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FEDERAL PROCEDURE-JURISDICTION-REMOVAL UNDER SECTION 1441(C) OF TITLE 28 BY NONRESIDENT DEFENDANT WHERE JOINT TORTS CAUSE A SINGLE INJURY

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FEDERAL PROCEDURE—JURISDICTION—REMOVAL UNDER SECTION 1441(C) OF TITLE 28 BY NONRESIDENT DEFENDANT WHERE JOINT TORTS CAUSE A SINGLE INJURY—Plaintiff, a citizen of Utah, brought a joint action for damages in a state court of Utah against Powell, also a citizen of Utah, and the Denver & Rio Grande Western Railroad Company, a Delaware corporation. Plaintiff

alleged both an assault and battery by Powell in the depot of the railroad company, and negligence of the railroad company in failing to take action to prevent or arrest this assault. The railroad company had the entire action removed to the federal district court under section 1441(c) of the Judicial Code.¹ Upon motion of the railroad company, the claim against it was severed, and eventually compromised and dismissed. Plaintiff then filed a motion to remand his remaining action against Powell, which was denied. After judgment went for Powell, plaintiff appealed. The court of appeals *held*, remanded with instructions to vacate the judgment against Powell and remand this action to the state court. Under section 1441(c) of the Judicial Code,² no "separate and independent claim or cause of action" existed as there was but a single injury for which relief was sought. *Snow v. Powell*, (10th Cir. 1951) 189 F. (2d) 172.

Section 1441(c) of the Judicial Code changed the requirements for removal to the federal courts by nonresident defendants who were joined with defendants whose residence was in the same state as that of the plaintiff. One purpose of this change was to clarify removal and free it from the "separable controversy" doctrine existing under section 71 of the old Judicial Code.³ A second purpose was to curtail the instances of removal by making the requirements more demanding.⁴ No longer was removal by a nonresident defendant only dependent upon having a controversy with the plaintiff "which can be fully determined as between them,"⁵ but under the present code defendant must show a "separate and independent claim or cause of action"⁶ against the plaintiff. The principal case is in accord with this view. Clearly the facts present a "separable controversy" which would have been removable under section 71 of the old Judicial Code.⁷ However, under section 1441(c), as interpreted by the United States

¹ 62 Stat. L. 937 (1948), 28 U.S.C. (Supp. III, 1950) §1441(c). It states in full: "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."

² *Ibid*.

³ See MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE §0.03(37), p. 239 (1949); also Reviser's Notes, 28 U.S.C.A. 1441; *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951); *Mayflower Industries v. Thor Corp.*, (3d Cir. 1950) 184 F. (2d) 537.

⁴ *Ibid*.

⁵ The quoted language comes from 36 Stat. L. 1094 (1911), 28 U.S.C. (1946) §71. The pertinent part of that section is: "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."

⁶ See note 1 *supra*.

⁷ The principal case is very similar to *Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347 (1939). In that case also there was a negligence action joined with an intentional tort. The Court expressly found these claims to be "separable."

Supreme Court in *American Fire & Casualty Co. v. Finn*,⁸ the action must be remanded to the state court. The key words of section 1441(c), which are said to indicate the more narrow approach to removal, are "separate and independent." The emphasis placed on the word "independent" by the principal case coincides with the emphasis placed on this word in the interpretation of this same section by the Supreme Court in the *Finn* case.⁹ In attempting to shed light upon what it would not consider "independent," the Supreme Court, in the *Finn* case, indicated that where a "single wrongful invasion of a single primary right"¹⁰ was alleged, there could be no removal. In the principal case there has been only one injury, and therefore only a "single wrongful invasion of a single primary right." Accordingly, the action would not be "independent."¹¹ In the light of the *Finn* case, section 1441(c) must be interpreted as creating a narrower area of removal jurisdiction. In the case where an action based on negligence is joined with a willful tort, the change becomes most evident. It is unfortunate that this matter must be subjected to a second trial on the merits. It has been suggested that the Judicial Code be amended to allow an interlocutory appeal from an order denying a motion to remand.¹² This suggestion seems worthy of repetition at this time.

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⁸ 341 U.S. 6, 71 S.Ct. 534 (1951).

⁹ *Ibid.*

¹⁰ The full remarks of the Court explaining what it meant by a "single wrongful invasion" are as follows: "single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."

¹¹ Recent cases interpreting these same words are *Bentley v. Halliburton Oil Well Cementing Co.*, (5th Cir. 1949) 174 F. (2d) 788; *Edwards v. E. I. DuPont de Nemours & Co.*, (5th Cir. 1950) 183 F. (2d) 165; *Harward v. General Motors Corp.*, (D.C. N.C. 1950) 89 F. Supp. 170; *Doran v. Elgin Cooperative Credit Assn.*, (D.C. Neb. 1950) 95 F. Supp. 455.

¹² 50 MICH. L. REV. 475 at 477 (1952).