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Federal Rules of Civil Procedure - Removal of Actions - Failure to File Copies of Removal Petition in State Court

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(1905) which suggests the prosecution must say if it intends to use the confession so the prisoners can be tried separately.

the requirements for the granting of a separate trial.¹² When one considers that the courts do not assume all errors are prejudicial, but regard the whole record in determining the substantial correctness of the decision,¹³ the majority opinion reaches a just result in admitting the confession and taking the chance of possible prejudice toward the defendant. In fact, the admission seems to further the search for truth.¹⁴

WILLIAM F. LINDELL.

FEDERAL RULES OF CIVIL PROCEDURE — REMOVAL OF ACTIONS — FAILURE TO FILE COPIES OF REMOVAL PETITION IN STATE COURT.— Plaintiff commenced action in state court by service of summons.¹ Defendant filed a removal petition and bond in Federal Court, gave notice to the plaintiff and brought copies of the removal petition to the state court where they were not filed because plaintiff had not yet filed her action.² Defendant pleaded third-party defendant who after expiration of the time for removal moved to quash the third-party complaint and to remand the action to the state court on the ground that the removal statute³ was not complied

12. *Suarez v. State*, 95 Fla. 42, 115 So. 519 (1928); *People v. Feolo*, 282 N.Y. 276, 26 N.E.2d 256 (1940); *Flamme v. State*, 171 Wis. 501, 177 N.W. 596 (1920); 1 *Burn's Indiana Ann. St.* § 2300 (1926) ("... [A]ny defendant requiring it, before the jury is sworn must be tried separately. See also *People v. Buckminster*, 274 Ill. 436, 113 N.E. 713 (1916) (Which held that the admission of the part of the codefendant's confession which implicated defendant was error despite instruction to the jury to disregard the implications).)

13. 28 U. S. C. § 391 (1946); See *Lutwak v. United States*, 344 U. S. 604, 619 (1952) ("A defendant is entitled to a fair trial but not a perfect one.")

14. As Judge Learned Hand stated the problem, "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance." *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

1. See N. D. Rev. Code § 28-0501 (1943) "Civil actions in the courts of this state shall be commenced by service of a summons."; see also *Coman v. Williams*, 78 N. D. 560, 50 N.W.2d 494, 498 (1952) (dictum) (the court obtains jurisdiction at service of the summons). The state court must have jurisdiction before the federal court can acquire jurisdiction on removal. See *Weeks v. The Fidelity and Casualty Company of N. Y.*, 218 F.2d 503, (5th Cir. 1955).

2. See N. D. Rev. Code § 28-0511 (1943) (requiring the summons and the several pleadings in a civil action to be filed with the court within ten days after service thereof); see also *Crum, Proposed North Dakota Rules of Civil Procedure*, 32 N. Dak. L. Rev. 88, 98-99 (1956) (that the state court may have jurisdiction of the action without a record of the case); see also *Schaff v. Kennelly*, 61 N.W.2d 538, 543 (N. D. 1953) (dictum) ("... filing is not a condition precedent to the acquisition of jurisdiction...").

3. 62 Stat. 939 (1948), as amended, 28 U. S. C. A. § 1446 (1949) ("Procedure for Removal, (a) File verified petition in federal court, (b) within 20 days of commencement of action in state court, (c) post bond in Federal court and (d) promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State Court, which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.") Formerly, removal was initiated by filing the petition in state court, and copies of the petition in Federal Court. See 36 Stat. 1095 (1911), 28 U. S. C. § 72 (1946). See also Rule 81, Fed. Rules of Civ. Proc., making

with. The United States District Court for the District of North Dakota, Davies, J., denied the motion, holding that failure to strictly comply with the removal statute by promptly filing copies of the removal petition in the state court did not defeat Federal jurisdiction since the requirement is merely ministerial and since the failure was excusable. Both the state and Federal courts had jurisdiction of the case between the time of the filing of the removal petition and the filing of copies of that petition in the state court. *Hornung v. Maser Tank & Welding Co.*, F. Supp. (N.D.D. civ. No. 3446, April 15, 1957).

The language of the removal statute has compelled some courts to state that it must be "strictly construed"⁴ but the decisions of the courts appear to be inconsistent with that position. Thus the motion for remand has been denied: where the removing party failed to give the required notice,⁵ where the bond was not filed simultaneously with the petition,⁶ where copies of the removal petition were filed in state court before the original petition was filed in federal court,⁷ and, where copies of the petition were not filed until the day after filing of the petition and after the time for removal had expired.⁸

Apparently the requirements of the removal statute are of two types: that which is jurisdictional will be strictly construed⁹ and those which are procedural or ministerial (model or formal) will be liberally construed.¹⁰ Where the defect in removal procedure is jurisdictional the remand will be granted, as where the removing party fails to timely file the removal petition in federal court¹¹ or where he is guilty of total noncompliance with the removal statute.¹² Where the defect in removal is ministerial remand will not be made where it is harmless¹³ or excusable.¹⁴ Subsequent cor-

the rules applicable to removed actions but without necessity of repleading, setting out time for answer, and preserving right to jury trial if not requested in original complaint if requested within ten days after removal or notice thereof.)

