INTRODUCTORY

This Memorandum is divided into two parts - Part I discusses the Federal Injunctive Power and Part II discusses Removal. The introduction to Part II appears separately infra.

Part I deals with the inherent and statutory power of the Federal Courts to enjoin State Court proceedings. It discusses that power as it was considered to exist prior to the decision of the United States Supreme Court in Toucey v. New York Life Insurance Co., 314 U.S. 118, (1941) and whether or not the pre-Toucey power has been diminished. Also discussed is the 5th Circuit attitude toward the power. That power as it concerns us is called the "ancillary exception" to the anti-injunction prohibition of the Federal Judicial Code.

An outline to Parts I and II follows:

Part I - INJUNCTION

1. DOES A FEDERAL COURT HAVE THE POWER TO ENJOIN PENDING LITIGATION IN THE CIRCUIT COURT OF MONTGOMERY COUNTY.

   a. Old Law.

   b. The Toucey Case.

   c. 1948 Revision of the Judicial Code.

   d. Post Revision Decisions in the Supreme Court of the United States.

   e. Post Revision Decision in the 5th Circuit.

   f. Conclusion.

2. ASSUMING INJUNCTIVE POWER CAN BE EXERCISED, UPON WHAT BASIS CAN IT BE INVOKED.

a. As a judicial exception of 28 U.S.C., §2283.

b. As within the provisions of 28 U.S.C., §2283.

c. Conclusion.

3. DOES A FEDERAL COURT HAVE THE POWER TO ENJOIN ENFORCEMENT OF THE EXISTING JUDGMENTS AS HAVING BEEN FRAUDULENTLY OBTAINED.

Part II - REMOVAL

1. Time for Removal.

a. Do we come within the Statutory Time?

b. Can the Federal Courts extend the Statutory Time?

c. Opposing party's waiver of untimeliness argument where Fraud present.

2. Grounds for Removal.

a. Fraudulent Joinder.

b. How far will the Courts enquire into the merits of a controversy to determine whether an action is removable? Will they confine themselves soley to the pleadings.

c. The test of Fraudulent Joinder.

d. Whether Joinder of four individual defendants was fraudulent.

PART I

INJUNCTION

1. DOES A FEDERAL COURT HAVE THE POWER TO ENJOIN PENDING LITIGATION IN CIRCUIT COURT OF MONTGOMERY COUNTY.

A. The Old Law.

Prior to the decision in Toucey v. New York Life Insurance Co. and the 1948 Revision of the judicial code §265 thereof provided that no "writ of injunction be granted to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Nevertheless, Congress, by legislative enactment and the Federal Courts under their equitable powers had created many exceptions to the statutory inhibition. 1./

1./ The Congressional exceptions were to be found in the Bankruptcy Act of 1867, 14 Stat. 526; the Removal Acts now §1441 et seq of 28 U.S.C. - (section 265 has always been deemed inapplicable to removal proceedings. Dietzsch v. Huidekoper, 196 U.S. 239; Toucey v. N. Y. Life Ins. Co., 314 U.S. 118, 133); The Interpleader Act of 1926, 44 Stat. 416 expressly granting exclusive jurisdiction to Federal Courts providing them with injunctive power, and the Frazier-Lemke Act, 47 Stat. 1473 providing for exclusive Federal jurisdiction with respect to actions against farmers or their property. The judicial exceptions are enumerated in the Toucey case and involved the so-called in rem cases, i.e. where Federal and State Courts exercised concurrent jurisdiction over the same res; cases where it was alleged the State Court judgments were fraudulently obtained; and the so-called relitigation cases involving state court actions relitigating matters previously decided in the Federal Courts.

Among the judicially created exceptions arising out of the inherent equitable powers of the Federal Courts and the ones of greatest importance to us are those cases classified by Professor Barret as belonging to the "ancillary exceptions."[2] Professor Moore has described these cases as constituting a well settled doctrine, namely that a federal district court has the power to enjoin the continued prosecution or the formenting of vexatious and groundless proceedings, or where there is a multiplicity of suits and such suits are in furtherance of a fraudulent scheme against the defendant or are otherwise inequitable and result in irreparable harm and injury to him.[3] That power, Professor

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2./ See Barrett, Federal Injunctions Against Proceedings in State Courts, 35 Calif. L.R. 545, 549-50 (1947).

