Wyoming Law Journal

Volume 5 | Number 4 Article 4

December 2019

Removal under the New Doctrine of Separate and Independent Cause of Action

Thomas L. Whitley

attributed to the corporation. It is felt that this would create the much desired result of uniformity in the instance of complete liquidation. But what about a distribution in kind after partial liquidation and dividends in kind (illustrated by the *Guinness* case)? The proposal dealt with dividends in kind only in regard to credit allowed to the receiving corporation in intercorporate distributions in kind.[28] The need is not only for specific legislation as to complete liquidation but also for partial liquidation and dividends in kind.

BOB C. SIGLER.

REMOVAL UNDER THE NEW DOCTRINE OF SEPARATE AND INDEPENDENT CAUSE OF ACTION

Prior to the 1948 amendment, the former section 71 of 28 U.S.C. (1940 Ed.) provided for the removal of an action from the state to the federal courts on the basis of a separable controversy. It read:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and 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."

It is to be noted that the provision provided for controversy, and nowhere mentioned a separable controversy; this addition was made by the construction put upon it by the courts. With the enactment of the amendment to the Judicial Code in September of 1948, sixty years of case law founded on the old test of separable controversy was thrown into the limbo of rejected law and in its place stands a new ground for the removal of cases from the state to the federal courts. The new Code, 28 U.S.C.A. 1441 (c), eliminates the separable controversy as a ground for removal and in its stead provides for removal on the following ground:

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

Thus the revisers eliminated the separable controversy which involved the joinder of multiple parties interested in one cause of action; and confined removal to the situation in which there is a joinder of two or more causes of action.[1] This new statute covers a controversy to which an alien or a state is a party, both of which were excluded under the old act. In other words, regardless of the parties, so long as the removing defendant is a non-

28. H.R. 6712, 80th Cong., 2nd Sess. Sec. 120 (1948).

1. Moore's Commentary on the U.S. Judicial Code, p. 239 (1949).

resident, if one cause of action is of removable character it affords the basis for the removal of an entire suit embracing multiple causes of action.[2]

The revisers had several reasons for eliminating the separable controversy as a basis for removal. First, this ground for removal had been added following the Civil War in an effort to protect a non-resident defendant who had been joined with one or more local defendants under the relaxed and expanding state joinder provisions, and this reason has ceased to be important.[3] Second, the confusion surrounding the concept of separability overshadowed whatever present utility it had.[4] A third and very important purpose was to limit the number of removal cases coming from the state courts.[5]

The separable controversy was keyed to original jurisdiction, *i.e.*, it had to involve a matter which could have been sued on originally in the federal court. Thus since the Judicial Code of 1911 the separable controversy had to involve an amount in excess of $3,000; and there had to be complete diversity between the plaintiff and all the defendants interested in the separable controversy.[6] It was required that all persons interested in a separable controversy must have been able to remove, although all did not need to join in the removal petition.[7] But the suit had to be one capable of separation into parts, so that in one part a controversy would be presented which could be fully decided without necessitating the presence of the other parties. If the relief asked by the plaintiff and obtainable in the case, as alleged in the pleadings, could not be granted unless all who were made defendants were parties, then there was no separable controversy; and this is perhaps the most practicable and most frequently decisive test applied.[8]

It is important to distinguish three classes of litigation that the decisions made in dealing with separable controversy. The groupings are as follows: (1) cases involving a pleaded claim to which all the defendants were

2. Moore's, supra note 1, at p. 251; McFadden v. Grace Line, Inc., 82 F.Supp. 494 (S.D. N.Y. 1948).
3. Moore's, supra note 1, p. 239.
4. Moore's, supra note 1, at p. 239; American Fire and Casualty Co. v. Finn, 71 Sup. Ct. 534 (1951).
5. Moore's, supra note 1, at p. 239; American Fire and Casualty Co. v. Finn, 71 Sup. Ct. 534 (1951); Mayflower Industries v. Thor Corporation, 184 F.(2d) 537 (3d Cir. 1950); Willoughby v. Sinclair Oil and Gas Co., 89 F.Supp. 994 (W.D. Okla. 1950). The Revisers Notes to Section 1441 (c) states: "Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation."
6. Moore's, supra note 1, p. 240; See Pullman Company v. Jenkins, 305 U.S. 534, 59 Sup. Ct. 347, 83 L. Ed. 334 (1939). For a discussion of the Separable Doctrine see Note, 36 Col. L. Rev. 794 (1936); 41 Harv. L. Rev. 1048 (1928).
7 Pullman Company v. Jenkins, 305 U.S. 534, 59 Sup. Ct. 347, 83 L. Ed. 334 (1939). Chief Justice Hughes stated: "It was incumbent upon the Pullman Company to show that it had a separable controversy which was wholly between citizens of different states."
8. 45 Am. Jur. 863, 865, Section 74.

