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Federal Jurisdiction -- Removal -- Separate and Independent Claim or Cause of Action

J. C. Johnson Jr.

and development,[27] and religious welfare of the child[28] and in addition, the character and feelings of the parties desiring custody.[29] Furthermore, a decision in this type of case involves judicial discretion. Being familiar with the surrounding circumstances, hearing the testimony, seeing the witnesses, and interviewing the child are all matters which place the trial court in a better position to determine what is for the child's best interest, and its decision should not be lightly overturned.[30]

In the light of the above discussion, it is submitted that a parent should not be denied the custody of his child without a good and sufficient cause, but in determining whether such cause does in fact exist, all factors affecting the welfare of the child should be considered.

RODDEY M. LIGON, JR.

Federal Jurisdiction—Removal—Separate and Independent Claim or Cause of Action

Suit divisibility as a basis for removal to the federal courts has long been available to non-resident defendants who were joined with resident defendants in a single action. The act of July 27, 1866, brought into being the right of these defendants to remove on the ground of "separable controversy."[1] At this time the case was split into two parts, with the part involving the non-resident defendant removed to the federal court and the part involving the resident defendant left in the state court. It was not until the act of March 3, 1875, that the removal of the entire suit was allowed where a "separable controversy" was found to exist.[2] Under the last act the court was permitted, upon removal, to remand in whole or in part as justice required. This last revision continued in substantially the same form until September 1, 1948.[3] During

gins v. Scoggins, 80 N. C. 319 (1897); Haskell v. Haskell, 152 Mass. 16, 24 N. E. 859 (1890).

[25] See Scoggins v. Scoggins, *supra* note 24, where three girls awarded to mother and one boy to father.

[26] Lancey v. Shelley, 232 Iowa 187, 2 N. W. 2d 781 (1942); Dunkin v. Siefert, 123 Iowa 64, 98 N. W. 558 (1904); Buchanan v. Buchanan, 93 Kan. 613, 144 Pac. 840 (1914); Weinman, *The Trial Judge Awards Custody,* 10 LAW AND CONTEMP. PROB. 721, 733 (1944).

[27] *See* Spears v. Snell, 74 N. C. 210, 213 (1876); Dunkin v. Siefert, *supra* note 26.

[28] Atkinson v. Downing, 175 N. C. 244, 95 S. E. 487 (1918); Moore v. Dozier, 128 Ga. 90, 57 S. E. 110 (1907); Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. R. 485, 488 (1916).

[29] Sheers v. Stein, 75 Wis. 44, 43 N. W. 728 (1889).

[30] Pappas v. Pappas and Elkin v. Pappas, 208 N. C. 220, 197 S. E. 661 (1935); Clegg v. Clegg, 186 N. C. 28, 118 S. E. 824 (1923); *In re* Rosa Gray Hamilton, 182 N. C. 44, 108 S. E. 385 (1921); Stokes v. Cogdell, 153 N. C. 181, 69 S. E. 65 (1910); Pra v. Gherardini, 34 N. Mex. 587, 286 Pac. 828 (1930).

[1] 14 STAT. 306 (1866).

[2] 18 STAT. 470 (1875).

[3] 36 STAT. 1094 (1911). "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and

this period the question of whether a "separable controversy" was contained in a given action continually afforded one of the most perplexing problems of federal jurisdiction.

One approach to the problem of determining the existence of a separable controversy within a suit has been on the basis of *parties.*[4] According to this view, when the joinder of defendants is permissive rather than necessary, then the nonresident defendant so joined may remove the whole case on the ground that it contains a separable controversy as to him. Thus, in a proceeding against several insurers who were members of an association which insured the plaintiff's property, the non-resident defendants were allowed to remove the entire case to the federal courts.[5]

During the process of development of removal jurisdiction under the separable controversy statute, the courts evidently believed that in certain types of actions all of the case should not be removed to the federal courts. Thus they devised the "separate controversy" concept, which allowed the federal courts to retain only a part of the case and to remand the remainder. The cases so split up were those which involved joinder of distinct claims and not merely joinder of parties.[6] Hence, an action by a railroad corporation to condemn land for a right of way was separate as to the claim or cause of action against each individual landowner of tracts along the way. The non-resident defendant landowners were allowed to remove that portion of the case as between themselves and the railroad, but the remainder of the case was remanded to the state court.[7]

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which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district." This statute was familiarly known as the "separable controversy" statute. For historical sketch, see 3 MOORE, FEDERAL PRACTICE §101.02 (2d ed. 1948).