3./ Moore's Federal Practice, Vol. 1 page 2626 - The authorities cited by Professor Moore are Sovereign Camp Woodmen of the World v. O'Neill, 266 U.S. 292 (1924); American Optometric Ass'n. v. Ritzholz, 101 F.2d 883 (7th Cir. 1939) cert den. 307 U.S. 647; Jamerson v. Alliance Ins. Co. 87 F.2d 253 (7th Cir. 1937), cert den. 300 U.S. 683; and the following cases not considered apposite by this writer; Texas & Pacific Ry. Co. v. Kuteman, 54 F. 547 (5th Cir. 1892) - where the court enjoined threatenedrather then pending litigation and distinguished the anti-injunction statute on that ground; Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa, 42 F. Supp. 917 (N.D. Idaho 1942) where action commenced pursuant to Federal Declaratory Judgment Act and exercise of injunctive power was in aid of Federal jurisdiction independently acquired.

Moore declares [4.] springs from the equitable jurisdiction of the court, and is based on the fact that the defendant has no adequate remedy at law by which he may protect himself from irreparable damage resulting from the conspiracy. Such a conclusion is strengthened in our situation when it is remembered that there is no power of consolidation in Montgomery County.

Before going into a discussion of the cases exemplifying the judicially created ancillary exceptions to the anti-injunction statute it is worth mentioning that the anti-injunction statute when first enacted in 1793 very probably reflected the prevailing prejudices against equity jurisdiction.[4a.] Also Chancellor Kent in his Commentaries on American Law (1826) Vol.1 p.386 noted that the anti-injunction statute prevented control by the Federal over the State Courts, other than by means of the established appellate jurisdiction.[5.]

4./ Moore, IBID.

4-a./ See the authorities collected in the Majority Opinion in Toucey supra 1 at p. 131.

5./ However, Chancellor Kent was commenting in connection with the first case to arise under the anti-injunction statute, i.e. Diggs & Keith v. Wolcott, 4 Cranch 179 (1807) where the Supreme Court reversed an injunction of state proceedings arising out of a series of promissory note - There was no allegation of fraud or vexatious proceedings.

In Woodmen of the World v. O'Neill, 266 U.S. 292 (1924) a suit in equity was brought in a Federal District Court to enjoin the prosecution of 25 separate actions at law instituted against the Society in a local Texas court to recover amounts ranging from $997 to $1,170. which the defendants claimed as per diem, mileage and traveling expenses by reason of attending the National Convention of the Society in an attempt to secure the election of their own delegates. In the federal district court the Society alleged that in each of the suits the same cause of action had been stated in identical language and only one issue was involved in all of them; that there was no merit in the cause of action set up by the defendants and that the suits were wholly without any foundation and it prayed an injunction of the state court actions. The district court dismissed the bill upon the specific ground of want of jurisdiction.

The Supreme Court was faced with essentially two issues: one, that the District Court did not have jurisdiction because the amount in controversy in any one suit did not exceed $3000 and the Society was not entitled to aggregate the total amount of the judgments sought against them in the state courts for the purposes of sustaining federal jurisdiction. The second question the Supreme Court was required to answer was whether or not Title 28 Section 379 prohibited federal courts from staying the pending state court actions. In

answer to the first question, the Supreme Court held as follows:

> "A conspiracy to prosecute, by concert of action, numerous baseless claims against the same person for the wrongful purpose of harassing and ruining him, partakes of the nature of a fraudulent conspiracy; and in a suit to enjoin them from being separately prosecuted, it must likewise be deemed to tie together such several claims as one claim for jurisdictional purposes, making their aggregate amount the value of the matter in controversy. We conclude, therefore, that, on the face of the bill, the District Court had jurisdiction of the suit by reason of the diversity of citizenship and the amount in controversy."

In holding that the jurisdiction thus acquired was not taken away by the provision of the Judicial Code which stated that no writ of injunction would be issued by any court of the United States to stay proceedings in any state court, the Supreme Court held as follows:

> "This section does not deprive a district court of the jurisdiction otherwise conferred by the federal statutes, but merely goes to the question of equity in the particular bill; making it the duty of the court, in the exercise of its jurisdiction, to determine whether the specific case presented is one in which relief by injunction is prohibited by this section or may nevertheless be granted."

Therefore, this decision established that where a Federal District Court has acquired jurisdiction by reason of diversity and requisite jurisdictional amount the anti-injunction

statute did not deprive it of jurisdiction to determine whether the court should exercise its equitable powers. Impliedly therefore the anti-injunction statute did not deprive the Federal courts of their inherent equitable powers. 6./

In Jamerson v. Alliance Ins. Co. of Philadelphia 87 F. 2d 253 (7th Cir. 1937) ten fire insurance companies sought to enjoin the insured from prosecuting 11 separate pending suits in the city court of East St. Louis, Ill., upon separate fire insurance policies issued to the insured covering the same merchandise subsequently destroyed by fire.

