

Proskauer, J., in the present case, declined to follow those cases, on the ground that the Uniform Act had changed the New York law of fixtures.

*Kohler Co. v. Brasum*,<sup>32</sup> gives some attention to the section on fixtures under their present laws,<sup>33</sup> though not resting the decision upon this provision. Nothing unexpressed in the two above cases is mentioned.<sup>34</sup>

These three cases, which are probably examples of what may be expected in the future, clearly reveal the beneficial effect of the adoption of Section 7 of the Uniform Act in outlining an adequate and practical method of adjusting the conflicting rights of conditional sellers of chattels to become annexed to the realty and subsequent purchasers of the realty. This provision is without a doubt one of the finest recent developments in the law of sales, and its adoption should be heartily endorsed everywhere.

D. A. MACPHERSON, JR., '29.

<sup>32</sup> 226 N. Y. S. (60) (Dec., 1927).

<sup>33</sup> *Supra*, note 25.

<sup>34</sup> For a full discussion of the Kohler case and the Cohen case, see Cornell Law Quarterly, 13:435-8.

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## REMOVABILITY WHERE RESIDENT CO-DEFENDANT IS NOT SERVED

In *Rodgers v. Gaines Bros. Co.*<sup>1</sup> a resident of Missouri brought an action for personal injuries in the state court, alleged to have been caused by the joint negligence of the defendant corporation, organized in Oklahoma, and the defendant foreman, a citizen of Missouri. The corporation was alleged to have furnished an unsafe wagon and the foreman was alleged to have directed the plaintiff to drive it in a dangerous place. The resident foreman was not served with summons. The defendant corporation filed a petition for removal to the federal court, on the ground of diversity of citizenship. The petition was denied, and the defendant excepted. During the taking of the defendant's evidence, the plaintiff dismissed as to the resident foreman. It was held that the petition for removal had been properly denied.

The time when a cause of action such as the one in the principal case becomes removable is a question which the courts have fairly definitely settled, but one which is still likely to trip up the unwary lawyer.<sup>2</sup> It is the purpose of this note to state the rules which the courts have formulated.

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<sup>1</sup> 295 S. W. 492 (Mo. App.).

<sup>2</sup> Of course, in many cases in which it appears that the lawyers had been caught asleep it is possible that they had had no serious desire to remove the cause; that the point had originally been raised solely for the purpose of delay; and that they paid no more than slight attention to it until after the case had been lost in the trial court.

Where the state law permits a master and servant to be sued jointly for injuries caused by the latter's negligence, the plaintiff has the legal right to treat the cause as a joint one,<sup>3</sup> whatever his motive is in so doing.<sup>4</sup> The liability is joint and several, and a defendant is not to be heard to say that the plaintiff must treat the defendants as severally liable in order to facilitate the removal of the cause. Still more established is the rule that where the plaintiff alleges in his petition (as in the principal case) that the negligence of the master and servant concurred in producing the injury, though they might be separately sued, the plaintiff has the right to sue them jointly.

In *Cincinnati N. O. & T. P. R. Co. v. Balon*,<sup>5</sup> a resident of Kentucky brought suit against a nonresident railroad company and its resident engineer for injuries alleged to have been caused by the negligence of both defendants (although in reality it was the negligence of the servant, for which the master was liable on the doctrine of *respondet superior*). The court denied the petition of the railroad company for removal, saying: "Where [a state] has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury and the plaintiff, in due course of law and in good faith, has filed a petition electing to sue for a joint recovery given by the laws of the state, we know nothing in the federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident therein, properly joined under the Constitution and laws of that state wherein it is conducting its operations, and is duly served with process."

The principle that "a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint"<sup>6</sup> is the clue to the problem raised by the principal case. Its importance is due to the fact that in such cases the cause cannot be removed to the federal court on the ground of diversity of citizenship unless all the defendants join in the petition for removal and are all nonresidents.<sup>7</sup> Hence, in every

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<sup>3</sup> *Alabama G. S. Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. Ed. 441, 26 Sup. Ct. 161.

