1968

Federal Procedure (1959-1967)

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Federal Procedure

10. A J59 species of dogwood grows on the western slopes of the Blue Ridge Mountains in Virginia that is specially adapted to the manufacture of spindles, used in weaving. This wood is cut into "checks", cured and prepared for market by persons living in the locality in which it is grown, and shipped by them to various parts of the United States. In order to better business conditions, Adams, Brown and several other large producers organized an association known as the Dogwood Producers Ass. This Association negotiated all contracts for the sale of the "checks," and in conjunction with the purchasers fixed the price to be paid, and it was agreed between the Association and the purchasers that, in consideration of the undertaking on the part of the Association and its members to supply all the "checks" needed, the several purchasers would not buy "checks" from other producers. The result of this was that Welch, who was also engaged in producing dogwood "checks," was unable to sell his product which he had formerly disposed of to mills located in New England and Southern States. Welch brought a civil action in the District Court of the United States for the Western District of Virginia against the Association and each of its members, seeking to recover $500 compensatory damages, and $1,500 punitive damages. Process was served on the Association by delivering a copy thereof to Adams, its President, and personal service was had on each member of the Association.

The complaint alleged the facts above set out and sought a recovery against the Association and each member thereof under an act of Congress commonly spoken of as the Sherman Act, claiming that the contract between the Association and the purchasers constituted a contract and conspiracy in restraint of trade.

The defendants and Welch all lived in the Western District of Virginia.

The defendants moved the court as follows:

(1) To dismiss the action as to the Association because it was an unincorporated voluntary association.

(2) To quash the attempted service of process on the Association.

(3) To dismiss the action as to all the defendants because they and the plaintiff were all citizens of the Western District.

(4) To dismiss the action as to all defendants because the amount in controversy was not sufficient to confer jurisdiction on the Federal Court.

(5) To dismiss the action because it was not one cognizable by the Federal Court.

How should the court rule on each motion?

(FEDERAL PROCEDURE) Motion overruled in each case

(1) Because Section 17(b) of the Federal Rules of Civil Procedure provides that an unincorporated association may sue or be sued in its common name when a federal question is involved.

(2) Because personal service on the President and each member is the best possible service.

(3) Because the residence of the parties is immaterial for jurisdictional purposes when a federal question is involved and in this case the Western District of Virginia is the proper venue.

(4) Because Title 15, section 15 of the United States Code expressly provides for original jurisdiction in the federal district courts regardless of the amount in controversy.

(5) Because a regulation of interstate commerce by Congress is cognizable in federal courts under the Constitution.

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8. On Novemver 2, 1958, Payne of Florida brought suit in the proper Florida state court against Dell of Florida, Elk of Georgia, and Felt of Alabama. Payne stated a cause of action for $15,000 in tort for personal injuries jointly against all of the defendants. Each defendant at once filed an answer in denial of all material allegations of the complaint. On November 2,1959, one week before the case was set for trial, Payne voluntarily dismissed the suit as to Dell of Florida. Thereupon, Elk of Georgia at once filed in the proper Federal District Court a petition for removal thereto of the cause on the ground of diversity of citizenship.

Should the petition for the removal be granted?

(FEDERAL PROCEDURE) No. The petition could not have been granted while a Florida citizen was on each side. After the dismissal of Dell the case was removable provided both Elk and Felt join in the petition. Since Felt has not joined in such a petition it is still not removable. See 116 U.S.408. Since joint tort liability is involved the action against Elk is not a separate and independent action from that against Felt.

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9. The Pine and Oak Lumber Co.,Inc., a New York corporation, consults you concerning its claim against the Piedmont Building and Construction Company,Inc., a Virginia corporation, with its principal place of business in Charlottesville,Va. You are advised by your client that it had shipped several carloads of lumber to the latter company pursuant to its orders, and that Company had refused to pay for the lumber, claiming that it had such imperfections as to render it worthless. It is the desire of your client that an action be commenced in its behalf in the United States District Court against the Piedmont Building and Construction Co.Inc., to recover the sum of $32,000, the agreed purchase price, and it is further the desire of your client to have a jury trial.

(1) What steps should you follow(a)to commence the action,and (b) to obtain a jury trial for your client?

(2) Assume that an action had been properly commenced by your client in the Federal District Court and that counsel for defendant has concluded that your initial pleading does not state a good cause of action,(a) what pleading, if any, should be filed by counsel for the defendant, and (b) within what time should it be filed?