Among the allegations of the insurance company seeking the injunction were that each policy was a standard insurance contract containing a provision that each insurer should not be liable for any more than its pro rata share of any total loss; that although certain of the policies sued upon in the state court purported to constitute an individual liability of more than $3,000, yet each of the suits on those policies was brought for $2,999.

6./ This conclusion becomes important in view of the Revisors' notes to the 1948 revision of the Judicial Code discussed infra in section 1c.

Another of the allegations of the insurers, which was sustained by the District Court and Court of Appeals, was that the insured fraudulently conspired with others to procure and did procure all of the policies of insurance by false statements. It also appeared that the insured had been convicted in a United States Court on an indictment charging him with using the mails to promote the aforementioned conspiracy.

In sustaining the granting of the injunction by the District Court against the attack that 28 U.S.C.A. Section 379 prohibited the assumption of jurisdiction, the Circuit Court held as follows:

> "It is unnecessary to discuss at length the applicability of section 265 of the Judicial Code (28 U.S.C.A. §379). The Supreme Court has held that it is not a jurisdictional statute, but one that merely goes to the equity presented by the bill. That court has further held that if the bill discloses a case appropriate for the exercise of equitable and injunctive powers of a federal court, an injunction of the character here involved may be issued. Smith v. Apple, 264 U.S. 274, 44 S.Ct. 311, 68 L.Ed. 678; Woodmen of the World v. O'Neill, supra. This question was fully discussed in the District Court's opinion, and we concur in the result reached therein." 7./

In American Optometric Ass'n. v. Ritzholz, 101 F.2d 883, (7th Cir., 1939), the Plaintiff Association was a non-profit organization of optometrists incorporated in the state of Ohio

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7./ It may be noted incidentally that Smith v. Apple, 264 U.S. 274, cited by the 8th Circuit involved the use of injunctive relief with respect to the enforcement of fraudulently obtained state court judgments discussed infra in section 3.

with affiliates in 47 other states. The defendants were engaged in the business of selling optical goods and operated under numerous trade names. It appeared from the record of the case that the Association had from time to time assisted governmental agencies in their efforts to investigate practices of the defendants and in fact the defendants had been ordered by the Federal Trade Commission at various times to cease and desist from certain fraudulent representations. The defendants had filed seven suits against the plaintiff-Association, its officials and affiliates and members in the state courts of Indiana, Illinois and Nebraska and in the Federal Courts of Nebraska, Minnesota and Canada. The gravamen of all the actions was that the Association was seeking to ruin defendants' business by unlawful acts such as libeling defendants, intimidating employees, and inducing others not to deal with defendant or accept defendants' advertising, the total amount of damages sought by defendant in those actions aggregating $450,000. The District Court found that all the actions instituted by the defendants against the plaintiff-Association were groundless, were not brought in good faith, were wilfull, vexatious and malicious and for the purpose of vexing, harassing and injuring the plaintiff. In sustaining the injunction issued by the District Court against the attack that it was in violation of the prohibition of Title 28, section 379, the

Seventh Circuit held as follows:

> "We are of the opinion that the facts alleged in the bill of complaint in the instant case, which are established by the evidence, constitute grounds for the exercise of the equity power of injunction by the federal district court and that under the decisions of the Supreme Court of the United States the exercise of such power does not fall within the inhibitions of Section 265 of the Judicial Code."

The Jamerson & Ritzholz cases, both 8th Circuit decisions, are the only cases I have been able to find where a federal court has enjoined vexatious and fraudulent suits pending in state courts. One 5th Circuit decision 8./ was cited by Professor Moore to support the equitable injunctive power, Texas & P. Ry. Co. v. Kuteman, 54 Fed. 547 (5th Cir. 1892). However, the court enjoined threatened rather than pending litigation and it is clear the threatened litigation is not within the statutory language prohibiting the enjoining of state court proceedings. The literal interpretation given to the anti-injunction statute in the following quotation from that opinion might bode ill for prospective injunction actions commenced in the 5th Circuit today were it not for recent decisions in that circuit discussed subsequently herein (Section 1d):

8./ Supra note 3

"It is not clear that the bill in this case seeks to stay or enjoin any pending proceedings in state courts, though the language of the prayer that the defendant be enjoined 'from instituting or prosecuting such action pending this cause' is susceptible of that construction. Manifestly the chief purpose was to prevent the further institution of the many threatened suits, and, if the plaintiff sought relief as to suits already brought, as well as to suits threatened, the two purposes and prayers are not so united or dependent that they must stand or fall together. The language of the statute is plain, and the decisions uniform, that with the exception named in the statute, a writ of injunction shall not be granted to stay pending proceedings in any court of a state."

