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Federal Removal -- Jurisdictional Amount

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adopted the view that repairing of a roof is an inherently dangerous task, the court's holding that the lessor "was under a duty to see that no injury would be sustained by the tenant in the making of the repairs" cannot be upheld. The court has made the landlord an absolute insurer for everything done by the contractor within the scope of his employment. It is submitted that if the court meant to do this, it should have stated what it was doing in unequivocal terms, rather than attempting to justify a result by citing Florida cases which do not support the view adopted by the court.

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FEDERAL REMOVAL — JURISDICTIONAL AMOUNT

The plaintiff, a longshoreman and citizen of Florida, filed suit in a Florida circuit court to recover damages allegedly due to the negligence of the defendant, or to the unseaworthiness of the defendant's vessel. The complaint alleged that the defendant was a Connecticut corporation with an office and principal place of business[1] in Florida, and demanded damages in excess of 5,000 dollars.[2] Defendant removed the action to a federal district court alleging the requisite diversity and jurisdictional amount in the petition for removal. The plaintiff moved to remand, claiming the *ad damnum* clause of the complaint did not meet the federal jurisdictional requirement, but the motion was denied. A jury trial resulted in a verdict for the defendant. On appeal, *held*, reversed and remanded: a complaint demanding damages in excess of 5,000 dollars is not removable from a state court to a federal court in the absence of affirmative proof that the damages claimed exceed 10,000 dollars. *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252 (5th Cir. 1961).

A civil action brought in a state court may generally be removed by the defendant to a federal district court, provided the federal court could have had jurisdiction originally.[3] The right to remove is one granted by

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1. "For the purposes of this section and section 1441 of this title, 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." 28 U.S.C. § 1332(c) (1958). The issue of diversity of citizenship was not raised prior to trial. The issue was raised on appeal but was not ruled upon as other grounds were present to reverse and remand the action.

2. The Circuit Court for Dade County, Florida has jurisdiction of all actions at law provided the amount in controversy exceeds the sum of $5,000. FLA. CONST., art. 5, § 6(3); FLA. STAT. § 33.02 (1959). See note 23 *infra*.

3. American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877); Delpit v. United States Shipping Board Emergency Fleet Corp., 19 F.2d 60 (9th Cir. 1927); City of Corbin v. Varden, 18 F. Supp. 531 (E.D. Ky. 1937); Belcher v. Aetna Life Ins. Co., 3 F. Supp. 809 (W.D. Tex. 1933).

statute and is geared generally[4] to original jurisdiction, which requires the amount in controversy to be "in excess of $10,000.00 exclusive of interest and costs."[5] This jurisdictional amount applies both in cases of federal questions[6] and those based on diversity of citizenship.[7] The right to remove is generally controlled by the complaint[8] viewed as of the time when the petition for removal is filed.[9] The petition must be filed within twenty days after receipt by the defendant of a copy of the initial pleading setting forth the claim for relief.[10] If the case stated by the initial pleading is not removable, the defendant may subsequently remove within twenty days after receipt of an "amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[11]

The preceding statute is the result of case decisions[12] and was codified only recently.[13] The statute requires the record of the action to be the sole source from which the court will ascertain whether a case not removable originally has become removable after the initial pleading.[14]

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4. Special removal provisions with independent requirements are contained in 28 U.S.C. § 1442 (1958) (federal officers sued or prosecuted); 28 U.S.C. § 1443 (1958) (civil rights cases); and 28 U.S.C. § 1444 (1958) (foreclosure action against the United States).

5. In the event the plaintiff recovers less than the sum or value of $10,000, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. 28 U.S.C. § 1331(b); § 1332(b) (1958).

6. 28 U.S.C. § 1331 (1958).

7. 28 U.S.C. § 1332 (1958).

8. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938); McLeod v. Cities Service Gas Co., 233 F.2d 242 (10th Cir. 1956); Smith v. Southern Pac. Co., 187 F.2d 397 (9th Cir.), *cert. denied*, 342 U.S. 823 (1951); Cipriano v. Monarch Life Ins. Co., 138 F. Supp. 50 (D.R.I. 1956); McCracken v. Brown & Root, Inc., 101 F. Supp. 180 (W.D. Ark. 1951); Department Store Service Inc. v. "John Doe", 98 F. Supp. 870 (E.D.N.Y. 1951).