(FEDERAL PROCEDURE)1)(a) The action should be commenced by filing a complaint with the court. (Rule 3) (b) Rule 38 (b) reads in part: Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

2)(a) Rule 7(c) abolishes demurrers, pleas, and exceptions for insufficiency of a pleading. The proper procedure would be either to serve an answer containing a motion to dismiss or to move the court to dismiss the case for failure to state a claim upon which relief can be granted. See Rule 12(b). 2)(b) If an answer is served the time limit is within 20 days after the service of the summons and complaint upon the defendant. If defendant makes no motion to dismiss in his answer, the objection of failure to state a claim upon which relief can be granted may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits. See Rule 12(h).

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9. General Explosives, Inc., is a New Jersey corporation with its main office and only place of business in Hopewell, Va. One of its trucks ran over and seriously injured Pedestrian in Hanover County,Va. Pedestrian brought an action in the Circuit Court of Hanover County to recover $50,000 damages from General Explosives. The defendant consults you as to its right to remove the action to the United States District Court. How ought you to advise it?

(FEDERAL PROCEDURE) It has no such right whether or not Pedestrian is a resident of Virginia. Under Section 1332 of the Judicial Code(28 U.S.C.A.1332) for the purposes of removal "A corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Thus if Pedestrian is a citizen of Virginia there is no diversity, and if he is not, and is nevertheless satisfied with a Virginia court the defendant resident cannot remove.

8. Pearson, a resident of Pennyslvania, visited Richmond for the purpose of attending a sales conference and, while crossing Grace St., he was struck and injured by an automobile driven by Benton, a resident of Delaware. Pearson immediately engaged a Richmond attorney, who instituted an action against Benton in the United States District Court for the Eastern District of Virginia, Richmond Division, seeking damages in the amount of $25,000. Process was served on Benton just as he was checking out of the Hotel Richmond. When Benton failed to file any responsive pleadings, the action proceeded to trial which resulted in a $10,000 judgment by default being entered against him.

Pearson then sued Benton on the default judgment in the United States District Court for Delaware, in which district Benton resides. Benton filed his responsive pleadings in which he contended(1)that the judgment against him in Virginia was void because the Federal District Court in Virginia lacked jurisdiction,(2)that the judgment against him was void because the District Court in Virginia had no venue of the action,and(3)that Pearson was guilty of contributory negligence.

How should the District Court of Delaware rule on each of these defenses in acting on Pearson's motion to strike them out?

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(FEDERAL PROCEDURE) All these defenses should be stricken.(1)Since there was diversity of citizenship and over $10,000 involved the Federal Courts had potential jurisdiction or jurisdiction over the persons and subject matter.(2)While the proper venue is that of Pennsylvania or Delaware(where either the plaintiff or defendant resides) venue is waived unless objected to.(3)In order to rely on the defense of contributory negligence the defendant must indicate in his answer that such is one of his defenses. Since that was not done in this case the matter is now res adjudicata.

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10. Fry, a resident of West Virginia, brought an action in the Circuit Court of Logan, West Virginia, against Power Company to recover damages for personal injury. Power Company by reason of diversity of citizenship(it being a Virginia corporation) removed the action to the District Court of the United States for the Southern District of West Virginia. Then Power Co., before the service of its answer, moved ex parte for leave to serve a summons upon Coal Company, also a Virginia corporation doing business in West Virginia, as a third party defendant. Power Company contended that the primary negligence causing the injuries sustained was that of Coal Company. The leave was granted and process duly executed on Coal Company. Counsel for Coal Company promptly moved to dismiss on the grounds that Power Co., and not Coal Company had been sued by Fry. How should the court rule on the motion to dismiss Coal Co.?
(FEDERAL PROCEDURE) Coal Company's motion should be denied. Rule 14(a)Federal Rules of Civil Procedure reads in part, "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." It is immaterial that this third party practice brings in parties who do not have diversity of citizenship.

7. On Dec.1,1962 John Apple, a resident of Charlotte, North Carolina, sued Albert Duff, a resident of Richmond, in the U.S. District Court for the Eastern District of Virginia. Apple's complaint recited two causes of action. The first alleged that Duff had used insulting words concerning Apple in a speech made by Duff on June 20, 1962, and asked for $20,000 as damages resulting therefrom. The second cause of action asserted that Duff had breached a contract made with him on May 15,1962, providing for the sale of certain real property to Apple, and asked for the recovery of $15,000 as damage resulting from the breach. Duff now seeks your advice on whether he can properly move to dismiss Apple's complaint on the ground of a misjoinder of causes of action. What should your advice be?
(FEDERAL PROCEDURE) He cannot. Federal Rule of Civil Procedure 18(a) reads in part, "The plaintiff in his complaint * * * may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party." Note: By Rule 42(b)the court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim.