necessary or indispensable parties—these cases consist of non-separable controversies; (2) cases dealing with a pleaded claim to which some of the defendants are only proper parties – such cases involve separable controveries; (3) cases in which separate and independent claims or causes of action against the same or different parties are joined – these do not involve a separable controversy but are now removable under Section 1441 (c).[9]

As to the first group of cases in which all the defendants are indispensable or necessary parties to plaintiff's cause of action, it is obvious that there is no controversy between one of them and the plaintiff which can be fully determined as between them so these were held non-removable. This holding remains true under the new Code, which has narrowed rather than broadened removal. Cases which fall within the second classification involved permissive joinder of parties. Here the plaintiff pleads one cause of action, against several parties either severally or in the alternative. As two or more controversies, parts of one cause of action, are presented, the non-resident defendant interested in a particular controversy could remove the entire suit.[10] The plaintiff in these cases has joined multiple parties, but not multiple causes of action. Although he could bring a separate suit on each controversy involved, if he does not do so and proceeds to enforce his right as one cause of action, the suit is not removable under Section 1441 (c).[11] In regard to the third group of cases, while prior to the Code of 1948 the courts recognized the principle that the joinder of separate and distinct claims did not present a separable controversy, Section 1441 (c) expressly adopts this princple as the measure of removability of a case from the state to the federal courts.

As stated above, one very important reason for changing the grounds for removal was to decrease the volume of federal litigation. The effectiveness of this restrictive policy of Congress against removal depends upon the meaning ascribed to "separate and independent . . . cause of action." This is the key phrase in the statute, proper application of which depends on the definition and meaning given to the phrase. If the desired result is to be obtained, no ambiguity or uncertainty can exist as to the meaning of this phrase. Once a definite meaning has been given to this phrase, proper application of the balance of the statute should uniformly follow from all of the courts with the result that the Congressional purpose of limiting the amount of removed cases to the federal courts should attain a uniform application in all the courts. For the purposes of the removal statute, the word separate is given its ordinary meaning of unconnected or distinct.[12] As to the term independent, its addition was to give emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state

9. Moore's, supra note 1, at p. 241.
10. Moore's, supra note 1, at p. 244.
11. Moore's, supra note 1, at p. 248; Butler Mfg. Co. v. Wallace and Tiernan Sales Corp., 82 F.Supp. 635 (W.D. Mo. 1949); Edwards v. E I. Du Pont DeNemours Co., 183 F.(2d) 165 (5th Cir. 1950).
12. Webster's New International Dictionary (2d Ed. 1936).

courts before allowing removal.[13] Also for the purpose of removal, the term "claim" is synonymous with the phrase "cause of action."[14] That leaves for definition the phrase "cause of action," a term which has many and varied meanings. Frequent use of this phrase is made in the various codes and its meaning is assumed to be clear, however, nothing could be further from the truth. But upon its definition may turn the important decision in the removal cases.

The term "cause of action" is used by various courts with varying shades of meaning depending upon the particular problem involved at the time, with the result that there are at least four general views that should be mentioned. First, is "cause of action" as synonymous with "right of action."[15] This use is often found in such expressions as "Has the plaintiff a cause of action?" meaning, has he a right to legal relief? A "right of action" has been defined as "the right to prosecute an action with effect," which seems to mean a right against the representatives of organized society, the courts. The usage of the two terms as identical is undesirable because it furnishes no aid on the question of the extent of a cause of action. Furthermore, in practice it tends to lead to an unreasonably small unit, which would in removal cases, hinder the stated policy of limiting the number of cases removed by application of a narrow definition.