Several cases have denied the power to enjoin pending state court proceedings where the only basis forwarded for injunctive relief was the existence of a multiplicity of actions [9./] however they recognized the existence of the ancillary exception where something more than multiplicity of actions is shown. Such was the state of the law prior to the decision of the Supreme Court in Toucey v. New York Life Insurance Co. [10./]

9./ DiGiovanni v. Camden Insurance Ass'n., 296 U.S. 64 (1935); Armour & Co. v. Hougen 95 F.2d 196 (8th Cir. 1938); New York Life Ins. Co. v. Stoner, 92 F.2d 845 (8th Cir. 1937); First State Bank v. Chicago R.I. & P. R. Co., 63 F.2d 585 (8th Cir. 1933); Georgia Power Co. v. Hudson, 49 F.2d 66 (4th Cir. 1931); Union Central Life Insurance Co. v. McAden, 21 F. Supp. 110, (U.S. D.C. Tex., San Angelo Div. 1937).

10./ Supra Note 1.

B. The Toucey Case.

At the issue before the Court in the Toucey case was the power of a federal district court to enjoin the re-litigation in the state court of issues settled by a prior federal decree. Justice Frankfurter writing for a majority of the court held that the injunction prohibition of the then Section 379 of Title 28 of the Judicial Code prevented federal courts from enjoining the state court proceedings. While this holding was later overruled by the congressional re-enactment of that Code as Title 28, Section 2283, nevertheless Justice Frankfurter's comments on the history of that section of the Code are important to a prediction of how the court might today handle injunction cases. In the body of Justice Frankfurter's opinion he noted that in the course of 150 years, Congress had made few withdrawals from the sweeping prohibition of the injunction statute. He enumerated these congressional exceptions as (1) bankruptcy proceedings; (2) removal actions; (3) limitation of shipowner's liability; (4) interpleader; and (5) the Frazier-Lemke Act dealing with the exclusive federal jurisdiction over proceedings against the farmer or his property.

Justice Frankfurter then discussed the judicially created exceptions to the statutory inhibition against federal injunctions of state court proceedings. He noted that the

rule had become well settled that the judicial code did not preclude the use of the injunction by a federal court to restrain state court proceedings seeking to interfere with property in the custody of the court.

Justice Frankfurter then went on to discuss the cases where federal courts have enjoined litigants from enforcing judgments fraudulently obtained in the state courts noting that the foundation of those cases was very doubtful without undertaking to re-examine them. Finally, Justice Frankfurter in re-examining the so-called "re-litigation cases" decided that they fell within the statutory inhibition and overruled those decisions which granted injunction under such circumstances.

In Toucey therefore, the court accepted the existence of express and implied legislative exceptions to the anti-injunction statute. While it recognized the existence of at least one judicial exception the decision apparently marked a significant restriction of the power to enjoin state court proceedings and "infused new vitality into the policies of the statute." 11./

11./ See Note 74 Harv. L.R. 726, Federal Power to Enjoin State Court Proceedings.

C. 1948 Revision of the Judicial Code.

In 1948 the anti-injunction statute was amended to read as follows: (28 U.S.C. 2283)

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The substance of the Revisor's Notes in this section was as follows:

> "An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.
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> "The phrase 'in aid of its jurisdiction' was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.
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> "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co., * * *. A vigorous dissenting opinion * * * notes that at the time of the 1911 revision of the Judicial Code, the power of the courts of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).
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> "Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.
>
> "Changes were made in phraseology."

In light of the revisor's note with respect to the restoration of the basic law prior to the Toucey decision and the exceptions written into the statute it would appear that Congress intended a wider latitude for the exercise of the equitable discretion of the federal courts than some of the members of the Supreme Court believe.[12]

D. Post Revision Decisions in the Supreme Court of the United States.

In Amalgamated Clothing Workers of America v. Richman Bros. Co.[13], writing for a majority of the court and speaking of the 1948 Revision, Justice Frankfurter declared:

> ". . . By that enactment Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."