<sup>4</sup> The fact that the plaintiff's motive in the joinder was to prevent a removal of the cause by the nonresident defendant does not affect the right to removal. *Chicago, R. I. & P. R. Co. v. Schwyhart*, 227 U. S. 184, 57 L. Ed. 473, 33 Sup. Ct. 250, and the numerous cases cited in note 362 to Sec. 71, Title 28, U. S. C. A. That the resident defendant is pecuniarily irresponsible does not show a fraudulent joinder to prevent removal. *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136, affirmed 229 U. S. 102, 57 L. Ed. 1090, 33 Sup. Ct. 584.

<sup>5</sup> 200 U. S. 221, 50 L. Ed. 448, 26 Sup. Ct. 166.

<sup>6</sup> *Powers v. Chesapeake & Ohio R. Co.*, 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. 264.

<sup>7</sup> *Chicago, R. I. & P. R. v. Martin*, 178 U. S. 245, 44 L. Ed. 1055, 20 Sup. Ct. 854; *Highway Const. Co. v. McClelland*, 14 Fed. (2d) 406. There is a line of cases apparently inconsistent, in which one defendant was not served with process, and yet the other defendant was granted removal; but in these cases all the defendants were nonresidents. *Tremper v. Schwabacher*, 84 Fed. 413; *Keenan v. Gladys Belle Oil Co.*, 11 Fed. (2d) 418; *Bowles v. H. J. Heinz Co.*, 188 Fed. 937; *Hunt v. Pearce*, 271 Fed. 498; and *Community Bldg. Co. v. Maryland Casualty Co.*, 8 Fed. (2d) 678. In the last cited case, the court said: "While

such case, the inquiry is: Is a resident defendant a *party* to the action? Much depends upon the statutes of the particular state involved, but in general it may be said that one is a party defendant from the moment the plaintiff commences his action against him by filing his petition, "*irrespective of the service of the writ of summons upon him.*"<sup>8</sup> When one realizes that the service of summons has no bearing upon the question of removal, up to the moment of trial, the problem is much simplified.

It is obvious that when the plaintiff voluntarily dismisses the action as to the resident defendant, that defendant is no longer a party to the cause; and this is true whether or not he has been served. There would be no doubt that the cause would thus become immediately removable were it not for the words of the present federal removal statute:

Any party entitled to remove any suit . . . may make and file a petition [for removal] at the time, or any time before the defendant is required . . . to answer or plead to the declaration or complaint of the plaintiff.<sup>9</sup>

When the case stated in the plaintiff's petition is a removable one, the defendant should file his petition for removal at or before the time he is required to make any defense whatever, in accordance with the plain meaning of the statute.<sup>10</sup> "But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all."<sup>11</sup> To so hold would work an unnecessary injustice. Besides, the statute reads "a party *entitled* to remove." As long as the resident defendant is a party to the action, the nonresident defendant is not entitled to remove the cause, and hence cannot successfully file a petition for removal. Therefore, since cases becoming removable after the defendant has pleaded to the complaint or declaration were not expressly provided for in the statute, the courts have engrafted on the statute rules to fit the circumstances, rules which as nearly as possible are within the spirit of the removal act.

In *Powers v. Chesapeake & Ohio R. Co.*,<sup>11a</sup> three resident employees were joined with the nonresident railroad company. There was service on the railroad company and on two resident defendants, but none on

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there are some early decisions and expressions in the textbooks to the effect that all the defendants, whether or not they have been served and brought within the jurisdiction of the court, must join in the petition for removal, the weight of authority, and we think the better reasoning, sustains the rule that defendants over whom the court has not acquired jurisdiction may be disregarded in removal proceedings, and that the defendants who have been summoned must of necessity be allowed to exercise their right of removal."

<sup>8</sup> *Rodgers v. Gaines Bros. Co.*, 295 S. W. 492 (Mo.).

<sup>9</sup> Judicial Code Sec. 72, Title 28.

<sup>10</sup> *Edrington v. Jefferson*, 111 U. S. 770, 28 L. Ed. 594, 4 Sup. Ct. 683.

<sup>11</sup> *Powers v. Chesapeake & Ohio R. Co.*, 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. 264.