The second definition of cause of action is that expressed by Professor McCaskill to the effect that the cause should be considered as limited by the single right which is being enforced and the extent of such right should be determined by the precedents.[16] In effect, therefore, we would have causes limited according to the extent of the rights as enforced under the systems in vogue before the codes, even to enforcing the ancient subdivisions of actions. This view limits the extent of the cause to the extent of a particular remedial right under the old writ system.[17] Thus the single right is a remedial right, *i.e.*, the particular right-duty legal relation which is being enforced in the action under consideration. To apply this theory in the case of removal is to apply a restricted meaning of cause of action and the purpose of Congress has not been advanced. This view would throw the court almost back to the separable controversy distinctions that have just been written out of the Code. It would make a cause removable not for any genuine reason but because of an artificial division of the law under a now outmoded system.

Another view of the term cause of action is that expressed by Professor Pomeroy and revolves around the idea of the primary right.[18] Pomeroy

13. American Fire and Casualty Co. v. Finn, 71 Sup. Ct. 534 (1951).
14. Butler Mfg. Co. v Wallace and Tiernan Sales Corp., 82 F.Supp. 635 (W.D. Mo. 1949); American Fire and Casualty Co. v. Finn, 71 Sup. Ct. 534 (1951) footnote 5.
15. Clark on Code Pleading (2d Ed. 1947), p. 130; Clark, The Code Cause of Action, 33 Yale L.J. 817, 823 (1923-24).
16. McCaskill, Actions and Causes of Action, 34 Yale L.J. 614 (1925); Note, 9 Corn. L.Q. 73 (1923); Clark on Code Pleading (2d Ed. 1947), p. 132; Clark, The Code Cause of Action, 33 Yale L.J. 817, 824 (1923-24).
17. Clark, supra note 15, at p. 132.
18. Pomeroy, Code Remedies (4th Ed. 1904) section 347; for discussion see Clark on

states that every action must have the elements of a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant, a delict or wrong done by the defendant which consisted in a breach of such primary right and duty, a remedial right in favor of the plaintiff, a remedial duty on the defendant, and finally the remedy or relief itself, then Pomeroy says: "Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action." In general use it is opposed to secondary or remedial, and it refers to the general substantive right which the plaintiff has before the defendant's breach, as distinguished from the resulting secondary right to damages or specific relief.[19] Thus if *A* and *B* by concurrent acts cause bodily harm to the plaintiff, under Pomeory's primary right theory there is only one cause of action because the right of the plaintiff is to bodily security and there has been only one breach of this right by the defendants either jointly or severally. Under the single remedial right theory of McCaskill, there would exist two causes of action, one against each of the defendants because the plaintiff would have a remedy against each for the wrong done. The difficulty with the primary right theory is that while a definite yardstick to measure the extent of a single cause seems to be afforded, yet actually there is no very definite unit of measurement. Primary is not such a unit and the idea of primary right is capable of many interpretations as to what the right of the plaintiff consists of. Thus the difficulty is that it lends itself just as readily to a narrow interpretation as to a broad one and it has no limits except for the court's discretion.

The fourth view, with Clark as its champion, is that a cause of action is a group of operative facts giving cause or ground for judicial interference.[20] The extent of the cause is to be determined by the courts, having in mind the facts and circumstances of the particular case and controlled by factors of trial convenience and the general purpose to be served by the rule involved. This means that there will result a grouping of facts into a single unit as a lay or nonprofessional witness would naturally do. The cause will therefore comprise the material facts of the happening giving rise to the dispute. It must be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right. Thus this cause of action may give rise to innumerable remedial rights. This is avowedly a flexible and loose definition of the term. But it seems better to compel a court to support its decision on procedural points by arguments based on practical trial conditions than upon arbitrary formal distinctions.

In the cases decided since the adoption of the new statutory provision, the courts that concerned themselves with the meaning of cause of action have failed to adopt a clear meaning of the term. The United States

Code Pleading (2d Ed. 1947) at p. 134; Clark, The Code Cause of Action, 33 Yale L.J. 817, 826 (1923-24).

19. Clark on Code Peading (2d Ed. 1947) p. 135.
20. Clark on Code Pleading (2d Ed. 1947) p. 137; Clark, The Code Cause of Action, 33 Yale L.J. 817, 827 (1923-24).