9. The right of removal has existed since the original Judiciary Act of 1789. This act gave the circuit court diversity jurisdiction and also provided for removal, on the basis of diversity, of state actions. Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 73, 79. Removal under the present statutes is effected by the defendant filing a petition and bond in the federal court, filing in the state court a copy of the petition, and giving prompt written notice to all adverse parties. 28 U.S.C. § 1446 (1958).

10. If the initial pleading is not required to be served on the defendant, and has been filed in court, then the twenty day period starts on the date of service of summons, or whichever period is shorter. 28 U.S.C. § 1446(b) (1958).

11. 28 U.S.C. § 1446(b) (1958).

12. Fritzlen v. Boatmen's Bank, 212 U.S. 364 (1909); Powers v. Chesapeake & O. Ry., 169 U.S. 92 (1898); Ayers v. Watson, 113 U.S. 594 (1885). *Accord*, Remington v. Central Pac. R.R., 198 U.S. 95 (1905); Cobleigh v. Epping Brick Co., 85 F. Supp. 862 (D.N.H. 1949); Higgins v. Yellow Cab Co., 68 F. Supp. 453 (N.D. Ill. 1946).

13. 28 U.S.C. § 1446(b) (1958).

14. Evangelical Lutheran Church v. Stanolind Oil & Gas Co., 251 F.2d 412 (8th Cir. 1958); McLeod v. Cities Service Gas Co., 233 F.2d 242 (10th Cir. 1956); Ellis v. Davis, 4 F.2d 323 (5th Cir. 1925); Putterman v. Daveler, 169 F. Supp. 125 (D. Del. 1958); Rosario v. Waterman S.S. Corp., 158 F. Supp. 537 (S.D.N.Y. 1957); Youngson v. Lush, 96 F. Supp. 285 (D. Neb. 1951); Doggett v. Hunt, 93 F. Supp. 426 (S.D. Ala. 1950); Hutson v. Imperial Royalties Co., 134 Kan. 378, 5 P.2d 825 (1931). "[T]he language of the Statute requires that the record of the Court from which removal is sought is the sole source from which to ascertain whether a case originally not removable has become removable." Putterman v. Daveler, *supra* at 129. See also Ellis v. Davis, *supra* at 323, where the court in referring to the record stated, "As pointed out by

The time period for removal at a later period in the proceedings is keyed to receipt by the defendant of a *paper*[15] supplying the necessary facts for removal.[16] The burden of proof rests upon the removing defendant to show that the jurisdictional facts existed at the time of removal[17] should the plaintiff test the right of removal by a motion to remand.[18] While the amount set forth in the complaint is controlling,[19] some federal courts have retained jurisdiction when the allegations of the complaint showed the amount in controversy to be in excess of 10,000 dollars, although the plaintiff prayed for judgment in an amount less than 10,000 dollars.[20] But the plaintiff does have the right to waive part of the claim so as to have the action remain in the state court.[21]

The instant case demonstrates the principle that removal statutes will be construed strictly.[22] The original complaint filed in the state court

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the defendant in error, the court is not confined to the allegations of the petition for removal, if the record otherwise discloses a case of which the federal court has jurisdiction."

15. 28 U.S.C. § 1446(b) (1958).

16. A few cases have permitted removal when the requisite jurisdictional facts were established from oral motions. Fred. Olsen & Co. v. Moore, 162 F. Supp. 82 (N.D. Cal. 1958); Waldron v. Skelly Oil Co., 101 F. Supp. 425 (E.D. Mo. 1951).

17. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); Carson v. Dunham, 121 U.S. 421 (1887); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877); Davenport v. Procter & Gamble Mfg. Co., 241 F.2d 511 (2d Cir. 1957); Wells v. Missouri Pac. Ry., 87 F.2d 579 (8th Cir. 1937).

18. 28 U.S.C. § 1447 (1958). When an issue is joined upon the averments of fact in a removal petition, application should be made to the court to fix the procedure to be followed in determining such issues of fact, whether by affidavit, oral testimony, depositions, or otherwise. Philipbar v. Derby, 85 F.2d 27 (2d Cir. 1936); Mapes v. Shaub, 54 F.2d 419 (M.D. Pa. 1931).