In a footnote, the majority of the Court referred to the revisor's notes that the revised section had restored the basic law as generally understood and interpreted prior to the Toucey decision. The footnote continued that even if

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12. e.g. Justice Frankfurter's opinion in Amalgamated Clothing Workers of America et al v. Richman, 348 U.S. 511 (1955), discussed infra section id.

13. 348 U.S. 511 (1955).

the revisor's note was taken to mean that despite the revised wording the section was to derive its content from decisions prior to 1948, nevertheless there was no precedent for the present proceeding and moreover in context it was clear that the quoted phrase referred only to the particular problem which was before the Court in the Toucey case.

The problem this case presents for us is whether Richman leaves any life in Woodmen v. O'Neill and its progeny the Jamerson & Ritzholz cases.[14]

In Richman the petitioner, a labor union, sought to enjoin in a Federal District Court an employer's suit brought in the Court of Common Pleas for Cuyohoga County, Ohio wherein the employer alleged that the Union had engaged in a conspiracy in restraint of trade seeking a temporary and permanent injunction

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14/ Supra Note 3; Professor Moore takes the view that the prohibition found in §2283 should not deprive a federal court of its jurisdiction to issue an injunction under the ancillary exception doctrine since the injunction in such a case would be in "aid" of the jurisdiction of the Federal Court and therefore within one of the exceptions written into §2283. However, this portion of the memorandum is only concerned with whether the Richman case, apart from whether O'Neill etc. comes within the statutory exception, impliedly overrules the O'Neill case and its progeny.

of union activities. Under the Taft Hartley Act, and prior decisions of the Supreme Court [15.], exclusive jurisdiction over unfair labor practices vested in the National Labor Relations Board which had the authority to seek injunctions over such practices in the Federal Courts. The Capital case [16.] decided that State Court proceedings seeking injunction of unfair labor practices would be enjoined if the NLRB sought to act over the same subject matter. It was held in that case that 28 U.S.C. 2283 was no bar to the Federal injunction since it would be in aid of jurisdiction exclusively within Federal courts and Federal agencies. [17.] Justice Frankfurter in Richman

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15./ Garner v. Teamsters Union, 346 U.S. 485 (1953); Capital Service, Inc. v. Labor Board, 347 U.S. 501 (1953).

16./ Supra 15.

17./ Justice Douglas writing for the majority held: "We do not stop to consider the many questions which have been propounded under this newly worded provision of the code. One alone suffices for this case. For we conclude that the injunction issued by the District Court was 'necessary in aid of its jurisdiction' and thus permitted under the exceptions specifically allowed by Congress."

distinguished Capital on the ground that in the latter the NLRB sought to enjoin state action, while in Richman a private litigant did.[18]

The argument of the petitioner in Richman ran to the effect that 28 U.S.C. 2283 did not prohibit federal injunctions of State Court proceedings where the subject matter of the action, namely unfair labor practice, was exclusively within a field pre-empted by Congress. In answer to this contention Justice Frankfurter held that no such exception had been established by judicial decision under the former section of the code nor had Congress left any justification for its recognition in the re-enactment of that decision.

Arguably the Richman decision does not sap the vitality of O'Neill, etc. It appeared in Richman that petitioner had a federal remedy available to him which would not have upset the balance between Federal-State relationships with which Justice Frankfurter was so pre-occupied in the Richman case,[19] at least not by judicial decree. Apparently

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18./ This distinction drew a vigorous dissent from Justice Warren, Douglas and Black who said it opened the door for the evasion of a Federal Regulatory scheme.

19./ e.g. his comment in that case that "the prohibition of §2283 is but continuing evidence of confidence in the State Courts, reinforced by a desire to avoid direct conflicts between State and Federal Courts.

it could have petitioned the NLRB to seek an injunction of the State Court proceedings as themselves constituting an unfair labor practice.[20] This would distinguish Richman from our situation since our only adequate remedy to avoid immediate and irreparable harm would be an injunction of the pending actions in the Montgomery County Court.

Additionally it should be noted that the majority opinion did not specifically overrule previous judicial exceptions to the anti-injunction statute and in a more recent case held that one exception to §2283 was where the injunction of State Court proceedings was sought by the United States.[21]

E. Post Revision Decisions in the 5th Circuit.

There have been two important decisions in the 5th circuit[22] since the 1948 Revision which provide some indication of whether that court will interpret §2283 narrowly so as not to prevent a Federal Court from exercising its

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20. Justice Frankfurter decided this was a possibility although he indicated there was no law on it yet. See p. 520 of his opinion.