Supreme Court in the case of *American Fire and Casualty Co. v. Finn* adopted a view which spoke of a single primary right and which said that a "cause of action does not consist of facts, but of the unlawful violation of a right which the facts show," and then concluded that a single wrong arising from an interlocked series of transacations is not a separate cause of action.[21] Although the language is not clear, in this case the court appeared to apply the primary right theory. Some courts have also applied the primary right theory,[22] others have used the operative fact idea,[23] and still others have applied a mixture of the various theories.[24] Actually, either the Clark or the Pomeroy views will reach the same result in most of the cases if the idea of a primary right is given a broad interpretation so there is no need to distinguish between the two. However, the distinction will be important in a case in which two very different rights arise out of the same fact situation[25] with the result that the case will contain two causes of action and hence be removable under the primary right idea while under the operative fact theory it still will remain just one cause of action and hence will not be removable to the federal courts. Thus the operative fact theory, which is also applied in regard to pleading in the petition in many courts and so should be familiar to them, goes further toward advancing the intention of the revisers in reducing the number of removed cases that will reach the federal courts.

A look at the elements of the statute in the abstract does not allow one to accurately describe the course that will be taken by the courts, nor to accurately define the new test that has been promulgated for removal cases. Nor does an examination of the cases decided since the enactment of the amendment outline a pattern which permits a general statement of the new 'separate cause of action' doctrine. As each particular case looks toward the issues in that particular case, and as each is thus of necessity divergent in approach and at times even conflicting in results, so that a clear view of the new doctrine is not possible, no more seems possible than to classify the cases according to their fact situations.

Numerically the most important group of cases that have been decided under the new test for removal are the tort cases looking toward the recovery of damages. These are mostly against large non-resident corporations with a resident joint tortfeasor joined as party defendant in an attempt to prevent removal. These cases break down naturally into two groups: first, cases in which the negligence is charged as a result of con-

21. American Fire and Casualty Co. v. Finn, 71 Sup. Ct. 534 (1951).
22. Bentley v. Halliburton Oil Well Cementing Co., 174 F.(2d) 788 (5th Cir. 1949); Butler Mfg. Co. v. Wallace and Tiernan Sales Corp., 82 F.Supp. 635 (W.D. Mo. 1949); Rodewald v. Phillips Petroleum Co., 91 F.Supp. 700 (S.D. Iowa 1950).
23. Mayflower Industries v. Thor Corp., 184 F.(2d) 537 (3d Cir. 1950); Edwards v. E. I. DuPont DeNemours Co., 183 F.(2d) 165 (5th Cir. 1950).
24. Willoughby v. Sinclair Oil and Gas Co., 89 F.Supp. 994 (W.D. Okla. 1950); Commander-Larabee Milling Co. v. Jones-Hettelsater Const. Co., 88 F.Supp. 476 (W.D. Mo. 1950).
25. Mayflower Industries v. Thor Corp. 184 F.(2d) 537 (3d Cir. 1950), same fact situation gave rise to an action on the contract against Thor and an action of conspiracy against both Thor and the resident defendant.

current action on the part of the defendants,[26] and second, cases in which the action charged negligence as a result of concerted action.[27] In almost all of these cases the case has been remanded to the state courts because it failed to measure up to the statutory requirement of a separate cause of action. This action appears to be proper under either the primary right or the operative fact theory of cause of action. In the tort cases, the plaintiff is trying to recover for one injury done to him by the actions of the defendants so only one primary right exists, that is, the right to be free from injury. Or only one set of operative facts is shown upon which recovery is sought so in either event only one cause of action exists.

In a suit on a fire loss against two non-resident companies joined with the resident agent to recover in the alternative, the court held that there is but a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under section 1441 (c).[28] As already observed, the court appeared to apply the primary right doctrine but could have reached the same decision under the operative fact theory and would not have needed to involve itself with the scope of the plaintiff's rights.

In a land condemnation proceeding, the court stated that the petition for condemnation of the land owned by the defendant states a separate cause of action as to the land owned by the other non-resident defendants.[29] Under either the primary right or an operative fact theory of cause of action this dictum would be wrong because the plaintiff in regard to all the land had one right to take it for the public good, or under the operative fact theory, the facts are the same in regard to all the land being condemned so that only one cause of action exists.