[4] 3 MOORE, FEDERAL PRACTICE §101.06 (2d ed. 1948).

[5] Des Moines Elev. & Grain Co. v. Underwriter's Grain Ass'n., 63 F. 2d 103 (8th Cir. 1933); *cf.* Texas Employer's Ins. Ass'n. v. Felt, 150 F. 2d 227 (5th Cir. 1945) (action brought in alternative against three insurance carriers because uncertain as to who was employer at time of worker's accident); Branchville Motor Co. v. American Surety Co. of N. Y., 27 F. 2d 631 (E. D. S. C. 1928) (suit against surety on bond joined with action in tort against insured's employee). For excellent discussion see Note, *The Content of "Separable Controversy" for Purpose of Removal to Federal Courts,* 36 COL. L. REV. 788 (1936).

[6] 3 MOORE, *op. cit. supra* note 4, §101.06.

[7] Deepwater Ry. v. Western Pocanhontas Coal & Lumber Co., 152 Fed. 824 (C. C. S. D. W. Va. 1907); *cf.* Tillman v. Russo Asiatic Bank, 51 F. 2d 1023 (2d Cir.), *cert. denied,* 285 U. S. 539 (1931) (two causes of action joined, first based on dishonor of plaintiff's check, second on refusal to pay own draft); Little Six Oil Co. v. Noble, 17 F. 2d 728 (5th Cir. 1927) (action against contracting party and one who has assumed his obligation); Alabama Power Co. v. Gregory Hill Gold Mining Co., 5 F. 2d 705 (M. D. Ala. 1925) (condemnation proceedings); Wright v. Ankeny, 217 Fed. 988 (W. D. Wash. 1914) (liability of each subscribing stockholder of insolvent corporation on stock subscription); Manufacturer's Comm. Co. v. Brown Alaska Co., 148 Fed. 308 (C. C. S. D. N. Y. 1906) (contracts and liability of maker of promissory note and several indorsers thereon are separate and distinct).

Moreover, an important procedural rule had been developed under this statute. Where under the state law[8] the plaintiff was allowed to allege the liability of the defendants jointly, such as in the joint tort-feasor and master-servant cases, and he elected to do so, then the joint allegation made it unnecessary to determine whether the suit could be removed on the ground of separable or separate controversy. Such joint allegation effectively barred consideration of the question of removability under the removal statutes prior to 1948, and the case was deemed nonremovable.[9]

In view of the uncertainty and the confusion caused by the language of the old statute, Congress has adopted a new removal statute, which provides that:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued on alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, at its discretion, may remand all matters not within its original jurisdiction."[10]

Thus Congress has abolished "separable controversy" as a ground of removal and has substituted therefor "a separate and independent claim or cause of action."[11]

The most significant result of the few decisions under the new statute has been the apparent retention of the procedural rule under the old statute that an allegation of concurrent negligence and joint liability bars removal. Only two decisions, from the same district court, have been

[8] There is a conflict as to whether it is obligatory on the part of the federal courts to follow state statutes and decisions in such cases. It has been held that a state court decision on the removability to a federal court of a cause of action pending before it, is not binding upon the federal court sitting in that jurisdiction; but a state court decision as to the nature of the obligation under the state laws, as joint or several, which affects the right to remove, must be accepted by the federal courts. Fournet v. De Vibliss, 24 F. Supp. 60 (W. D. La. 1938). Cases collected in Note, 140 A. L. R. 733, 735 (1942).

[9] "If a plaintiff alleges that the concurrent negligence of the railroad company and its employee, Johnson, was the cause of his injury, he has a right to join them in one action. If he elects to do so, it supplies no ground for removal because he might have sued them separately." Chicago, R. I. & Pac. Ry. v. Dowell, 229 U. S. 102 (1912); Pullman Co. v. Jenkins, 305 U. S. 534 (1939); Hay v. May Department Stores Co., 271 U. S. 318 (1926); McAllister v. Chesapeake & O. Ry., 243 U. S. 320 (1917); American Car and Foundry Co. v. Kettlehake, 236 U. S. 311 (1914); Chesapeake & O. Ry. v. Cockrell, Administrator, 232 U. S. 146 (1913); Chicago, R. I. & Pac. Ry. v. Schwyart, 227 U. S. 184 (1912); Chicago, B & Q. R. R. v. Willard, 220 U. S. 413 (1911); Southern Ry. v. Miller, 217 U. S. 209 (1910); Illinois C. R. R. v. Sheegog, 215 U. S. 308 (1909); Wecker v. National Enameling Co., 204 U. S. 176 (1906); Cincinnati, N. O. & Tex. Pac. Ry. v. Bohon, 200 U. S. 221 (1905); Alabama & G. So. Ry. v. Thompson, 200 U. S. 206 (1905); Chesapeake & O. Ry. v. Dixon, 179 U. S. 131 (1900); Chicago, R. I. & Pac. Ry. v. Martin, 178 U. S. 245 (1899).