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21. Leiter Minerals, Inc. v. United States et al, 352 U.S. 220, (1956).

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22. Jacksonville Blowpipe Company v. Reconstruction Finance Corp. 244 F.2d 394, (5th Cir. 1957); T. Smith & Son, Inc. v. Williams 275 F.2d 397, (5th Cir. 1960).

jurisdiction or broadly to exclude the exercise of equitable discretion.[23]

Jacksonville Blowpipe Company v. Reconstruction Finance Corporation,[24] was an appeal from a summary judgment enjoining appellant from prosecuting a suit in the State Court of Florida. It appeared that the appellant had installed a certain blowpipe system in the manufacturing plant of one Parker who was adjudged a bankrupt. The referee declared the appellant to be the owner of the system and directed the Trustee to either give appellant possession of it or pay the amount of the claim. Pursuant to this the Trustee wrote to appellant's attorney authorizing him to proceed in any manner he saw fit to recover the blowpipe system which had been sold as part of the bankrupt's plant to the Reconstruction Finance Corporation. The RFC tendered to the blowpipe company

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23. It might be well to keep in mind that the question before a Federal District Court with respect to §2283 is not whether the statute deprives it of jurisdiction but whether it prevents the exercise of its equitable discretion. (Sovereign Camp Woodmen of the World v. O'Neill, supra at 3.) Obviously if the statute were jurisdictional there would be no room for the exercise of judicial discretion.

24. Supra at 22.

a check in the full amount of its claim and the referee entered an order approving the act and discharging the Trustee. No appeal was taken from that order. Appellant then filed a suit in the Circuit Court of Florida demanding a return of the blowpipe system or its value plus $4,500 damages for its retention. The RFC thereupon filed this suit in the District Court praying for a declaratory judgment determining appellee's and appellant's rights to the system and for a permanent injunction prohibiting appellant from prosecuting any suits for repossession or damages for the retention of the system.

The question the court decided was whether the District Court could enter an injunction enjoining the State Court proceedings in view of the p rohibition of Title 28, U.S.C.A., Section 2283. The appellant relied principally on the decision in Toucey v. New York Life Insurance Co.and the Richman Brothers case.

The Fifth Circuit Court carefully examined the opinion of the Supreme Court in Toucey and Richman. In apparent disagreement with Justice Frankfurter's dictum it noted with approval the revisor's comments to §2283 that the revised section had restored the basic law as generally understood and interpreted prior to the Toucey decision. It held that in spite of the broad opinion of the Supreme Court in the Richman case the so-called in rem exception to the prohititions of §2283 which were part of the law prior to Toucey and restored

to the law in view of the revisor's note after Toucey, were dispositive of the action before it, and distinguished Richman Brothers case on the ground that anything said by the Court therein with respect to the so-called in rem exceptions would be at most"dictum."

It sustained the holding of the District Court on three specific grounds: (1) that the in rem exception to the prohibition of Section 2283 prior to Toucey was restored by the re-enactment of that section after the Toucey decision; (2) that the situation was a "re-litigation situation," a recognized exception within the re-enactment of Section 2283; and (3) the case before it was within the statutory exception against injunction, namely the power of the Federal Courts to protect or effectuate their judgments.

Then in 1960 came that Courts decision in T. Smith & Son, Inc. v. Williams.[25] There the question to be decided by the court was whether a Federal Court may enjoin compensation proceedings brought by a longshoreman against his employer in a State Court under a State Act when, as the Federal Courts saw it, the longshoreman's remedy was exclusively under the Longshoremen's and Harbor Worker's Compensation Act.

The importance in this decision for our purposes lies essentially in the restriction of the Jacksonville case

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25/ Supra at 22.

as based on a "so-called narrow exception to the general ban against injunctions, namely to prevent the re-litigation of issues previously decided between the same litigants." With respect to this, the following quotation of the Court is pertinent:

> "We cast no doubts on the correctness of Jacksonville Blow Pipe. Relitigation of issues previously decided between the same litigants is a narrow exception to the general ban against injunctions. It may be supported as encompassed in the third express exception of Section 2283. But, as we read Richman, Heinz v. Owens, Harper and Empire Pictures, the hands-off doctrine expressed in Section 2283 is to be considered in the light of the function of Section 2283 as a pillar of federalism. Like the doctrine of abstention, its '*** justification *** lies in regard to the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations in a matter close to the political interests of a state.' Louisiana Power & Light Co. v. City of Thibodaux, 1959, 360 U.S. 25, 79 S.Ct. 1070, 1073, 3 L.Ed. 2d 1058." [Emphasis addes]

However, it is to be noted that the court correctly reasoned the injunction sought here did not come within any of the judicially defined exceptions prior to the Toucey decision.