7. In an action pending in the United States District Court for the Western District of Virginia, Herdsman, a citizen of Texas, sought to recover from Rancher, a citizen of Virginia, $20,000 as the purchase price of cattle shipped pursuant to a contract dated April 1, 1963. Rancher filed an answer averring payment of the purchase price, and he also filed a counterclaim for the recovery of $5,000 for an alleged breach of an express warranty respecting that shipment of cattle. Rancher filed another counterclaim to recover damages in the amount of $4,000 for an alleged breach of a written contract for the sale of other cattle, such contract bearing date November 15, 1962.

Herdsman consults you and inquires whether Rancher may properly assert his counterclaims in this action. What should you advise him?

(FEDERAL PROCEDURE) I would advise Herdsman that Rancher may properly assert his $5,000 counterclaim. In fact, if he does not do so, he will lose it. Rule 13(a) reads in part, "COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim ***". Since the $4,000 offset arose out of a different transaction this counterclaim is only a permissive one under Rule 13(b), and cannot be asserted against Herdsman as it is not sufficient in amount to satisfy jurisdictional requirements of diversity suits since it is in the nature of an independent suit for $4,000.

10. You have been retained by Duncan to sue Elder for damages for breach of contract, and since your case meets all jurisdictional requirements, you have proceeded in the United States District Court for the Eastern District of Virginia. The case is very complicated, and you have concluded that you need more information than that which plaintiff has been able to give you and, also, that the contract with numerous supplemental agreements would require complicated proof if its existence and validity were questioned. You have filed your complaint, and among other things, you want to accomplish the following:

(a) Obtain the names of witnesses to certain occurrences and obtain certain factual information as to procedures used in various departments of Elder's business.

(b) Ascertain what Elder, himself, and his superintendent can be expected to testify at the trial in relation to his dealings with Duncan.

(c) Obtain certain work records, statements, and report which you believe to be in Elder's possession so that you can compare them with Duncan's records.

(d) Establish the existence of the contract and the numerous supplemental agreements without the necessity and expense of having a large number of necessary witnesses to establish the formal proof at trial.

State what procedure you would follow to accomplish the above, either separately or collectively.

(FEDERAL PROCEDURE)(a) I would serve Elder with written interrogogatories pursuant to Rule 33. This rule requires the person upon whom they have been served to answer them "separately and fully in writing under oath."

(b) I would follow the procedures laid down in Rules 26 and 30 under which "Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence ***".

(c) I would follow the procedure laid down in Rule 34 under which "Upon motion of any party showing good cause therefor ***the court in which an action is pending may(1)order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters *** not privileged, which constitute or contain evidence *** and which are in his possession, custody, or control."

(d) I would follow the procedure laid down in Rule 36 by which "a party may serve upon any other party a written request for the admission by the latter of the genuiness of any relevant documents described in and exhibited upon the request or of the truth of any relevant matters of fact set forth therein."

6. J64 James White of Baltimore, Maryland, purportedly executed a deed of trust to Henry Brown, Trustee, of Richmond, Virginia, to secure ratably for John Williams of Richmond, Virginia, the payment of a note for $18,000 and for Thomas Hanson of Elkton, Maryland, the payment of a note for $12,000. The property embraced in the deed of trust was real estate in Montgomery County, Maryland, worth $40,000. Default was made in the payment of both notes and Williams requested the Trustee to sell under the deed of trust. The Trustee promptly notified White of his intention to foreclose, and was informed by White that the purported deed of trust was a forgery and was never executed by him. Brown, as Trustee, then brought an action in the United States District Court in Baltimore to effect the foreclosure, joining Williams as a party plaintiff and White and Hanson as parties defendant. White, by appropriate pleadings, moved the Court:

(a) To make Hanson a party plaintiff; and

(b) Then to dismiss the action. How ought the Court to rule on each motion?

(FEDERAL PROCEDURE) Each motion should be sustained. A complainant cannot obtain federal jurisdiction in a diversity case by misaligning necessary parties. The plaintiffs here are the trustee, and the two deed of trust beneficiaries, i.e. Brown of Virginia and Williams of Virginia and Hanson of Maryland and the defendant is White of Maryland. When properly aligned all parties plaintiff do not have a different state residence than all parties defendant and hence the federal courts do not have jurisdiction.

