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Federal Practice - Venue - Applicability of General Venue Satute to Defendant Brought Into a Case After Removal from the State Court

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FEDERAL PRACTICE—VENUE—APPLICABILITY OF GENERAL VENUE STATUTE TO DEFENDANT BROUGHT INTO A CASE AFTER REMOVAL FROM THE STATE COURT—Plaintiffs, citizens of Missouri, orginally brought suit in an Alabama state court against D_1, a citizen of Virginia, and D_2, a citizen of Minnesota, to recover for injuries sustained in an automobile accident which occurred in Alabama. After defendants had removed to the federal district court, plaintiffs amended their complaint to include D_3, a citizen of Florida, service of process having been made in accordance with the Alabama nonresident motorist statute.[1] By special appearance, D_3 moved for dismissal because of improper venue.[2] *Held,* motion granted and cause dismissed as to D_3. While the original action was removed from the state court, the action against D_3 was commenced in the federal court and is subject to the general venue provisions[3] which apply to diversity of citizenship cases and which require that all plaintiffs or all defendants reside within the judicial district. *Craft v. Murphy,* (M.D. Ala. 1957) 156 F. Supp. 486.[4]

The crux of the principal case is whether the amendment joining D_3 is to be analyzed as a new action arising under diversity jurisdiction or as an incident to the older action which reached the federal court through its removal jurisdiction. The court in the principal case adopted the former view and refused to follow an earlier decision of a New York federal district

[1] Ala. Code (1940) tit. 7, §199.

[2] D_3 also contested the sufficiency of the service of process, but the case was decided on the basis of venue, making discussion of service unnecessary.

[3] "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C. (1952) §1391(a).

[4] For general information on venue and removal jurisdiction, see 3 MOORE, FEDERAL PRACTICE, 2d ed., p. 2119 et seq. (1948); Evans, "The Removal of Causes, Federal Removal Jurisdiction in Diversity of Citizenship Cases," 33 VA. L. REV. 445 (1947). Appointment of an agent within the district to accept service of process waives improper venue. Nierbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939). This does not extend to the fictitious appointment of an agent under nonresident motorist statutes. Olberding v. Ill. Central R. Co., 346 U.S. 338 (1953).

court which reached an opposite result.[5] With no controlling precedent from the appellate levels, each of these courts based its decision on cases not in point.[6] The holding of the principal case appears to be erroneous. Since venue and removal are matters of statutory grace,[7] and since the federal statute expressly provides for the summoning of additional parties into a suit after it has been removed to the federal court,[8] an amendment adding a party defendant should not change the character of the suit, even as to the added party. Since the section of the statute which categorically sets forth the removal provisions has been interpreted to be independent and free of the provision spelling out the specific venue applicable to suits commenced in the federal courts,[9] it is illogical to read this same venue provision into a different subsection of the same removal provision as was done in the principal case. If D_2 had been joined in the state court before removal, there could be no objection to venue in the applicable federal court. Therefore, there is no hardship in making him a party after removal.[10] Congress must have intended that the federal court to which the case is removed be proper venue for all parties, whether they were in the suit originally or not. That the district court is given power to issue service of process and complete defective service after a case has been removed[11] strengthens this conclusion. Perhaps the district judge should weigh any special burdens placed on the additional party against the policy in favor of keeping a case together when he exercises his broad discretionary power over the amending process,[12] but lack of conformity to the general venue provision should not absolutely prevent the joinder attempted in the principal case.

There is another problem which the court alluded to but did not discuss. If D_2 had been joined in the state court, he would have had the opportunity to decide for himself whether or not he wanted the case re-

5 Fawick Corp. v. Alfa Export Corp., (S.D. N.Y. 1955) 135 F. Supp. 108.

6 The principal case was grounded upon Olberding v. Ill. Central R. Co., note 4 supra, while the New York court based its decision upon Polizzi v. Cowles Magazines, Inc., 345 U.S. 663 (1953), and Moss v. Atlantic Coastline R. Co., (2d Cir. 1946) 157 F. (2d) 1005, cert. den. 330 U.S. 839 (1947). These cases did not involve the joinder of a defendant after removal to the federal court had been accomplished.

7 Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877); Ex parte Wisner, 203 U.S. 449 (1906); 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 172 (1950).

8 28 U.S.C. (1952) §1447(a); Rule 21, Fed. Rules Civ. Proc. 28 U.S.C. (1952).

9 28 U.S.C. (1952) §1441(a); Lee v. Chesapeake and Ohio R. Co., 260 U.S. 653 (1923); General Inv. Co. v. Lake Shore & Mich. Southern R. Co., 260 U.S. 261 (1922); Moss v. Atlantic Coastline R. Co., (2d Cir. 1946) 157 F. (2d) 1005, cert. den. 330 U.S. 839 (1947); Buffington v. Vulcan Furniture Mfg. Corp., (W.D. Ark. 1950) 94 F. Supp. 13.

10 See the principal case at 488, and note 8 supra.

11 28 U.S.C. (1952) §§1441(a), 1448.

12 See Rules 15, 20(b) and 21, Fed. Rules Civ. Proc., 28 U.S.C. (1952); Davis v. L. L. Cohen & Co., 268 U.S. 638 (1925); Kerner v. Rackmill, (M.D. Pa. 1953) 111 F. Supp. 150; Sanders v. Metzger, (E.D. Pa. 1946) 66 F. Supp. 262; 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 136, 872 et seq. (1950).

moved to the federal court.[13] In the principal case he was already in the federal court, and properly so by terms of the statute.[14] His only objection, then, should be that he was not able to exercise his privilege of having the case tried in the state court. To remedy this, Congress specifically provided that a later-joined defendant could ask for a remand of the case to the state court.[15] Consistent with the intent of Congress, this procedure would give discretion to the district judge, who is most capable of protecting the private interests of all the parties as well as the public interest in the efficient administration of justice.[16]

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[13] 28 U.S.C. (1952) §1441(a); Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100 (1941); Wright v. Missouri Pac. R. Co., (8th Cir. 1938) 98 F. (2d) 34.

[14] See notes 7 and 8 supra, and Gas Service Co. v. Hunt, (10th Cir. 1950) 183 F. (2d) 417.

[15] 28 U.S.C. (1952) §1448 provides, "This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case." See Hutchins v. Priddy, (W.D. Mo. 1952) 103 F. Supp. 601; Hunt v. Pearce, (8th Cir. 1922) 284 F. 321; 2 CYCLOPEDIA OF FEDERAL PROCEDURE, 3d ed., §3.134 (1951); LEWIS, REMOVAL OF CAUSES §290 (1923).

[16] For excellent comments on multiparty litigation in the federal courts, see 71 HARV. L. REV. 874 (1958); 58 COL. L. REV. 548 (1958). These do not, however, discuss the problems in the principal case.