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Article 8

Practice - Estoppel to Deny Jurisdiction of Federal Court After Removal Without Right

John M. Grogan

Except for the Massachusetts case which requires a "labor market monopoly" before granting relief, it appears that even in states not having statutes to protect the right to work a man can obtain relief against a union holding a closed shop contract that will not grant him membership.

LEO M. MCDONNELL

Practice—Estoppel to Deny Jurisdiction of Federal Court After Removal Without Right—Plaintiff, a citizen of Texas, brought action in a state court of Texas against the American Fire and Casualty Company, a Florida corporation, the Indiana Lumbermen's Mutual Insurance Company, an Indiana corporation, and one Reiss, her insurance broker, who was also a citizen of Texas, to recover in the alternative on one of the two insurance policies or from Reiss for damage to her house caused by a fire. The action was removed to the United States District Court on the petition of the two insurance companies where judgment was entered against the American Fire and Casualty Company which then appealed. *Held:* There was no right of removal under 28 U.S.C.A. §1441, and the defendant was not estopped from protesting the lack of jurisdiction of the district court although it itself had invoked it. *American Fire & Casualty Co. v. Finn, 71 S.Ct. 534 (1951).*

The Supreme Court in reviewing this code section on certiorari held that there was no right of removal since there was no diversity of citizenship between the plaintiff and one of the defendants, Reiss, and no "separate and independent claim or cause of action which would be removable if sued upon alone," the plaintiff having suffered only one wrong and being entitled to only one relief. The question then arose whether a defendant who had removed a suit to a federal court was estopped from appealing from an adverse judgment on the grounds that the court was without jurisdiction to render a judgment because there was no right of removal.

As a rule the parties before the court may waive a lack of jurisdiction over their persons and proceed to trial as long as the court has jurisdiction over the subject matter of the suit. The party invoking the jurisdiction is then concluded by the judgment and estopped to protest the jurisdiction of the court.[1] Thus when the parties removing a suit to a federal court have no right to remove it since they do not come within the provisions of 28 U.S.C.A. §1441, the court may retain the action if it would have had original jurisdiction of it.[2] This occurs when a party is sued in his home state by a non-resident. In such case,

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[14] 160 A.L.R. 918.

[1] 15 I.L.A. 273.

[2] Hanley-Mack v. Godchaux, 2 F. (2d) 435, 437 (6th Cir., 1924).

he has no right of removal because he is a resident of the state in which the action is brought, but the diversity of citizenship would give the federal court original jurisdiction. In such case the party against whom judgment is rendered is held estopped from protesting the right of removal since the estoppel does not attempt to endow the federal court with jurisdiction it could not otherwise possess.[3]

On the other hand if a court does not have jurisdiction of the subject matter of an action, consent of the parties will not give it jurisdiction.[4] In such case it is immaterial how the lack of jurisdiction came to the knowledge of the court and it is no valid objection that the party protesting the jurisdiction was also the one who invoked it.[5] Thus if the federal court would not have had original jurisdiction of the cause, the party removing it without right is not estopped from later protesting the lack of jurisdiction of the court. The principle behind this ruling is that the judicial power of the United States has been precisely defined in the Constitution and must not be extended even though all parties to a case desire it.[6] It is the duty of the court to see that it has jurisdiction, and it is an error to render a judgment in a case to which its jurisdiction does not extend.[7] Although a judgment will not be reversed for an error in process which was to the advantage of the appellant, an error to his advantage relating to the jurisdiction of the subject matter must be rectified by the court.[8]

Thus in some cases the dispute may resolve itself as to whether the federal court would have had original jurisdiction of the cause. In the principal case Mr. Justice Reed, expressing the majority opinion, states that the federal court would at no time have had original jurisdiction of the suit since Reiss was present at the time of judgment and the judgment finally adjudicated the merits of the litigation against him.[9] On the other hand, Mr. Justice Douglas, dissenting, believes that since judgment was found against the American Fire and Casualty alone and Reiss was dismissed, the effect is the same as if the plaintiff had brought the suit in the district court against the insurance company alone, in which case the court would have had jurisdiction.[10] The weight of his reasoning lies in the fact that the petitioning insurance company itself occasioned the removal of the suit. Judgment was found against it alone, and it is not a resident of the state where the action was brought.

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[3] Baggs v. Martin, 179 U.S. 206, 21 S.Ct. 109, 45 L.Ed. 155 (1900).
[4] Peoples Bank of Belleville v. Calhoun, 102 U.S. 256, 260-261, 26 L.Ed. 101 (1880); see Baggs v. Martin, *supra,* note 3.
[5] *Supra,* note 1.
[6] Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379, 383, 4 S.Ct. 510, 512, 28 L.Ed. 462 (1884).
[7] Wildman v. Rider, 23 Conn. 172, 176 (1854).
[8] Capron v. Van Noorden, 2 Cranch 126, 2 L.Ed. 229 (1804).
[9] 28 U.S.C. §1332, 28 U.S.C.A. §1332 (1948).
[10] *Ibid.*

Hence the fact that one of the defendants was a resident of Texas is a mere irregularity as to it, and to permit it to raise such an irregularity after it has consented to it and permitted judgment to ensue would seem abusive of ordinary concepts of justice.

In reaching this conclusion Mr. Justice Douglas follows *Bailey v. Texas Co.*[11] However the facts in that case were somewhat different from the case at hand. Again there was no diversity of citizenship because one of the defendants was a resident of the state where the action was brought. A non-resident defendant obtained removal to a federal court where the resident defendant appeared, but the complaint was dismissed as to it before the issues were put to the jury. Appealing from an adverse verdict, the non-resident defendant raised the question of the jurisdiction of the federal court. It was held that there was no right of removal since there was no diversity of citizenship, but the court said:

> "We need not consider whether the actions against the steamship companies were ever before the District Court; they were dismissed, and the plaintiff has not appealed."[12]

Thus the court in that case seemed to base its reasoning on the fact that at the time of judgment there was diversity of citizenship. Hence Mr. Justice Douglas' proposal that a non-resident defendant should be estopped to protest the right of removal as long as judgment was not rendered against a resident defendant would be a new step towards widening the estoppel doctrine, and the majority ruling that there can be no estoppel when the federal court would not have had original jurisdiction of the suit at the time of judgment more clearly follows the line of previously decided cases.

JOHN M. GROGAN

[11] Bailey v. Texas Co., 47 F. (2d) 153 (2d Cir., 1931).
[12] *Ibid,* p. 155.