<sup>11a</sup> *Supra*, note 11.

the third resident defendant. A petition for removal was filed, which was denied, and the case was also remanded by the federal court. Then the railroad company answered. A year after the first petition for removal, and when the case was called for trial before a jury in the state court, the plaintiff discontinued the action against the individual defendants. The railroad company filed a second petition for removal. It was held that a petition for removal filed as soon as the case becomes a removable one is filed in time, although it is after the time when the defendant is required to answer. The court said, *per* Justice Gray:

"To construe that provision as restricting to the time prescribed for answering the declaration the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute, but it would utterly defeat all right of removal in many cases . . . The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to time, must when necessary to carry out the purpose of the statute yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removal case in the court in which it is brought."

*Powers v. Railway Company* is the leading case on this problem, and ever since it was decided the courts have uniformly held that a voluntary dismissal as to a resident defendant gives the nonresident defendant a right to file a petition for removal at once. It is only when the cases diverge slightly from a dismissal which is voluntary one pure and simple that new battlegrounds arise. Suppose, for example, that the resident defendant has not been served, but the plaintiff proceeds to trial against the nonresident defendant alone. Is the former still a party to the action, so that the cause cannot be removed?

In *Berry v. Railway Company*,<sup>12</sup> the plaintiff sued two railroads who were jointly and severally liable for the death of plaintiff's intestate. One defendant was a resident and one was a nonresident. No process was served on the resident defendant. When the case was called for trial, the nonresident appeared and moved that the plaintiff be required to elect whether she would dismiss as to the resident defendant or continue the cause for service. The plaintiff declined to do either, but requested that the cause proceed to trial as to the nonresident defendant, whereupon the latter filed a petition for removal. It was held that the plaintiff's election to proceed to trial against the nonresident defendant alone operated as a severance of the controversy and entitled the nonresident railroad company to remove the cause. The court commented on various cases, including the Powers case, and said: "It is but a step further, and it seems a logical one, that if a plaintiff voluntarily abandons the joint character of his proceedings and elects to pursue the only defendant who has been drawn within the jurisdiction

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<sup>12</sup> 118 Fed. 911.

of the court upon a liability which is either joint or several, at his election, there arises at the moment of the election such a change in the structure of the controversy as confines the inquiry to the citizenship of the parties then before the court."

Another case to the same effect is *Golden v. Northern Pacific R. Co.*<sup>13</sup> Here the resident defendant who had not been served and had not made an appearance, was actually present at the trial as a witness. No question arose at the time the plaintiff announced he was ready for trial; but the court held that the announcement by the plaintiff that he was ready for trial, the nonresident defendant knowing that the resident was not subject to the jurisdiction of the court, amounted to notice to the nonresident that the plaintiff had determined to proceed against him alone, thus converting the action into a several one against the nonresident "as effectively as if it had originally been made the sole defendant."

In this connection, Section 1406 R. S. Mo. 1919 is relevant. It provides that where there are several defendants, some of whom do not appear and are neither notified nor summoned, the plaintiff may proceed against those, if any, who do appear or are summoned, and dismiss his petition as to the others; or he may continue the cause until the next term. As the principal case points out, "the clear import of this statute is that, after an action has been duly commenced against a party defendant, he is a party to the action, even though not served," but ceases to be a party when the plaintiff evidences his intention of abandoning the cause of action against him by electing to proceed to trial without him, or by voluntarily dismissing as to him.

A line of cases diverging still farther from the Powers case is those in which the cause of action against the resident defendant is dismissed or is shown to be nonexistent in some other manner than through the agency of the plaintiff. Of course, in these cases the defendant has been served. It appears to be definitely established that where the plaintiff has not acquiesced in such action and still regards the resident as a party, the nonresident defendant is not entitled to remove the cause.

In *American Car Co. v. Kettelhake*,<sup>14</sup> a demurrer by the resident defendant was sustained, the plaintiff excepting, and saving his exception. The plaintiff then asked to take involuntary nonsuit, with leave to set it aside, which request was granted. It was held that the nonresident defendant could not remove the cause. The court said: "Where there is a joint cause of action against defendants residents of the same state with the plaintiff and a nonresident defendant, it must appear to make the case a removable one as to a nonresident defendant because of dismissal as to resident defendants that the discontinuance as to such defendants was *voluntary* on the part of the plaintiff, and that such action has taken the resident defendants out of the case, so as to leave a controversy wholly between the plaintiff and the nonresident defendant." In other words, the resident defendants must have completely disappeared from the case; and as long as the

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<sup>13</sup> 39 Mont. 435, 104 Pac. 549, 34 L. R. A. (N. S.) 1154.

