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Federal Procedure - Questionable Joinder to Prevent Removal

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FEDERAL PROCEDURE

Questionable joinder to prevent removal

In *Parks* v. *New York Times Company*[1] the resident plaintiff instituted a libel action in an Alabama state court against four residents and a nonresident alleging that the nonresident, the New York Times, published an advertisement defaming certain public officials because of their handling of purported race riots. The resident defendants who failed to disaffirm the New York Times act of incorporating their names within the advertisement as endorsers of its contents were joined in the action for their alleged ratification of the libelous advertisement. Upon petition to the Federal District Court, the nonresident defendant contended that the plaintiff had fraudulently joined the resident defendants in order to preclude removal from the state to the federal court. The District Court sustained the removal petition asserting that there was no "liability of the resident defendants under any recognized theory of Alabama law,"[2] and on appeal the Circuit Court reversed and remanded to the state court for trial on the merits.

Since complete diversity of citizenship is a prerequisite for invoking the jurisdiction of the federal courts,[3] the federal courts introduced the procedural rule of fraudulent joinder in order to prevent a nonresident from being deprived of his right of removal. However, the courts when applying the principles of fraudulent joinder have been confronted with diametrically opposed substantive rights of the litigants. The resident plaintiff has the right to select the forum and join all parties that are jointly and severally liable in one action but not to the degree that the joinder fraudulently deprives the nonresident of his right of removal to the federal court.

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[1] Parks v. New York Times Company, 308 F.2d 474 (5th Cir., 1962).

[2] Parks v. New York Times Company, 195 F.Supp. 919, 922 (M.D. Ala., 1961).

[3] Strawbridge v. Curtiss, 7 U.S. 265 (1806); Haynes v. Felder, 239 F.2d 868, 870 (5th Cir., 1957).

Therefore, in order not to "modify, abridge, or enlarge the substantive rights of the litigants or to enlarge or diminish the jurisdiction of the federal court"[4] the federal courts have consistently utilized the following tests in determining whether there was a fraudulent joinder: (1) Did the resident plaintiff "have a real intention on colorable grounds to procure a joint judgment?"[5] (2) Is there sufficient doubt as to the liability of the resident defendant under the substantive law of the state where the action is brought?[6] In fact, even though the resident plaintiff joins the resident and nonresident for the sole purpose of precluding removal, the joinder although fraudulent in intent is permissible if a cause of action is stated.[7]

When the principle of fraudulent joinder was orginally pronounced, the procedural rules permitting joinder of parties as joint tortfeasors or master and servant were stringently construed. At the present time three views govern the joinder of master and servant in the same action. Ohio procedure illustrates the view which prohibits the joinder of master and servant "if the master's liability is based solely on respondeat superior."[8] Although Virginia procedure permits master and servant to be joined in the same action, there can be no joinder when the plaintiff states a related claim against the servant since there is no liability on the part of the master for this cause of action.[9] Finally, under the federal rules and modern code pleading states all "persons may be joined in one action

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[4] 62 Stat. 961 (1948); U. S. v. Sherwood, 312 U.S. 584 (2d Cir., 1941); Warf & Warehouse v. Pillsbury, 259 F.2d 850, 852 (9th Cir., 1958).

[5] Morris v. E. I. DuPont De Nemour & Co., 68 F.2d 788, 791 (8th Cir., 1934); Smith v. Southern Pacific Co., 187 F.2d 397, 401 (9th Cir., 1951), *cert. den.* 342 U.S. 823.

[6] Wells v. Missouri Pac. R. Co., 87 F.2d 579, 582 (8th Cir., 1937); Chumley v. Great Atlantic & Pacific Tea Co., 190 F.Supp. 254, 256 (M.D. N.C., 1961).

[7] Norwalk v. Air Way Electric Appliance Corp., 87 F.2d 317, 319 (2d Cir., 1937); Smith v. Southern Pacific Co., 187 F.2d 397, 400 (9th Cir., 1951), *cert. den.* 342 U.S. 823.

[8] French v. Central Construction Co., 76 Ohio St. 509, 81 N.E. 751 (1907); Shaver v. Shirks Motor Express Corp., 163 Ohio St. 484, 127 N.E.2d 355, 362 (1955); Wells, *Joinder of Master and Servant,* 23 OHIO ST. L.J. 488, 491 (1962).

[9] Norfolk Union Bus Terminal, Inc., v. Sheldon, 188 Va. 288, 49 S.E.2d 338 (1948); *The Notice of Motion and Modern Procedure,* 35 VA. L. REV., 380, 389 (1949).

as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief . . ."[10] Since there has been a gradual development of procedural rules facilitating the joinder of defendants, especially master and servant, in the same action,[11] the principle of fraudulent joinder, although originally designed to balance the substantive rights of the litigants, has been a tool—as reflected in the *Parks* case—for recognizing the plaintiff's substantive right to select the forum and join all parties that are jointly and severally liable.