4. *Merz v. Dixon*, 95 F.Supp. 193, 195 (D.Kan. 1951) (dictum); *Peavey v. Reed Co.*, 41 F. Supp. 351, 352 (E. D. N. Y. 1941) (dictum); *cf. Coco v. Altheimer*, 46 F. Supp. 321, 323 (W. D. La. 1942) (dictum) ("... within the time and in the manner prescribed...").

5. *Jones v. Elliott*, 94 F. Supp. 567 (E. D. Va. 1950).

6. *Tucker v. Kerner*, 186 F.2d 79 (7th Cir. 1950).

7. *Merz v. Dixon*, 95 F. Supp. 193 (D. Kan. 1951).

8. *Donlan v. F. H. McCraw & Co.*, 81 F. Supp. 599 (E. D. N. Y. 1948).

9. See *Coco v. Altheimer*, 46 F. Supp. 321 (W. D. La. 1942).

10. See *Rock v. Manthei*, 129 F. Supp. 769 (W. D. Mo. 1955) (minor without next friend amounts to a mere "technical irregularity"); see also notes 5, 6, 7 and 8 *supra*.

11. *Kramer v. Jarvis*, 81 F. Supp. 360 (D. Neb. 1948); *Coco v. Altheimer*, 46 F. Supp. 321 (W. D. La. 1942).

12. *Youngson v. Lusk*, 96 F. Supp. 285 (D. Neb. 1951).

13. *Kidd v. National Fire Ins. Co.*, 32 F.2d 935 (W. D. Va. 1929).

14. *Peavey v. Reed Co.*, 41 F. Supp. 351 (E. D. N. Y. 1941).

rection of technical irregularities relates back to the time of the filing of the removal petition.¹⁵

Jurisdiction vests in the federal court at the time of the filing of the removal petition,¹⁶ but until such time as the removal statute has been complied with there is a dual jurisdiction in the state court.¹⁷ State court jurisdiction may be waived by acquiescing in the actions of the federal court and by failure to take appropriate action in the state court.¹⁸ Until removal is completed however, the plaintiff is free to proceed with the action in the state court¹⁹ but in event of conflicting proceedings federal jurisdiction predominates.²⁰

FRANCIS BREIDENBACH.

INSURANCE — AUTOMOBILE LIABILITY — EXTENT OF COVERAGE UNDER SUBSTITUTION PROVISION. — The holder of an unexpired automobile liability policy was involved in an accident after the sale of the automobile described in the policy and the ordering of a new one. The accident occurred in a borrowed automobile within the 30 day period allowed by the policy for notifying insurer of any replacement under the automatic insurance provision of the policy. The policy contained a substitution provision extending coverage to any automobile not owned by him "while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction". The United States District Court, District of South Dakota, refused recovery, and on appeal the United States Court of Appeals, Eighth Circuit, one justice dissenting, held that there was no coverage on the grounds that ownership of some automobile was a condition precedent to liability of the insurer. *Daugaard v. Hawkeye Security Ins. Co.*, 239 F.2d 351 (8th Cir. 1956).

A court should take notice of the purpose the insured had in mind when seeking insurance and should avoid an interpretation

15. *Shenandoah Chamber of Progress v. Frank Associates*, 95 F. Supp. 719, 720, (E. D. Pa. 1950) (dictum).

16. *Steamship Co. v. Tugman*, 106 U. S. 118 (1882); *Coyle v. Skirvin*, 124 F.2d 934 (10th Cir. 1942); *Kingston v. American Car & Foundry Co.*, 55 F.2d 132, 136 (8th Cir. 1932) (dictum); *Shenandoah Chamber of Progress v. Frank Associates*, 95 F. Supp. 719, 720 (E. D. Pa. 1950) (dictum).

17. See *Donlan v. F. H. McGraw & Co.*, 81 F. Supp. 599 (E. D. N. Y. 1948); but see *Peavey v. Reed & Co.*, 41 F. Supp. 351 (E. D. N. Y. 1941).

18. *Kramer v. Jarvis*, 81 F. Supp. 360 (D. Neb. 1948).

19. *Donlan v. F. H. McGraw & Co.*, 81 F. Supp. 599, 600 (E. D. N. Y. 1948) (dictum).

20. *Miners Savings Bank v. United States*, 63 F. Supp. 305 (M. D. Pa. 1945); *But cf. Hopson v. North American Ins. Co.*, 71 Idaho 461, 233 P.2d 799.