<sup>14</sup> 236 U. S. 311, 59 L. Ed. 594, 35 Sup. Ct. 355.

plaintiff has the right to have the ruling reviewed by the appellate court, the resident defendant remains a party to the action.

In *Southern R. Co. v. Lloyd*,<sup>15</sup> two railroads, lessor and lessee, were sued jointly in North Carolina for negligence. One of the defendants was a Virginia corporation and the other was organized in North Carolina. A petition for removal on the ground of diversity of citizenship was denied. At the close of the plaintiff's testimony the court intimated that there was no cause of action against the North Carolina railroad, and upon this intimation a nonsuit was taken as to that company. A second petition for removal was then filed, which was denied, the court saying: "The order of nonsuit in the trial court as to the North Carolina Railroad Company, appealed from by the plaintiff with the right of review in the Supreme Court of the state, did not make the cause removable as to the Southern Railway Company."

And in *Alabama, Great Southern R. Co. v. Thompson*,<sup>16</sup> it was said: "The right to remove depended upon the case made in the complaint against both defendants jointly, and that right in absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action."<sup>17</sup>

At first blush, it seems that the courts have set up an artificial distinction between voluntary and involuntary dismissals; but there is always the possibility that the trial court erred in its ruling, and until that point is definitely settled, it cannot be said that the resident defendant is no longer a party to the action. Hence, until a final ruling, the plaintiff can continue to regard the cause as a joint one.

The importance of the foregoing rules, as a practical matter, lies in the indication of the time when the petition for removal should be filed. If at the time the petition for removal is filed the cause is not removable, the petition will not succeed, no matter what happens afterwards,

<sup>15</sup> 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210.

<sup>16</sup> 200 U. S. 206, 50 L. Ed. 441, 26 Sup. Ct. 161.

<sup>17</sup> And see *Moeller v. Southern Pac. Co. et al.*, 211 Fed. 239; and *Bailey v. Southern R. Co.*, 112 So. 203 (1927). *Whitcomb v. Smithson*, 175 U. S. 635 was an action against two railroads jointly. The court granted a motion to instruct the jury to return a verdict in behalf of one railroad. The other defendant immediately filed a petition for removal; this was denied, the court saying, "the contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company, the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal which was not concluded by the previous action of the Circuit Court (denying an earlier petition for removal). This might have been so if when the cause was called for trial in the state court plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all defendants (citing the Powers case). But that is not the case. The joint liability was insisted on here to the close of the trial, and the non-liability of the railway company was ruled *in invitum* . . . . This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent . . . . The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."

and the appellate court, like the trial court, will consider the application as of the time it was filed.<sup>18</sup>

In *Louisville & Nashville R. Co. v. Wangelin*<sup>19</sup> (a case involving a separable controversy, but the principle of which is applicable) the court said: "The question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court *at the time of the filing of the petition for removal.*"<sup>20</sup>

In the principal case, the court held that the resident defendant was a party to the action, although not served; hence, a petition for removal then filed was of necessity denied. When the plaintiff elected to proceed to trial against the nonresident alone, the case became removable, but the defendant waived his right of removal by not filing a new petition at once. The court stated the rule concisely, as follows: "The right of appellant to have removed this case must be determined *as of the time of the filing of its petition therefor.*"<sup>20</sup>

The rule of the principal case is well stated in the syllabus to *Morgan's L. & T. R. & S. S. Co. v. Street*<sup>21</sup> in the following words: "A nonresident defendant who failed to request the court to suspend the trial to enable him to prepare a bond and application for removal of the action to the federal court on the dismissal of the action as to the resident defendant, but who continued in the trial, and took chances with the jury, waived his right of removal to the federal court."

Assuming, then, that a right to remove arises after answer has been made and that a new petition for removal must be filed, what is the time within which it must be filed? It was said earlier in this note that no express provision covers this point; but *Powers v. Railroad Co.*, *supra*, intimated that it should be filed as soon as the cause becomes removable. Although the question does not often arise, the better doctrine appears to be to construe this strictly, and to narrow the time limit as much as possible.