In spite of Smith's restriction on the holding in Jacksonville Pipe the decision reflected a general reluctance on the part of Federal Courts to interfere with State Court proceedings based on the premise that the subject matter of the

action is pre-empted by Congressional action.[26] Furthermore not only was the literal reading of §2283 by the Richman case apparently rejected by the 5th Circuit but also none of the cases involved the extraordinary circumstances presented in O'Neill and its progeny.

Conclusion.

The only important question at this juncture is whether or not one can reasonably assert that the Richman case has not eliminated the ancillary exception cases as arguable precedent. Apparently the 1948 revision didn't because of the wholesale restoration of the pre-Toucey basic law as commented on in the Revisor's notes. It is, at least arguable that Richman did not either because there was no explicit statement to that effect. It might not even be a fair inference from the Richman case because the court was not faced with anything approximating the extraordinary circumstances of O'Neill, Jamerson, and Ritzholz. Whether or not the present Supreme and

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26./ See also National Labor Relations Board v. Swift & Co. 233 F.2d, 226 (8th Cir. 1956). In the Smith case the court was not dealing with a subject matter clearly covered by federal legislation. It appeared in fact there was considerable doubt whether or not Congress and the decisions of the Supreme Court hadn't left room for State action in the field of compensation for the so-called amphibious worker.

and Fifth Circuit Courts would now overrule on ancillary exception cases is another matter.

2. ASSUMING INJUNCTIVE POWER CAN BE EXERCISED UPON WHAT BASIS CAN IT BE INVOKED.

A. As a Judicial Exception to 28 U.S.C., §2283.

There is perhaps little point now in attempting to lay a factual foundation sufficient to come within the ancillary exception doctrine. Essentially, we must show that the pending law suits were not brought in good faith, but brought pursuant to a conspiracy on the part of the plaintiff's to vent their spleen on the Times. This would allow us to get into the merits of the action before the Federal District Court with its consequent advantages and disadvantages.[27./]

B. As Within The Provisions of 28 U.S.C., §2283.

Section 2283 currently provides that a Federal Court may enjoin State Court proceedings "where necessary in aid of its jurisdiction." That phrase has never been defined by the

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27./ Among the advantages would of course be a ruling that the suits were groundless because the libel was not of and concerning any of the plaintiff's conversely a ruling that it was establishes a precedent we might not benefit from.

Supreme Court - the Revisor's note says the phrase was added to conform to section 1651 of Title 28 [28.] and to make clear the recognized power of the Federal Courts to stay proceedings in State cases removed to the District Courts.

It was always clear that Federal Courts, under the in rem exception to the anti-injunction statute could restrain State Court proceedings in bankruptcy matters, provided the Federal jurisdiction was first acquired. [29.] The power to enjoin State Court proceedings has also been sustained when the Federal action is brought subsequent in time to the State action. Thus, where State Court proceedings were instituted under various policies of insurance, the Federal Court enjoined the

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28./ Section 1651, the "all writs section" provides in its pertinent parts that the Federal Courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law." The annotation to that section under the heading "Injunctions in aid of jurisdiction" refer the reader to the cases annotated under §2283. However, this game of ping-pong between the two sections does provide some guides to definition in view of the decisions rendered under the predecessor to §2283.

29./ Callaway v. Benton, 336 U.S. 132 (1949)

proceedings "in aid of its jurisdiction" under the Federal Declaratory Judgment Act.[30] Professor Moore has taken the view that ancillary exceptions cases come within the "jurisdictional aid" statutory exception. Although he does not explain why, the argument would apparently run that the injunction would be in aid of the equitable jurisdiction of the Federal Courts which under the O'Neill case and its progeny will enjoin fraudulently inspired suits. If this view is correct then it can also be argued that the injunctive relief sought here is in aid of the original diversity jurisdiction to the Federal Courts which was defeated through the fraudulent joinder of the four individual defendant's[31]

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30. American Insurance Co. v. Lester, 214 F.2d, 578 (4th Cir., 1954); Pacific First Insurance Company v. C.C. Anderson Company of Nampa, 42 F.Supp. 917, (D.C.,Idaho So. District, 1942)-N.B. However compare with the dictum of the 5th Circuit in T. Smith & Son, Inc. v. Williams, supra. N.22:

> "It is questionable whether the phrase 'where necessary in aid of its jurisdiction' used in this section authorizes injunction to protect jurisdiction of original actions . . ."