[10] 28 U. S. C. §1441(c) (1949).

[11] For further discussion of the effect of §1441(c), see MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE §0.03(37) (1949).

opposed to this view. In *Bentley v. Halliburton Oil Well Cementing Co.*, the district court said, ". . . a separate and independent claim or cause of action had been alleged against the defendant tortfeasor," and allowed removal.[12] This court ignored completely the concurrent negligence allegation. It followed up this decision with a like result in *Buckholt v. Dow Chemical Co.*, another joint tort-feasor case.[13] The court of appeals reversed the district judge in *Bentley v. Halliburton Oil Well Cementing Co.*, and remanded the case to the state court, saying, "Joint liability for the whole tort negatives the idea of a separate and independent claim."[14] Four district courts agreed with this latter view under the new statute.[15] In *Butler Manufacturing Co. v. Wallace & Tiernan Sales Corp.*, the district court in the absence of an allegation of joint liability found it implied in the facts as set out in the complaint and remanded the entire case to the state court. The district judge said:

> "Only separate and independent claims joined in one action, which is sued on alone and within the original jurisdiction of United States District Courts are now subject to removability. In the instant case, it appears that the complaint charges a cause of action for damages caused at a singular time and place by separate wrongful acts of defendants. In light of the substantive law of the State of Missouri the complaint can only be construed to charge joint and several liability against the defendants. Consequently, no right of removal exists because of the existence of 'a separate and independent claim or cause of action' as asserted by the removing defendent."[16]

Therefore the same procedural rule that applied to such cases under the old statute applies equally under the new.

There was clearly an intent to change the right of removal under this new statute by abolishing separable controversies and substituting "a single and independent claim or cause of action." The federal court under the old statute allowed removal in *Texas Employers Insurance Ass'n. v. Felt* where three insurance carriers, two resident and one non-resident, were being sued in the alternative, since it was uncertain which was liable under th Workman's Compensation Act.[17] Now under the new statute it seems evident that this removal would not be allowed inasmuch as there was only one claim or cause of action asserted against the defendants. In a joint tortfeasor case clearly there is but one cause

[12] 81 F. Supp. 323 (S. D. Tex. 1948).
[13] 81 F. Supp. 463 (S. D. Tex. 1948).
[14] 174 F. 2d 788 (5th Cir. 1949).
[15] Board of Directors v. Whiteside, 87 F. Supp. 69 (W. D. Ark. 1949); Robinson v. Missouri Pac. Tran. Co., 85 F. Supp. 235 (W. D. Ark. 1949); Smith v. Waldemar, 85 F. Supp. 36 (E. D. Tenn. 1949); English v. Atlantic C. L. Ry., 80 F. Supp. 681 (E. D. S. C. 1948).
[16] 82 F. Supp. 635 (W. D. Mo. 1949).
[17] 150 F. 2d 227 (5th Cir. 1945).

of action. It appears that under the prior statute, if the liability was severally alleged, rather than jointly, a non-resident defendant could remove the case. The new statute, however, would not allow removal since there is only one claim or cause of action stated. Apparently it is the intent of the revisors of the statute that a single claim sued on may no longer be separated into parts so as to effect a removal of a single claim or cause of action from a state to a federal court. In this respect, the new statute may result in a decrease in the volume of federal litigation.[18] A clear example of the type of case applying the new statute, in which there are related but separate causes of action, is *McFadden v. Grace Lines, Inc.*[19] The complaint stated eleven causes of action arising out of similar claims on shipments made by plaintiffs, some on different dates. The district court, in its discretion, refused to remand any of the causes and tried the entire case.

While the new statute may prove to be an improvement over the earlier one, still the use of the language "separate and independent claim or cause of action" leaves much to be desired in the matter of clarity. What is mant by a "cause of action" has long been the subject of earnest debate among the profession.[20] As one writer has said, "A lengthy period of uncertainty will almost inevitably result from the adoption of 1441(c)."[21] The substantial rights of parties should not depend on the unpredictable tests established under an uncertain statute, and hence the need for a clearer statute is apparent.[22] Either a denial of the right of removal, absent complete diversity between the parties,[23] or a defini-

[18] H. R. REP. No. 308, 80th Cong., 1st Sess. A 134 (1947). But see Wills and Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure,* 9 OHIO ST. L. J. 257 (1948), where it is said, "In another respect, however, section 1441 (c) may increase the amount of federal litigation in that it will permit removal of suits containing entirely separate and independent causes of action, which are now remanded under the separable controversy limitation. Thus, it is entirely conceivable that total federal litigation may increase."

