

Michigan Law Review

Volume 51 | Issue 1

1952

FEDERAL PROCEDURE-REMOVAL DENIED TO IMPLEADED PARTY UNDER 28 U.S.C. 1441(c)

Robert G. Russell 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](#), [Contracts Commons](#), and the [Litigation Commons](#)

Recommended Citation

Robert G. Russell S. Ed., *FEDERAL PROCEDURE-REMOVAL DENIED TO IMPLEADED PARTY UNDER 28 U.S.C. 1441(c)*, 51 MICH. L. REV. 115 (1952).

Available at: <https://repository.law.umich.edu/mlr/vol51/iss1/14>

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.

FEDERAL PROCEDURE—REMOVAL DENIED TO IMPLEADED PARTY UNDER 28 U.S.C. 1441(c)—Plaintiff sued to recover indebtedness of \$7000, to foreclose a chattel mortgage, and to enjoin a local bank from permitting the accounts of the debtor to be withdrawn. Defendant then filed a cross-complaint, as authorized by state procedure, against a third party nonresident garnishee to recover damages for breach of contract and money owed in the sum of \$35,000.¹ The cross-defendant removed the case to the United States

¹ The garnishee's connection with the original action is not disclosed by the facts.

district court. *Held*, although the cross-complaint stated a separate and independent cause of action, it could not be the basis of removal since 28 U.S.C. §1441 (c)² contemplates only the removal of claims joined by the plaintiff. *Sequoyah Feed & Supply Co. v. Robinson*, (D.C. Ark. 1951) 101 F. Supp. 680.

Prior to the enactment of 28 U.S.C. §1441 (c), the "separable controversy" provision of 28 U.S.C. §71³ was interpreted by many courts to allow removal at the petition of nonresident intervenors and nonresident cross-complainants when the diversity and amount in controversy requirements were met. Removal was consistently granted at the petition of a new party who was not involved in the original proceeding, who was brought in by cross-bill or cross-complaint, and as against whom the original defendants sought affirmative relief, if the controversy removed could be fully determined between the original defendant and the third party defendant.⁴ Removal of a separable controversy at the petition of a nonresident intervenor was allowed providing the intervenor's claim was adverse to that of the original plaintiff or to the claim of all or some of the original plaintiffs and defendants.⁵ It was generally denied if the intervenor claimed under or was subrogated to the rights of the original plaintiff,⁶ if he sought primarily to enforce his own claim and only incidentally to oppose that of the original plaintiff,⁷ if he appeared only to protect the rights of the original defendant,⁸ or if the remaining defendants were necessary parties to the controversy whose removal was sought.⁹ It appears then that under section 71 a litigant was often considered to be a defendant within the intendment of the removal act although not named as such at the inception of the suit. The principal case, however, indicates that under section 1441 (c) a "separate and independent claim or cause of action" may be removed only at the petition of a defendant who is named as such at the commencement of the suit. Yet a federal district court in New York,¹⁰ subsequent to the enact-

² 28 U.S.C. (Supp. IV, 1951) §1441 (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, 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."

³ 28 U.S.C. (1940) §71: ". . . 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. . . ."

⁴ *Habermel v. Mong*, (6th Cir. 1929) 31 F. (2d) 822, 280 U.S. 587, 50 S.Ct. 37; *Consolidated Textile Corporation v. Iserson*, (D.C. N.Y. 1923) 294 F. 289.

⁵ *Bronson v. St. Croix Lumber Co.*, (C.C. Minn. 1888) 35 F. 634.

⁶ *Chicago v. Gage*, (C.C. Ill. 1875) 5 Fed. Cas. No. 2,664, *affd. sub nom. Ayers v. Chicago*, 101 U.S. 184 (1879); *Nash v. McNamara*, (C.C. Nev. 1906) 145 F. 541.

⁷ *In re San Antonio & A.P. Ry. Co.*, (C.C. Tex. 1890) 44 F. 145.

⁸ *Bronson v. St. Croix Lumber Co.*, *supra* note 5.

⁹ *Thorn Wire Hedge Co. v. Fuller*, 122 U.S. 535, 7 S. Ct. 1265 (1887); see *First National Bank v. Merchants' Bank*, (C.C. Ga. 1888) 37 F. 657 (removal allowed by non-resident intervenor where original defendant was only a nominal party).

¹⁰ *President and Directors of Manhattan Co. v. Monogram Associates*, (D.C. N.Y. 1949) 81 F. Supp. 739.

ment of the present statute, permitted the removal of a separate claim to a federal court by an impleaded third party. Removal was allowed because diversity existed between the original defendant and the third party defendant and because the controversy between them was wholly separate and distinct from that stated in the pleadings between the original parties. It would seem that that court in reaching this result ignored the phrase "is joined" in section 1441(c), which was interpreted to mean, even before the principal case, joined in the original complaint.¹¹ Since the right to remove is purely statutory,¹² and since the Supreme Court has declared that courts by interpretation should not defeat the purpose of Congress to limit removal jurisdiction,¹³ it would seem likely that the principal case rather than the New York case will be followed, with the result that section 1441(c) will not be construed to include claims other than those contained in the plaintiff's complaint.

Robert G. Russell, S.Ed.

¹¹ *Snow v. Powell*, (10th Cir. 1951) 189 F. (2d) 172.

¹² *Great Northern R. Co. v. Alexander*, 246 U.S. 276, 38 S. Ct. 237 (1918); *Bradley v. Halliburton Oil Well Cementing Co.*, (D.C. Okla. 1951) 100 F. Supp. 913.

¹³ *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951).