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Removal Denied: The Survival of the Voluntary-Involuntary Rule

Edward J. Waldron

Therefore, stock in a professional service corporation is subject to levy and sale under judgment execution to the same extent as ordinary corporate stock.[24] However, the added feature of a possible forced dissolution may destroy an essential element for an organization to be taxed as a corporation, that is, continuity of life, and result in Florida's professional service corporations being taxed as partnerships.[25] If this should happen, the essential purpose of the statute—to give to professionals the advantages of corporate tax treatment—would be destroyed.

WILLIAM L. SAX

REMOVAL DENIED: THE SURVIVAL OF THE VOLUNTARY-INVOLUNTARY RULE

The plaintiff, a citizen of Mississippi, filed a suit in a Mississippi state trial court against two defendants: one a New York corporation,[1] and the other its employee, a resident of Mississippi. The court entered a directed verdict in favor of the resident[2] defendant. The remaining nonresident defendant immediately filed a petition for removal in the United States District Court for the Southern District of Mississippi contending

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authorized stockholder would serve to preclude as a stockholder *any* person not a professional within the meaning of the statute. This would be the case regardless of the manner in which a nonprofessional happened to legally acquire shares of stock in a professional service corporation.

Street v. Sugerman, 202 So.2d 749, 751 (Fla. 1967).

Even if Florida Statute § 621.10 was not to apply, the inconsistency between a nonprofessional's holding of stock which only professionals may hold per Florida Statute § 621.09 would have to be resolved, and certainly not by avoiding the statute.

24. "Lands and tenements, goods and chattels, equities of redemption in real and personal property, and *stock in corporations* shall be subject to levy and sale under execution." FLA. STAT. § 55.20 (1965) (emphasis supplied).

25. A professional service organization is treated as a corporation . . . only if it has sufficient corporate characteristics to be classifiable as a corporation . . . rather than as a partnership or proprietorship.

Treas. Reg. § 301.7701-2(h)(1)(i) (1965).

There are a number of major characteristics ordinarily found in a pure corporation which, taken together, distinguish it from other organizations. These are: (i) Associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) *continuity of life*, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interests. (emphasis supplied).

Treas. Reg. § 301.7701-2(a)(1) (1960).

Since many of these characteristics are common to both a partnership and a corporation, only the strictly corporate characteristics are determinative. Therefore, each characteristic is important in determining the status of a corporation for tax purposes, and lack of one characteristic could be determinative of the question.

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1. New York is Dreyfus' place of incorporation and also its principal place of business. For both of these reasons, Dreyfus is a citizen of New York for the purposes of removal under 28 U.S.C. § 1441 (1964).

2. While we recognize that residency is not the equivalent of citizenship, hereinafter defendants will frequently be designated either as "resident" or "nonresident".

that the reference to an "order" in the 1949 amendment to the removal statute[3] should be read to include an order of a directed verdict. The plaintiff's motion for removal from the state court was denied in accordance with an earlier decision of the same district court.[4] On appeal, the Court of Appeals for the Fifth Circuit reversed, holding that the "voluntary-involuntary rule" survived this amendment and its application to the facts of this case required that removal be denied because the plaintiff did not voluntarily dismiss the resident defendant. *Weems v. Dreyfus Corp.*, 380 F.2d 545 (5th Cir. 1967).

When the instant action was instituted in the state court it was not removable to the federal court because of lack of complete diversity of citizenship of the parties. Article III, Section 2 of the Constitution of the United States declares that, "The judicial power shall extend to all cases . . . between Citizens of different states. . . ." Under this constitutional power, the Judiciary Act of 1789 granted diversity jurisdiction to the federal courts.[5] In *Strawbridge v. Curtiss*,[6] Chief Justice Marshall set forth the rule of "complete diversity" which required that diversity of citizenship must exist between all plaintiffs and all defendants.[7] Under this rule a nonresident defendant is unable to remove a case in which a resident defendant is properly joined. However, if after the suit is commenced the resident defendant is eliminated from the case, leaving only a nonresident as defendant, the question arises whether at that point the case is removable.

Until 1949 no statutory provisions dealt with the question of removal after commencement of a suit. However, the case law developed the rule:

> [T]hat if the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but

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3. The petition for removal was filed pursuant to 28 U.S.C. § 1446(b) (1964):
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy 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 (emphasis added).

