

# Michigan Law Review

---

Volume 50 | Issue 3

---

1952

## FEDERAL PROCEDURE-REMOVAL JURISDICTION- JURISDICTIONAL ESTOPPEL

Paul M.D. Harrison S.Ed.  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Procedure Commons](#), [Courts Commons](#), [Jurisdiction Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Paul M. Harrison S.Ed., *FEDERAL PROCEDURE-REMOVAL JURISDICTION-JURISDICTIONAL ESTOPPEL*, 50 MICH. L. REV. 475 (1952).

Available at: <https://repository.law.umich.edu/mlr/vol50/iss3/14>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

FEDERAL PROCEDURE—REMOVAL JURISDICTION—JURISDICTIONAL ESTOPPEL  
—Respondent sued petitioner, a Florida corporation, the Indiana Lumbermen's Mutual Insurance Company, an Indiana corporation, and Joe Reiss, a citizen of Texas, in a Texas state court. The complaint asked for relief in the alternative for a fire loss suffered by respondent. On the joint petition of the two corporate defendants, the case was removed to the federal court under section 1441(c) of

the United States Judicial Code.<sup>1</sup> Respondent unsuccessfully moved to remand the case, and, after trial of the case to a jury, a judgment in favor of the respondent was awarded against the petitioner alone. Petitioner's motion to vacate judgment was denied, and this action was affirmed by the circuit court of appeals. On writ of certiorari, *held*, reversed. The majority of the Court concluded that there was no right under the code to remove the case because of the absence of "separate and independent claims or causes of action,"<sup>2</sup> and this being a jurisdictional requirement, the petitioner was not estopped to allege this jurisdictional defect. The dissenting Justices argued that any error in removal which might have occurred was merely an irregularity and petitioner should be estopped from making any protest as to jurisdiction. *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951).

The denial of a motion to remand is not considered an order which will support an interlocutory appeal, but when the issue of removability is coupled with an appealable order or decree, then the lower court's action will be reviewed, since the jurisdiction of the court is in dispute.<sup>3</sup> It is well established that the consent of the litigants will not give a court jurisdiction of a case if it does not have power to deal with the subject matter of the dispute.<sup>4</sup> However, even though removal is improper and the courts do not obtain jurisdiction in that manner, the courts have consistently held that if they would otherwise have original jurisdiction to hear the case, then the error in removal will be considered as a mere irregularity and the judgment will not be disturbed.<sup>5</sup> The dispute between the majority and the dissent in the principal case was in regard to the question of whether the federal court would have had original jurisdiction of the case. The majority answered in the negative, looking at the case from the trial level. It found that the complaint had a citizen of Texas as plaintiff and defendant; and further, it pointed to the fact that the judgment adjudicated the merits of the claim against the resident defendant by decreeing that he was free from liability.<sup>6</sup> The dissent considered the judgment on appeal to be the controlling factor in determining the original jurisdiction of the court. It found, therefore, that the dispute between the petitioner and the respondent satisfied federal diversity

<sup>1</sup> 28 U.S.C. (Supp. IV, 1951) §1441.

<sup>2</sup> This aspect of the principal case is noted in 49 MICH. L. REV. 1236 (1951).

<sup>3</sup> *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 61 S.Ct. 229 (1940); *Mayflower Industries v. Thor Corp.*, (3d Cir. 1950) 184 F. (2d) 537.

<sup>4</sup> *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510 (1884); *Tillman v. Russo Asiatic Bank*, (2d Cir. 1931) 51 F. (2d) 1023; *Wabash R. Co. v. Barbour*, (6th Cir. 1896) 73 F. 513; *Capron v. Van Noorden*, 2 Cranch (6 U.S.) 125 (1804).

<sup>5</sup> *Baggs v. Martin*, 179 U.S. 206, 21 S.Ct. 109 (1900); *Toledo, St. L. & W.R. Co. v. Perenchio*, (7th Cir. 1913) 205 F. 472; *Handley-Mack v. Godchaux Sugar Co.*, (6th Cir. 1924) 2 F. (2d) 435; *Bailey v. Texas Co.*, (2d Cir. 1931) 47 F. (2d) 153; *Carpenter v. Baltimore and Ohio Ry.*, (6th Cir. 1940) 109 F. (2d) 375.

<sup>6</sup> The trial court's judgment provided, "It Is Further Ordered, Adjudged and Decreed that the Plaintiff take nothing as against Defendants, Indiana Lumbermen's Mutual Insurance Company and Joe Reiss, individually and doing business as the Joe Reiss Insurance Agency, and that such Defendants go hence without day with their costs." Principal case at 17.

jurisdiction requirements. Although, as pointed out by the majority opinion,<sup>7</sup> the jurisdiction of the federal court should not be expanded by judicial action, it is questionable whether the result of the principal case has not gone too far. The respondent, after being remanded to the state court, may sue the petitioner individually in the federal court. This will mean that substantially the same questions will be litigated for the second time between the parties. It is submitted that the dissent is correct in calling the error merely procedural and refusing to allow petitioner, who initiated the removal to the federal court, to protest the resulting federal judgment.<sup>8</sup> In any event, the decision by the majority of the court suggests the advisability of allowing an interlocutory appeal on the trial court's action to remand. Such an appeal in this case would have prevented the expense and delay caused by delaying the appeal until the merits of the case had been litigated.

*Paul M. D. Harrison, S. Ed.*

<sup>7</sup> Principal case at 17.

<sup>8</sup> Professor Moore, in analyzing the new Judicial Code, asserts that the former removal provisions were keyed to original jurisdiction, while the new provisions are not so related in all respects. If this is correct, then, under the former provisions, original jurisdiction which would allow retention of jurisdiction regardless of removal errors would be more easily found. This may serve to give the dissent further support in liberalizing the approach to original jurisdiction by looking at the judgment which is on appeal. See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 240 et seq. (1949).