In *Fogarty v. Southern Pacific Co. et al.*,<sup>22</sup> the federal court was very liberal. The plaintiff, having given notice that he would appear on Feb. 7, 1903, to move that the case be set for trial, the plaintiff appeared, and moved the court dismiss as against the resident defendant. This was done, and entered in the minutes, and the case was set for March 9. Defendant was unrepresented on that occasion and was not given actual notice of the dismissal. On Feb. 13, the defendant's attorney made a verbal request of the plaintiff's attorney for a change in the time fixed for trial, which request was not acceded to. Thereafter,

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<sup>18</sup> "It will be perceived that in *Powers v. Railway Company*, *supra*, two applications for removal were made; they were severally denied, and the record was filed in the Circuit Court of the United States in each instance. Remand was granted on the first removal and denied as to the second. Plaintiff voluntarily discontinued his action against the co-defendants before (the second petition was filed) leaving the case pending between citizens of different states." *K. C. Sub. Belt R. Co. v. Herman*, 187 U. S. 63, 47 L. Ed. 76, 23 Sup. Ct. 24.

<sup>19</sup> 132 U. S. 599, 33 L. Ed. 473, 10 Sup. Ct. 203.

<sup>20</sup> Italics ours.

<sup>21</sup> 57 Tex. Civ. App. 194, 122 S. W. 270. The syllabus paragraph is from the report in the Southwestern Reporter. <sup>22</sup> 121 Fed. 941.

nineteen days subsequent to the dismissal, the defendant filed a petition for removal. It did not appear when actual knowledge of such dismissal was first acquired. The court granted the petition, saying, "Nor, from the facts appearing, can it be properly held that the application for removal of the action was not made by the defendant company within a reasonable time after its right of removal arose."<sup>23</sup>

The strict view is taken in *Golden v. Northern Pacific R. Co.*<sup>24</sup> The petition for removal was filed on the second day of the trial, at the close of the plaintiff's evidence in chief. It was held that the petition came too late.<sup>25</sup> The case is interesting as illustrating an attempt made by the defendant's attorney to conceal his negligence in failing to apply for removal in time. Before filing the petition, the attorney stated to the court that the resident defendant was then in court and could be served and asked whether it was the intent of the plaintiff's counsel to serve him and have the action proceed against both defendants jointly. The plaintiff's counsel said they intended to have service at their own pleasure. Then the petition was filed, on the theory that the plaintiff had then elected to sever the action. But the court held that the case had become removable when the plaintiff elected to proceed against the nonresident defendant alone who had been served; and no petition having been filed, the point was waived.

The cases may be distinguished on their facts, since in the Fogarty case, the cause had not yet come up for trial. Whether this is a distinction the Supreme Court will recognize remains to be seen, but the clear import of the Supreme Court cases is in favor of the Golden case.<sup>26</sup> It would seem that if a choice must be made, the Golden case is the better of the two. The courts permit the application to be filed, not on the authority of any specific statutory mandate, but on grounds of fairness, which would also require that this privilege be exercised as soon as possible.

The following rules appear as the result of this inquiry:

(1) Where the plaintiff's petition states a joint cause of action against a resident and a nonresident defendant, and there is no separable controversy, the cause is not removable; (2) But if the plaintiff voluntarily dismisses as against the resident defendant or elects to proceed to trial without him, the cause becomes immediately removable; (3) A petition filed before that time will not be considered, even though the cause has since become removable; a petition for removal, in order to succeed, must be filed after the cause becomes removable; (4) And this petition must be filed as soon as the circumstances of the case permit.

JOSEPH NESSENFELD, '29.

<sup>23</sup> This case was approved and followed in *Markey v. Chicago, M. & St. P. R. Co.*, 171 Ia. 255, 153 N. W. 1053, where the application for removal was filed thirteen days after the dismissal.

<sup>24</sup> Note 13, *supra*.

<sup>25</sup> And see *Aetna Indemnity Co. v. City of Little Rock*, 115 S. W. 960, where the petition for removal was filed after judgment, nine days after the dismissal.

<sup>26</sup> *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959, 25 Sup. Ct. 577; *Fritzen v. Boatmen's Bank*, 212 U. S. 364, 53 L. Ed. 551, 29 Sup. Ct. 366.