Title 28 U.S.C. § 1446(b) (1964) was amended in 1949 and in 1965. The 1965 amendment extended the twenty day period to thirty days. Hereinafter reference to "the amendment" will be to the 1949 Amendment.

4. Lyon v. Illinois Cent. R.R., 228 F. Supp. 810, 811 (S.D. Miss. 1964). In *Lyon*, the court examined the 1949 amendment to 28 U.S.C. § 1446(b) 1964 and stated:
> [T]here is nothing in this statute from which it can be properly inferred that Congress intended that a removal could be effected only in the event the plaintiff voluntarily did something which removed the local defendant from the case.

5. This has been changed and codified and today is contained in 28 U.S.C. § 1332 (1964). 28 U.S.C. § 1441 (1964) authorizes removal by a nonresident defendant in any civil action brought in a state court where the federal district court would have had original jurisdiction due to diversity of citizenship.

6. 7 U.S. (3 Cranch) 267 (1806).

7. "If there are several parties on one or both sides, there is no federal diversity jurisdiction if one of the parties on either side is a citizen of a state of which a party on the other side is also a citizen." 1 BARRON & HOLTZOFF 145 (1960).

> if the dismissal was the result of either the defendant's or the court's acting against the wish of the plaintiff, the case could not be removed.[8]

The 1949 amendment to 28 U.S.C. 1446(b) (1964) did not track the words of the rule.[9] Notable in the change is the fact that the amendment contains no mention of dismissal by the voluntary act of the plaintiff. The amendment, on the other hand, simply states that the case is removable upon receipt by the defendant of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable. It was the phrase "order or other paper" which persuaded the distict court in *Lyon v. Illinois Cent. R.R.*[10] that removal was proper after the involuntary dismissal of the resident defendant:

> The plaintiff insists that the involuntary dismissal of the resident defendant does not remove him from the case but that contention is untenable insofar as this proceeding is concerned. . . . There is nothing in this statute from which it can properly be inferred that Congress intended that a removal could be effected only in the event that the plaintiff voluntarily did something which removed the local defendant from the case. The order of the state court on the resident defendant's motion . . . is surely an order or other paper from which it may first be ascertained that the case . . . has become removable. . . .
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> Something must be read into this statute which Congress did not write into it before it can be said that a case can become removable from a state court during the trial only in the event a plaintiff voluntarily does something to extricate and completely remove the resident defendant from the suit.

The Court of Appeals felt that the district court, in the instant case as well as in *Lyon*, failed to take into account the legislative history of the 1949 amendment and failed to read the amendment in light of the previously developed case law. The legislative history stated that the amendment was *"declaratory of the existing rule laid down by the decisions.* (See for example *Powers*. . . .)"[11]

The rule referred to in the legislative history is the voluntary-involuntary rule that developed from the case, *Powers v. Chesapeake & O. Ry.*[12] This decision emphasized the time element of the dismissal rather

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8. Note, *The Effect of Section 1446(b) on the Nonresident's Right to Remove*, 115 U. PA. L. REV. 264, 267 (1966).

9. See note 3 *Supra* for full quotation of the 1949 amendment.

10. 228 F. Supp. 810, 811 (S.D. Miss. 1964).

11. 2 U.S. CODE CONG. SERV. 1268, 81 Cong., 1st Sess. (1949).

12. 169 U.S. 92, 101 (1898). *Powers* was an action against a nonresident railroad and several of its resident employees. After the time period had elapsed, within which the petition for removal could be filed, the plaintiff voluntarily dismissed the resident defendants. Removal was then allowed.

than the fact that the plaintiff voluntarily dismissed the resident defendant.

> The result is that, when this plaintiff discontinued his action against the individual [resident] defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance was filed in due time.

Nevertheless, in *Whitcomb v. Smithson*[13] the fact that the resident defendant was eliminated by the voluntary action of the plaintiff was seized upon. Removal was denied because the resident defendant had been eliminated by a directed verdict rather than the voluntary action of the plaintiff. Two years later the Supreme Court again denied removal in *Kansas City Suburban Belt Ry. v. Herman*[14] and stated:

> In *Powers* . . . . Plaintiff voluntarily discontinued his action against the company's co-defendants . . . . In *Whitcomb* . . . . Plaintiff did not discontinue his action against either of the defendants and went to trial against both and the trial court directed a verdict in favor of one of them. The ruling was on the merits and *in invitum*.