In the case of *Mayflower Industries v. Thor Corporation*,[30] the plaintiff charged a breach of a distributorship contract on the part of Thor and also a conspiracy between Thor and the resident defendant to give the plaintiff's agency to the latter. The Court of Appeals for the third circuit split, publishing three opinions. The majority held that there was almost a

26. Bentley v. Halliburton Oil Well Cementing Co., 174 F.(2d) 788 (5th Cir. 1949), (remanded); Butler Mfg. Co. v. Wallace and Tiernan Sales Corporation, 82 F.Supp. 635 (W.D. Mo. 1949), (remanded); Billups v. American Surety Co., 87 F. Supp. 894 (D. Kan. 1950), (remanded); Edwards v. E. I. DuPont DeNemours Co., 183 F.(2d) 165 (5th Cir. 1950) remanded; Buckholt v. Dow Chemical Co., 81 F. Supp. 463 (S.D. Texas 1948), (denied motion to remand but the case was decided wrong and was reversed by the Halliburton case); Burns v. Carolina Power and Light Co., 88 F. Supp. 767 (E.D. S.Carolina 1949) (Federal Court keeps jurisdiction because of the failure to state a cause of action against the resident defendant); Howard v. General Motors Corporation, 89 F. Supp. 170 (E.D. No. Car. 1950), (remanded); Rodewald v. Phillips Petroleum Co., 91 F. Supp. 700 (S.D. Iowa 1950), (remanded); Willoughby v. Sinclair Oil and Gas Co., 89 F. Supp. 984 (W.D. Okla. 1950), (remanded); Commander-Larabee Milling Co. v. Jones-Hettelsater Const. Co. 88 F. Supp. 476 (W.D. Co. 1950), (denied on grounds a separate claim is asserted against the defendant).
27. Duffy v. Duffy, 89 F. Supp. 745 (S.D. Iowa 1950), (remanded).
28. American Fire and Casualty Co. v. Finn, 71 Sup. Ct. 534 (1951).
29. Board of Directors of Crawford County Levee District v. Whiteside, 87 F. Supp. 69 (W.D. Ark. 1949).
30. Mayflower Industries v Thor Corp., 184 F.(2d) 537 (3d Cir. 1950).

complete coincidence of the basic operative facts so that there was not a separate cause of action under the new code and hence the case was ordered remanded. The concurring judge, giving weight to the primary right doctrine, pointed out that the case should be remanded because the right which the plaintiff seeks to vindicate in this case is an economic one, his interest in the profitable relations between himself and Thor, as set out in the contract between them, and that two defendants have allegedly interfered with that profitable economic relation. The dissenting opinion maintained that there were two claims set out, one in contract and one in conspiracy which were based on two sets of operative facts so the case was properly removed. Another possible holding could be to the effect that the primary rights were different, one would be plaintiff's right to have his contract performed and the other a right of safety from a conspiracy, with the result that two causes of action were stated so the case properly removed. This shows the great flexibility of the two theories of cause of action, for under an application of either the operative facts or the primary right theory, the case could be held properly removed or it could be remanded to the state court, depending on the construction, either narrow or broad, which is put on the theory by the court.

The Congressional policy of a more restricted removal of cases to the federal courts is embodied in the Judicial Code in section 1441 (c). This new provision restricts removal by narrowing the basis on which a cause can be removed by writing out the separable controversy provision and substituting the new separate and independent cause of action which changed the test of removal from relation of the parties joined as defendants to the relation of the fact situation as it concerns a cause of action. To what extreme this policy is to be carried out depends on the theory of cause of action that is adopted. An adoption of the single right theory will mean that no substantial change will result in the number of cases that are removed. Adoption of the primary right idea will give effect to the purpose of the act to a large degree only if the broad meaning is given to the idea of the plaintiff's right. A narrow interpretation of this and a greater number of cases will be permitted to be removed. The primary right idea does not cover all the situations which are desirable to be kept in the state courts. If the courts were to adopt the idea of the operative fact as constituting a cause of action the most justice could be done in most of the cases. Under this the courts would have the discretion to leave all cases which have a common factual background to the state courts.

THOMAS L. WHITLEY.