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 F. 214 (C. C. A. 6th, 1922); Gershowitz v. Lane Cotton Mills, 21 F. Supp. 579 (D. C. Tex. 1937); Randall v. Becton-Dickinson Co., 18 F. (2d) 631 (D. C. Mass. 1927). However, at this point the analogy between the ordinary attach-

as any other case in which there are several defendants and the relief sought against one does not equal the jurisdictional amount.[20]

It may be conceded that the approach herein suggested does not automatically furnish clear answers to all the questions which may arise, and even that some confusion could creep into cases resting on such an approach. However, endowing the automobile with citizenship, the ability to commit a tort, and net worth will not eliminate the confusion, but merely confound it.

Something might be made over the fact that, if this case continues to be good law, there are multiple opportunities for enlarging its application. The statutory idea can be readily applied to the pistol with which plaintiff is shot, the factory which omits noxious fumes, the scaffold which collapses under the plaintiff, or any other property instrumental in the commission of a tort.[21] Indeed, it might be possible to allow the property to be named as a defendant in every attachment suit and even in actions to foreclose mortgages or to quiet title.[22] Foreign corporations, not now barred from removal because their stockholders are co-citizens with plaintiff, might be barred because their real estate and manifold chattels are.[23] And there would, perforce, be a great blossoming of the law on the *locus* of citizenship of property. It is pretty obvious that this is not going to happen; and, very probably, as part of the history of its non-happening, the instant case will be repudiated.

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ment case and the case of the non-driving owner breaks down. In the latter the relief sought, when there is no imputed negligence alleged, can never exceed the value of the car. In a rare case plaintiff might allege damages less than the value of the car, and in such case the damages alleged should govern. A comparable situation is found in the lien cases holding that the amount of the claim, not the value of the property, controls. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 43 Sup. Ct. 480, 67 L. ed. 871 (1923); City of Pawhuska v. Midland Valley R. Co., 33 F. (2d) 487 (C. C. A 8th, 1929).

[20] The decision would, under the cases, turn on whether owner's and driver's liabilities to plaintiff are "joint" or "several"—also stated as whether they have a "common and undivided interest." McDaniel v. Traylor, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. ed. 533 (1905); Walter v. Northeastern R. Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. ed. 206 (1893); Stemmler v. McNeill, 102 F. 660 (C. C. N. C. 1900). See also Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044 (1891). This question, therefore, involves something of the same considerations as are involved in determining whether there is a separable controversy. If both decisions are controlled by the same considerations, then: (1) If there is a "joint" liability, there is no separable controversy, but jurisdictional amount is present. Hence there would be no removal if the owner is a co-citizen with plaintiff or does not join in the petition. (2) If there is "several" liability, there is a separable controversy and the driver alone, if a nonresident, could remove.

[21] Perhaps somewhere along the line there would be a due process limitation on such absolute liability statutes.

[22] Due process would hardly be a bar here, since there is no question about the validity of the underlying cause of action and the right to proceed by attachment is clearly recognized. There might be trouble if the statute could be said to be intended primarily to defeat Federal jurisdiction. See Terral v. Burke Const. Co., 257 U. S. 529, 42 Sup. Ct. 188, 66 L. ed. 352, 21 A. L. R. 186 (1922).

[23] There are some, of course, who advocate restricting or eliminating the right of foreign corporations to remove to Federal Court, but none has been found who based his advocacy on the citizenship of the corporate property.