8. D64 Plaintiff, a citizen of New Jersey, suffered personal injuries in Pulaski County, which is in the Western District of Virginia, when the automobile he was driving was in collision with one driven in a negligent manner by Defendant, a citizen of Florida. There was some evidence that Plaintiff was guilty of contributory negligence. Plaintiff instituted a civil action against Defendant in the United States District Court for the Western District of Virginia for $25,000, alleging the diversity of citizenship. Defendant employs you to represent him, and asks whether he can be compelled to stand trial in the Federal Court.

(A) How and within what time should this question be raised?

(B) How ought the court to decide the question?

(FEDERAL PROCEDURE)(A) By Rule 12(a) and (b) of FRCP the question of venue may be raised by a responsive pleading filed within 20 days after service on defendant, or, at the option of the pleader, by motion.

(B) Yes, he can be compelled to stand trial in the United States District Court for the Western District of Virginia. While the general rule under 28 USCA#1391 is that venue in diversity cases must be either the residence of the plaintiff or that of the defendant, a recent amendment permits the action to be brought in automobile accident cases in the District Court having jurisdiction over the territory in which the accident took place.(Note for 1964--Since this is a recent change an answer according to the general rule would probably be acceptable.)

J65

9. On June 21, 1965, Apex Sales, Inc., a North Carolina corporation, brought an action against Prime Erectors, Inc., a Virginia corporation, in the United States District Court for the Eastern District of Virginia. In its complaint Apex Sales, Inc., alleged that Prime Erectors, Inc., had entered into a contract with Apex to construct for it a warehouse building in the City of Richmond, that Prime thereafter commenced such construction, that when the building was partly erected it collapsed, that such collapse was due to Prime's negligence in the construction of the building, and that, as a proximate result of such negligence, Apex had sustained damages of $30,000 for which it sought judgment.

Prime Erectors, Inc., now consults you and advises that, in erecting the warehouse building, it had carefully followed plans and specifications which had been prepared by Adam Parks, a well known architect of the City of Richmond, and that it had found that the true cause of the collapse was the faulty design of the building which Park had incorporated in the plans. Prime then asks by what means, if any, it might bring Park into the action for the purpose of requiring him to pay the loss.

What should your answer be?

(FEDERAL PROCEDURE) Third party practice is provided for under the Federal Rules of Civil Procedure 14(a) a portion of which reads as follows, "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him *** for all or part of the plaintiff's claim against him."

The fact that the third party defendant is of the same citizenship as the third party plaintiff will not prevent the federal court from having jurisdiction.

D65

10. Horace Hempstead, a citizen of New Hampshire, commenced an action in the U.S. District Court for the Eastern District of Virginia against Joseph Makeshift, a citizen of Virginia. The complaint commencing the action was in the following language:

1. Jurisdiction is based upon diversity of citizenship, the plaintiff being a citizen of New Hampshire and the defendant a citizen of Virginia. The property sought to be recovered has a market value of $20,000.
2. Plaintiff and defendant entered into an oral contract whereby defendant agreed to give and convey to plaintiff a lot, improved by a dwelling house, situate in a subdivision known as Lake View, in Richmond, Virginia. Defendant owned all of the lots in said Lake View Subdivision.
3. Although plaintiff has made numerous demands upon defendant to convey to plaintiff one of the lots, improved by a dwelling house, situate in said Lake View Subdivision, defendant has refused to do so.

Wherefore plaintiff demands that defendant be required specifically to perform said agreement.

/s/ Horace Hempstead
By John Lawyer
Plaintiff's Attorney

Promptly upon receipt of the complaint, Joseph Makeshift consulted Sam Barrister, who had just recently been admitted to practice. Being a timid young lawyer and lacking in experience, Barrister consults you advising that upon careful consideration of the complaint he has determined to file a demurrer to the complaint and also to file a special plea of the statute of frauds as a defense.

What advise should you give Barrister with respect to the pleadings he intends to file?

(FEDERAL PROCEDURE) Barrister should not demur as demurrers are no longer used in federal procedure. Rule 7c of Federal Rules of Civil Procedure. Under Rule 8c the defense of the statute of frauds must be set forth affirmatively by the defendant in his answer.