In past decisions where fraudulent joinder was alleged by the nonresident, the courts have consistently permitted a joinder of a resident agent with a nonresident principal in a tort action when the agency relationship existed at the time of the tort. In the *Parks* case, there was no agency relationship at the time of the tort as the nonresident was a complete stranger to the resident defendant. The resident plaintiff in his cause of action asserted that the resident defendant ratified the nonresident's act even though the resident received no ascertainable benefit from the unauthorized act of the nonresident. After reviewing the substantive law of Alabama, the court relying on *Birmingham News Co.* v. *Birmingham Printing Co.*[12] reasoned that "silence alone will not always suffice to even invite a conclusion that ratification was effected; yet under the related circumstances shown to have been known to the asserted principal, silence may afford evidence from which the jury may infer an intent to ratify."[13] Even in a libel action with a similiar fact situation as in the *Parks* case where failure to disaffirm within a reasonable time did not amount to ratification, the court stated that "silence would be at most a fact situation from which in connection with

[10] Fed. R. Civ. P. 20 (a).

[11] Annot., 59 A.L.R. 2d 1066 (1958): Alabama—Sarber v. Hollon, 265 Ala. 323, 91 So.2d 229 (1956); California—Rannard v. Lockheed Aircraft Corp., 26 Cal. 2d 149, 157 P.2d 1 (1945); Illinois—Laver v. Kingston, 11 Ill. App.2d 323, 137 N.E.2d 113 (1956); Maryland—Beinhauer-Leader Stores, Inc., v. Burlingame, 152 Md. 284, 136 A.2d 622 (1949); North Carolina—Shaw v. Barnar, 229 N.C. 713, 51 S.E.2d 295 (1949); Pennsylvania—East Broad Top Transit Co. v. Flood, 326 Pa. 353, 192 A. 401 (1937); Virginia—McLaughlin v. Siegel, 166 Va. 374, 185 S.E. 873 (1936); West Virginia—State ex rel. Baumgarner v. Simms, 139 W.Va. 92, 19 S.E.2d 277 (1953).

[12] Birmingham News Co. v. Birmingham Printing Co., 209 Ala. 403, 96 So. 336, 341 (1923).

[13] *Id.* at 341.

other facts and circumstances an actual ratification might be inferred."[14] In summary, "although the mere fact of acquiescence may be deemed far less cogent where no such relation of agency exists,"[15] ratification is a question of fact for the jury to determine unless the facts are clear beyond a substantial doubt.[16] Although the "facts and authorities indicate that the question of liability is a close one,"[17] the joinder is not fraudulent since the plaintiff has stated a cause of action under Alabama law with a question of fact to be adjudicated where the action was brought, not where removed.

Finally, in order to sustain the burden of proof, the removing party must prove by clear and convincing evidence[18] that the joinder is fraudulent. The courts have strictly adhered to this rule and have remanded doubtful issues to the state courts.[19] In cases where the joinder has been held to be fraudulent, the plaintiff upon joinder did not even state a cause of action against the resident defendant[20] or where the resident defendant was not even present at the time of the automobile accident.[21] The removing party, as in the *Parks* case, will inevitably fail to sustain the burden of proof where "there is any controversy, however slight, on the facts."[22]

In conclusion, the gradual development of judicial precedent or legislation establishing procedural rules permitting the joinder of master and servant in the same action coupled with the principles of fraudulent joinder readily enables the party bringing the action to select the forum and preclude removal from the state to the federal court where there is a lack of complete diversity of citizenship.

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14 Annot., 139 A.L.R. 1066, 1069 (1942); Dawson v. Holt, 11 Tenn. 583, 47 Am. Rep. 312 (1883).

15 Seavey, *Ratification by Silence,* 103 U.P.A. L. REV. 30, 33 (1954).

16 *Id.* at 39.

17 Parks v. New York Times Company, 308 F.2d 474, 480 (5th Cir., 1962).

18 *Id.* at 478.

19 James v. National Pool Equipment Co., 186 F.Supp. 598, 604 (S.D. Ill. 1960).

20 Johnson v. Weyerhauser Company, 189 F.Supp. 735, 736 (D.C. Oregon 1960).

21 Tinney v. McClain, 76 F.Supp. 694, 699 (N.D. Texas 1948); Polito v. Malosky, 123 F.2d 258, 261 (8th Cir., 1941).

22 Mails v. Kansas City Public Service Co., 51 F.Supp. 562, 565 (W.D. Missouri 1943).