FEDERAL PROCEDURE-REMOVAL JURISDICTION-MEANING OF "SEPARATE AND INDEPENDENT" AS USED IN THE UNITED STATES JUDICIAL CODE

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Federal Procedure—Removal Jurisdiction—Meaning of "Separate and Independent" as Used in the United States Judicial Code—The respondent suffered a loss by fire, and being uncertain as to which party was liable to compensate for this loss, joined the petitioner and two others as defendants in a suit asking for alternative relief. The petitioner and one of the defendants were insurance corporations with residence outside the state, while the third defendant's residence was the same as that of the respondent. The corporate defendants secured removal of the case to the federal court, and on a trial of the issues, a judgment was rendered for the respondent against the petitioner in the amount of the insurance claimed plus interest. A motion by the petitioner to vacate the judgment and remand the case to the state court was denied by the trial judge, and the court of appeals affirmed.1 On writ of certiorari, held, reversed. The majority held, "that where there is 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 1441(c)." Three

1 American Fire and Casualty Co. v. Finn, (5th Cir. 1950) 181 F. (2d) 845.
justices dissented on the ground that if any error had been committed as to removal, it was merely an irregularity and the petitioner having had the case removed was estopped to request a remand to the state court. *American Fire and Casualty Company v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951).

The provisions of the United States Judicial Code relating to the removal of cases from state courts to federal courts were substantially altered by the revision of 1948. Instead of the troublesome language of the old code which gave rise to the perplexing “separate-separable” controversy, the revised code permits removal, “(c) 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.” Although this change in language appears effectively to have eliminated any dispute about separability of claims or controversies, it has in turn presented terms requiring definition by the courts. Lower federal courts, in suits against joint or concurrent tortfeasors, have uniformly denied removal. The reasoning of the principal case appears to have approved the action of these courts. *Mayflower Industries v. Thor Corp.*, recently decided by the Court of Appeals for the Third Circuit, which was denied certiorari by the Supreme Court, should be compared with the principal case. Plaintiff in that case sued defendant A, a nonresident of the

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2 Justice Douglas wrote the dissenting opinion and Justices Black and Minton concurred.


4 “... when in any suit ... 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. ...” 36 Stat. L. 1094 (1911), 28 U.S.C.A. §71. Although this provision is now merely a matter of historical importance, it must be understood to appreciate fully the changes made by the new code. An article dealing with the old practice is one by Holmes, “The Separable Controversy—A Federal Removal Concept,” 12 Miss. L.J. 163 (1939).


6 “The distinctions which have heretofore been made in the case law between separate and ‘separable controversies’ and which were held to authorize the right of removal are now to be cast into the limbo of rejected and repealed law.” Butler Mfg. Co. v. Wallace and Tiernan Sales, (D.C. Md. 1949) 82 F. Supp. 635 at 637. A 1950 case, Duffy v. Duffy, (D.C. Iowa 1950) 89 F. Supp. 745 at 747, still talks in terms of finding a “separable controversy ... from the complaint.”


state, for damages from an alleged breach of an exclusive distributorship contract. In the same action the plaintiff alleged that the assumption of the distributorship by defendant B, a resident of the state, constituted a conspiracy by A and B to injure the plaintiff's business and he asked injunctive relief and damages against both. A successfully secured removal of the case, and after the trial court denied a preliminary injunction, the court of appeals on appeal held that there were no separate and independent claims or causes of action and ordered remand of the case to the state court.10 The two cases may be distinguished on the ground that the relief sought in the principal case was in the alternative while the complaint in the Mayflower case asked for relief against both defendants. However, the similarity of reasoning in both cases demonstrates many common points. Both courts emphasized the presence of the two adjectives "separate" and "independent," which they did not feel should be taken as synonymous terms. The use of two adjectives was construed as an expression of congressional intent that there should be a complete absence of underlying connection between the claims in order to have removal. Both courts felt that there could be no absence of underlying connection when the claims asserted arose out of the same "interlocked series of transactions"11 or "operative facts."12 It would appear that whether one claim in the alternative or multiple claims are presented, the burden will be on the party seeking removal to demonstrate that the claims do not have this common background.13 In imposing this requirement, it may be that these two cases have effectively eliminated removal of cases involving in-state and out-of-state defendants to federal courts. Under the most liberal state statutory provisions for joining defendants it is necessary to allege claims arising out of the same transaction or occurrence in order to join.14 Therefore, if the plaintiff has met the statutory provisions for joining defendants, he will have shown that his claims are not separate and independent.

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10 There were three separate opinions rendered by the court. Judge Hastie, in an opinion concurred in by Judge Goodrich, felt that the claims against both defendants were but two aspects of the same economic injury. Judge Goodrich gave further grounds for the court's action. Judge McLaughlin, in a dissenting opinion, felt that there were two distinct wrongs to the plaintiff in the form of breach of contract and conspiracy. Case authority may be found to support either side of the proposition that a breach of, and conspiracy to breach, an exclusive contract constitute two causes of action. Cf. Motley, Green and Co. v. Detroit Steel and Spring Co., (C.C. N.Y. 1908) 161 F. 389 (one cause of action); E. L. Hustig Co. v. Coca-Cola Co., 194 Wis. 311, 216 N.W. 833 (1927) (one cause of action); Mahoney v. Roberts, 86 Ark. 130, 110 S.W. 225 (1908) (two causes of action).

11 Compare Commander-Larabee Milling Co. v. Jones-Hettelater Const. Co., (D.C. Mo. 1950) 88 F. Supp. 476, which allowed removal. It is submitted that this case could not be supported under the test proposed by the principal case.

12 See CLARK, CODE PLEADING, 2d ed., §19 (1947), where a complete discussion is made on permissive joinder provisions. See also Blume, "The Scope of a Civil Action," 42 MICH. L. REV. 257 at 264 (1943).