19. American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Evangelical Lutheran Church v. Stanolind Oil & Gas Co., 251 F.2d 412 (8th Cir. 1958); Crockett v. Overfield, 22 F. Supp. 915 (E.D. Idaho 1938).

20. Capps v. New Jellico Coal Co., 87 F. Supp. 369 (E.D. Tenn. 1950); Campbell v. Jordan, 73 F. Supp. 318 (E.D.S.C. 1947); Burmon & Bolonsky, Inc. v. Luckenbach S.S. Co., 39 F.2d 619 (D. Mass. 1930). The *ad damnum* averments of the complaint constitute the matter in controversy and determine the jurisdiction of the court regardless of the prayer of the complaint. Campbell v. Jordan, *supra*. *But cf.* Stuart v. Creel, 90 F. Supp. 392 (S.D.N.Y. 1950) in which plaintiff sued for $1,497.53 and the averments of the complaint indicated the amount in controversy exceeded $6,000. The court stated at 393: "[W]hile the Court may look behind a mere allegation of the jurisdictional amount in a complaint to determine from the averments in the complaint whether the plaintiff could possibly recover $3,000 or more, the court cannot increase the amount prayed for in the complaint, which in this case seeks a money judgment for only $1,497.53."

21. Journal Pub. Co. v. General Cas. Co., 210 F.2d 202 (9th Cir. 1954); Brady v. Indemnity Ins. Co. of No. America, 68 F.2d 302 (6th Cir. 1933); Lorensen v. Jenney Mfg. Co., 158 F. Supp. 928 (D. Mass. 1958); Fleming v. Perkins, 202 Okla. 217, 212 P.2d 122 (1949). "Should she assert claim for a larger amount before judgment, the cause could then be removed to the federal court." Brady v. Indemnity Ins. Co. of No. America, *supra* at 303-4.

22. Graves v. Corbin, 132 U.S. 571 (1890); Maurer v. International Typographical Union, 139 F. Supp. 337 (E.D. Pa. 1956); Rodriguez v. Union Oil Co., 121 F. Supp. 824 (S.D. Cal. 1954). "[F]ederal courts should guard with jealousy their doors when litigants seek to open them through removal procedures." Maurer v. International Typographical Union, *supra* at 340.

sought damages "in excess of $5,000.00."[23] The federal appellate court cast the burden upon the removing defendant to prove affirmatively that the matter in controversy exceeded "the sum or value of $10,000.00" at the time of removal.[24] The defendant failed to produce any evidence as to the amount in controversy at the time of removal, thereby restricting the court to the allegations in the complaint.[25] The jurisdictional amount was not apparent upon the face of the complaint and the action was remanded.[26] The court succinctly stated that access to the federal courts is not to be denied merely because the complaint is "couched in nebulous mathematical phraseology. . . ."[27] The defendant may challenge the jurisdictional amount set forth in the complaint, and by an affirmative showing of the requisite amount, remain in the federal court.[28] But the court will only admit proof which the parties had established at the time of removal, and will exclude any evidence offered as to jurisdictional amount which has been collected by the parties since the time of removal.[29] If the action is remanded for failure of this proof, the action could be removed a second time should the defendant receive a copy of an amended pleading, motion, order or other paper from which it may be ascertained that the amount in controversy exceeds the requisite jurisdictional amount.[30]

The opinion of the appellate court fails to articulate the techniques to be utilized to show the amount in controversy.[31] It would appear, however, that the defendant could serve interrogatories[32] or requests for

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23. Florida has eliminated the *ad damnum* clause. See Committee Note, FLA. R. CIV. P. 1.8. The only statement of damages required is an allegation "of fact sufficient to show the jurisdiction of the court." FLA. R. CIV. P. 1.8(b).

24. See notes 14 and 19 *supra.*

25. The action had been removed within twenty days after the filing of the complaint. No pleadings, motions or interrogatories were filed by the defendant in the state court. Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252 (5th Cir. 1961).

26. "We cannot construe the complaint's words "in excess of $5,000.00" as "exceed(ing) the sum or value of $10,000.00. . . ." Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 254 (5th Cir. 1961).

27. *Id.* at 255.