The above decisions were shaped into a rule of law in *American Car & Foundry Co. v. Kettelhake*.[15] This rule was followed by the federal courts until the 1949 Amendment but not without comment. In an article prior to the amendment the voluntary-involuntary dichotomy was questioned:

> This re-examination of the cases suggests that the right of removal after the time for the defendant's answer should depend on the effective severence of the resident defendants from the action. Such a test is supported by the never-overruled . . . case of *Yulee v. Vose*. . . .[16]

It appears that the case law rule overlooked *Yulee v. Vose*,[17] a decision 20 years prior to *Powers*. In *Yulee* the court held that it was error for the state court to deny removal after the resident defendants had been *dismissed from the action by the court*. This would raise a question

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13. 175 U.S. 635 (1900).

14. 187 U.S. 63, 69-70 (1902).

15. 236 U.S. 311, 316 (1915); the Supreme Court stated:

> Taking these cases together, we think it fairly appears from them that where there is a joint cause of action against defendants resident of the same State with the plaintiff and a non resident 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 . . . .

16. Note, *Removal of Suits to Federal Courts After the Statutory Deadline: An Old Formula Re-Examined*, 60 HARV. L. REV. 959, 962 (1947).

17. 99 U.S. 539 (1878).

in the instant case since the Court of Appeals relied on the statement in the legislative history of the 1949 amendment that it was declaratory of the existing rule laid down by the decisions. Apparently the *Yulee* decision was not considered, particularly in *Whitcomb* which was the first case to deny removal because the resident defendant was not removed by the voluntary action of the plaintiff but rather by a court order.

Since 1949 it has been questioned whether the voluntary-involuntary rule survived the amendment. However, a majority of the federal district courts have continued to follow the voluntary-involuntary rule. In *Squibb-Mathieson International Corp. v. St. Paul Mercury Insurance Co.*,[18] the nonresident defendant claimed that the rule was changed by the 1949 amendment and that the case was removable when the resident co-defendent was involuntarily dismissed as long as an order of dismissal was entered. The court said the weight of authority since the 1949 amendment was contra and pointed out that the former distinction had merit, in that it prevented removal where the nonresident defendant was eliminated by a court order which might be subject to reversal on appeal.

One authority,[19] commenting on this problem, did specifically question whether the voluntary-involuntary rule survived the 1949 amendment. This commentator stated that it would appear to be no longer settled that a case was not removable if the non-resident defendant was eliminated from the case by a directed verdict. The comment was quoted and used as a basis of the decisions in *Lyon*.

The instant case is the first time the question of the survival of the voluntary-involuntary rule has been passed upon by a United States Court of Appeals since the 1949 amendment. It seems unfortunate that the court did not take a bold step and depart from the majority of district courts that have continued to follow the case law rule. The principal argument expressed in favor of the case law rule is the one "danger of appellate reversal" noted in *Squibb-Mathieson*. On the other hand, it may be argued that if *Yulee* is taken into consideration, the voluntary-involuntary rule is not declaratory of the rule laid down by decisions.

The situation presented in the instant case is an example of the results produced by the rule. Why should the defendant New York Corporation be denied removal to the federal courts because the resident defendant was eliminated by court order? The parties were then in complete diversity and the case should be removable.

It is submitted that the present rule lends itself to the possibility of sham joinder. It is obvious that if a plaintiff does not wish to have the case removed to the federal court by the nonresident defendant he cer-

18. 238 F. Supp. 598 (S.D.N.Y. 1965).

19. 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 474 (1960)

tainly is not going to voluntarily dismiss his action against the resident defendant. As pointed out in an article mentioned earlier,[20] a better test is needed. As long as diversity jurisdiction is continued there is no reason to impose such an artificial test as the voluntary-involuntary rule upon a nonresident defendant who may wish to remove to a federal court.

EDWARD J. WALDRON

20. *Supra* note 16.