[19] 82 F. Supp. 495 (S. D. N. Y. 1948).

[20] McCaskill, *The Elusive Cause of Action,* 4 U. OF CHI. L. REV. 281 (1937); Wheaton, *The Code Cause of Action,* 22 CORN. L. Q. 1 (1936); Clark, *The Cause of Action,* 82 U. PA. L. REV. 354 (1934); Harris, *What Is a Cause of Action?,* 16 CALIF. L. REV. 459 (1928).

[21] Wills and Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure,* 9 OHIO ST. L. J. 257 (1948).

[22] "The most expedient and sensible approach to the separable controversy problem, however, would be to deny removal to diversity cases except where federal jurisdiction exists under the rule in *Strawbridge v. Curtiss* [*infra* note 23] which allows federal jurisdiction in diversity cases only where every plaintiff could sue every defendant in the federal courts." Note, 42 ILL. L. REV. 105 (1948). Another view is that "it would seem distinctly preferable to retain the separable controversy for the present. We have a large number of cases construing the clause. Although these cases cannot be harmonized, they can at least be classified." Wills and Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure,* 9 OHIO ST. L. J. 257 (1948).

[23] This would be a return to the original grounds for removal as set out in *Strawbridge v. Curtiss,* 3 Cranch 267 (U. S. 1806) (All parties on one side of the suit [plaintiffs] must be diverse in citizenship from all the parties on the other [defendants] in order to have removal to the federal courts). See note 22 *supra.*

tion of a "separate and independent claim or cause of action" for the purposes of this statute, may lend certainty to this disputed area and serve to effectuate the original intent of the revisors.

J. C. JOHNSON, JR.

Municipal Corporations—Tort Liability—Governmental and Proprietary Functions

A municipal corporation is legally limited in its acts to those which are for a public purpose.[1] The liability of a municipality in tort depends upon whether the act complained of, even though committed in an undertaking for a public purpose, is characterized as governmental or proprietary. If the undertaking is characterized as governmental, then there is no liability unless imposed by statute; if it is characterized as proprietary, then the municipality is liable as any other corporation would be.[2]

In the case of *Rhodes v. Asheville*,[3] the Supreme Court of North Carolina was faced with the problem of determining in which of these two categories the operation of a municipally owned airport fell. Plaintiff's intestate had been fatally wounded by a watchman employed at the airport. In a resulting action for wrongful death, the municipal defendants maintained that N. C. GEN. STAT. §63-50 (Supp. 1947) declared such an operation to be a public, municipal, governmental function and that therefore no action would lie.[4] Their demurrer was overruled and they appealed. The Supreme Court, in affirming the lower court's decision, held that the statute only declared such operation to be for a public purpose. The Court then classified the undertaking as proprie-

[1] Nash v. Tarboro, 227 N. C. 283, 42 S. E. 2d 209 (1947); Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. 2d 211 (1944); Reidsville v. Slade, 224 N. C. 48, 29 S. E. 2d 215 (1944).

[2] Millar v. Wilson, 222 N. C. 340, 23 S. E. 2d 42 (1942); Parks v. Princeton, 217 N. C. 361, 8 S. E. 2d 217 (1940); Hodges v. Charlotte, 214 N. C. 737, 200 S. E. 889 (1938); Lewis v. Hunter, 212 N. C. 504, 193 S. E. 814 (1937); Broome v. Charlotte, 208 N. C. 729, 182 S. E. 325 (1935); Cathey v. Charlotte, 197 N. C. 309, 148 S. E. 426 (1929); Scales v. Winston-Salem, 189 N. C. 469, 126 S. E. 543 (1925); James v. Charlotte, 183 N. C. 630, 112 S. E. 423 (1922); Snider v. High Point, 168 N. C. 608, 85 S. E. 15 (1915); Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849 (1912); McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187 (1900).

[3] Rhodes v. Asheville, 230 N. C. 134, 52 S. E. 2d 371 (1949).

[4] "The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this article, shall are are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity." N. C. GEN. STAT. §63-50 (Supp. 1947).