28. The Supreme Court has approved the use of proofs when the complaint was insufficient for removal: "But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

29. A change in extrinsic circumstances after the institution of a suit will not cause it to become removable. Great Northern Ry. v. Alexander, 246 U.S. 276 (1918); Anaconda Copper Min. Co. v. Butte-Balaklava Copper Co., 200 Fed. 808 (D. Mont. 1912).

30. Fritzlen v. Boatmen's Bank, 212 U.S. 364 (1909); Pope v. Cheney, 22 Fed. 177 (S.D. Iowa 1884).

31. Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252 (5th Cir. 1961).

32. Boone v. Southern Ry., 9 F.R.D. 60 (E.D. Pa. 1949); Frederick Hart & Co. v. Recordgraph Corp., 7 F.R.D. 43 (D. Del. 1947); Silk v. Sieling, 7 F.R.D. 576 (E.D. Pa. 1947). A recent case permitted the interrogatories to be used as evidence to show jurisdiction on a motion to remand even though they were not filed in the state court nor part of the record. Gilardi v. Atchison, T. & S.F. Ry., 189 F. Supp. 82 (N.D. Ill. 1960).

admissions[33] requesting the plaintiff to state the amount of damages which he seeks to recover.[34] The plaintiff ought to be bound by his answers or admissions and should be estopped to increase the amount of damages above 10,000 dollars during trial.[35] If the defendant fails to use these discovery devices (other jurisdictional requisites being present) he would be deemed to have waived his right to remove, should the plaintiff during trial in the state court seek to establish that the amount in controversy exceeds 10,000 dollars.[36] This matter should be determined in the pleading stage and not during trial since the statute speaks in terms of a paper filed during the pleading stage.[37]

While this decision appears to be correct,[38] it may tend to restrict the removal privilege of the defendant in unliquidated damage actions if the plaintiff is successful in avoiding the issue of damages during the pre-trial discovery period.[39] The result is that many cases may proceed to trial based on an amount in controversy substantially below the federal jurisdictional amount but with the jury returning a verdict in excess of this amount. It is respectfully suggested that the Florida Supreme Court consider the advisability of amending the Florida Rules of Civil Procedure to require an *ad damnum* allegation in the complaint.[40] The submitted proposal would tend to eliminate the hazy area which presently exists between the federal removal statutes and the jurisdictional amount averments of the Florida Rules of Civil Procedure.

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33. The pleadings plus any admissions and undisputed evidence may be used as evidence to establish requisite jurisdictional facts in a hearing upon a motion to remand. Scarborough v. Mountain States Tel. & Tel. Co., 45 F. Supp. 176 (W.D. Tex. 1942).

34. Nor does the defendant waive the right to remove the action by filing an appearance, answering the complaint and serving notice to examine plaintiff in the state court. Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (S.D.N.Y. 1953).

35. A survey of federal cases does not disclose any case adjudicating this precise point. *But cf.* Journal Pub. Co. v. General Cas. Co., 210 F.2d 202 (9th Cir. 1954); Brady v. Indemnity Ins. Co. of No. America, 68 F.2d 302 (6th Cir. 1933).

36. *Cf.* Waldron v. Skelly Oil Co., 101 F. Supp. 425 (E.D. Mo. 1951); Ford v. Roxana Petroleum Corp., 31 F.2d 765 (N.D. Tex. 1929); Morgan's L. & T.R.R. & S.S. Co. v. Street, 57 Tex. Civ. App. 194, 122 S.W. 270 (1909).

37. 28 U.S.C. § 1446(b) (1958). However some earlier cases have been held removable after the pleading stage and during the trial. Powers v. Chesapeake & O. Ry., 169 U.S. 92 (1898); see cases cited in 76 C.J.S. *Removal of Causes* § 26 (1952).

38. A substantial issue as to lack of diversity of citizenship was raised by plaintiff on appeal, in that the defendant corporation had a principal place of business in the state wherein plaintiff resided. This issue was not decided in the opinion although it was argued with some fervor before the appellate court, according to the briefs of the parties. Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252 (5th Cir. 1961). See note 1 *supra*.

39. The problem is apparent when one considers the difficulty of estimating pain and suffering prior to trial. See Comment, *Argument of Counsel — The Measure of Damages For Pain and Suffering*, 15 U. MIAMI L. REV. 85 (1960).

40. FLA. R. CIV. P. 1.8(b).