8. '66 Rogers, a citizen of Virginia, was injured in Portsmouth, Virginia, while working as a brakeman for A. T. & T. Railway Company, a Virginia corporation engaged in interstate commerce, and while switching its cars over tracks maintained by the O. R. & E. Railway Company, a Virginia corporation, on the premises of Marine Industrial Company, a Virginia corporation. Rogers instituted an action at law in the United States District Court for the Eastern District of Virginia against all three of the corporations and alleged that he was entitled to a recovery against the A. T. & T. Railway Company under the Federal Employers' Liability Act because he was injured as the result of defective equipment furnished by the A. T. & T. Railway Company and the negligence of his fellow-employees of the A. T. & T. Railway Company; and also alleging a cause of action against the O. R. & E. Railway Company for its negligence in the maintenance of the tracks involved and against the Marine Industrial Company for its negligence in obstructing the said tracks on its premises, all of which acts of the three defendants combined to cause the accident and produce the injuries complained of.

A. T. & T. Railway Company filed its answer admitting jurisdiction but denying liability. The O. R. & E. Railway Company and the Marine Industrial Company each filed a motion to dismiss for lack of jurisdiction, said motions conceding that the Court did have jurisdiction over the case of Rogers v. A. T. & T. Railway Company by virtue of the provisions of the Federal Employers' Liability Act, but that the Court did not have jurisdiction over the other parties regardless of plaintiff's contention that the defendants were jointly negligent and their combined acts were indivisible causes of the accident. How should the Court rule on the motions of O. R. & E. Railway Company and Marine Industrial Company?

(FEDERAL PROCEDURE) Motions of O. R. & E. and Marine Industrial should be granted as jurisdiction over one defendant under the FELA does not confer jurisdiction over the others and there is no diversity of citizenship so as to give independent jurisdiction over O. R. & E. or Marine. 45 USCA #51, #56. McPherson, 275 F.2d 466.

8--Federal Procedure '66

Playboy, aged 19 years and wealthy, although he and his family had always lived in New York, spent the summer of 1965 at Resort in the State of Virginia and, while there, seduced Unfortunate's daughter, aged 18 years. Unfortunate brought an action, in the appropriate state court, for seduction against Playboy, seeking to recover $50,000 damages. Barrister, a reputable Virginia lawyer, was appointed guardian ad litem for Playboy, and process was served in Virginia on both Playboy and Barrister. Playboy, believing that he would fare better in a Federal Court than in the State Court, consults you ten days after process had been served on him and asks you:

(a) Within what time and by what procedure he might seek to secure a trial in the United States District Court?

(b) Whether this effort would be successful?

How ought you to answer each question?

(a) He must within 20 days after service of process file a petition of removal in the appropriate federal district court.

(b) Yes, diversity of citizenship exists as the real party in interest is Playboy. The citizenship of the real party in interest controls where jurisdiction is based on character of the parties as in diversity and alienage cases. See 3 Moore's Federal Practice, p. 1314.

6. 547 Plaintiff, a citizen of New York, brought an action at law in the Circuit Court of Roanoke County, Virginia, against Happy, a citizen of North Carolina, and against Lucky, a citizen of Virginia, for $50,000, for breach of contract. Three weeks after the Defendants had filed their respective grounds of defense, Plaintiff dismissed the action as to Lucky. Happy consults you and tells you that he would prefer to have his case tried in the federal court.

State how, if at all, you as attorney for Happy may get the case transferred to the U.S. District Court for the Western District of Virginia.

(CIVIL PROCEDURE) A verified petition must be filed in the U.S. District Court for the district and division within which the action is pending. The petition must be filed within twenty days "after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court, and is not required to be served on the defendant, whichever period is shorter." 28 USCA #1446 (a) #(b).

3. D67 Sam Fish is a resident of Alexandria and has properly brought an action against Elmer Crab of the City of Washington in the Circuit Court of the City of Alexandria. The motion for judgment alleges that, while Fish was standing at a street intersection in Alexandria, Crab carelessly drove his motor vehicle into Fish causing him injuries for which he sought $20,000. Crab now consults you and tells you that he has just been served, while in Alexandria, with Fish's notice of motion for judgment. He also tells you that his striking of Fish was the result of his fellow Washingtonian, Ben Turtle, suddenly driving his motor vehicle from the curb into the path of that driven by Crab, and that this caused Crab to veer to his left and

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strike Fish. Crab then asks you by what procedure he may cause Turtle to be made a party to the action brought by Fish. What should your advice be?

(FEDERAL PROCEDURE) Under Virginia rule 3:9.1 third party practice has been abolished in actions at law. You should advise Crab that he should seek to have the case removed to a federal district court on the basis of diversity jurisdiction, since Crab is from Washington,D.C. and Fish is from Alexandria, Virginia. Under rule 14

of the Federal Rules of Civil Procedure, third party practice is allowed. Crab could then join Turtle as a party defendant, and still retain the federal courts diversity jurisdiction. See 28 USCA #1441 and 1446.