It should be noted further that the prohibitions of section 2283 cannot be avoided by the simple device of framing the action as one for a declaratory judgment. H.J. Heinz Co. v. Owens, 189 F.2d, 505 (9th Cir., 1951), cert. den. 342 U.S. 905.

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31. The basis for the fraudulent joinder argument is explained in Part II of this memorandum.

C. Conclusion.

It is suggested therefore that the Federal Court has the power either under the ancillary exception cases or within the provisions of §2283 - "when necessary in aid of its jurisdiction" to enjoin pending State Court actions, and that it should exercise that power here because (1) the State proceedings are groundless (2) the injunction is in aid of the Federal Courts equitable jurisdiction which can be invoked to prevent groundless actions (3) the injunction is in aid of the Federal Courts diversity jurisdiction, which has been fraudulently avoided, thereby denying to the Times a substantial right namely its right to Proceed in the Federal Courts. 32./

3. DOES A FEDERAL COURT HAVE THE POWER TO ENJOIN ENFORCEMENT OF THE EXISTING JUDGMENT AS HAVING BEEN FRAUDULENTLY OBTAINED.

As discussed earlier herein Justice Frankfurter writing for a majority of the Court in Toucey v. New York Life Insurance Co. 33./ indicated that those cases which enjoined

32./ This latter argument and the relief sought is essentially the same as will be discussed in Part II. If it is determined there is substantial reason for believing removal would be granted we may not want to argue the fraudulent joinder in the non-removal proceedings since it might give the opposition an opportunity to argue, along the lines suggested in the Richman case, that we hadn't exhausted our Federal remedies.

33./ 314 U.S. 118.

enforcement of State Court judgments as having been obtained through fraud rested on a very doubtful foundation although he did not undertake to re-examine them. Nevertheless those cases have not been overruled and the Revisor's notes to section 2283 explain that the purpose of the revision was to restore the basic law as it stood prior to Toucey. In spite of Justice Frankfurter's qualification that the Revisor's must have meant prior law as it was changed by the Toucey holding it can be reasonably assumed that the Revisor's were acquainted with the Toucey opinion in its entirety including the doubt it cast on the prior law other than the specific situation faced by the court there. Ergo 'prior law' would include the law with respect to judgments obtained through the fraud of the plaintiff.

The doctrine of injunction based on fraudulently recovered judgments has been upheld in numerous Supreme Court and lower court decisions.[34] Under that doctrine the Federal Court does not act as a court of review and consider irregularities occurring during the proceedings in the State Court,[35] but considers matters extrinsic to the rendition of the judgment i.e. fraud discovered after judgment is rendered.

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34. e.g. Marshall v. Holmes, 141 U.S., 589,(1891); Wells Fargo & Co. v. Taylor, 254 U.S. 175, (1920); United States v. Marshunkashey, 72 F.2d 847, (10th Cir., 1934).

35. United States v. Mashunkashey, supra at 34

The fraud sufficient to enjoin enforcement of a State Court judgment has been explained by Justice Harlan in Marshall v. Holmes where he held:[36./]

> " . . . it is a settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment and which the injured party could not have availed himself in a court of law or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault a negligence in himself or his agents, will justify an application to a court of chancery . . ."

The courts invoking the doctrine have uniformly held that since the injunction runs to the party seeking to enforce the judgment it is not a 'stay of State Court proceedings' and therefore it is not within the proscription of the anti-injunction statutes. To put it in the words of the court in the Mashunkashey case "the action operates upon the party, not the judgment or decree of the State Court."

Our argument would run, therefore, that through plaintiff's fraudulent joinder of the four individual defendant's we have been unconsiconably denied our right to sue in the Federal Courts and enforcement of the State Court judgments by the plaintiff's should be denied.

36./ Supra 34 p. 596.

PART II -- REMOVAL

Introductory:

In this part of the memorandum we are concerned with basically two questions namely, (1) are we in time to remove (2) if we are in time on what grounds do we seek removal. The answer to the first question depends on whether the courts can and will extend the statutory time for removal or alternatively whether we can come within the statutory time. The answer to the second question depends upon how far courts will go behind the pleadings to determine whether a joinder has been fraudulent, what the test for fraudulent joinder is, and whether or not we have met the test.

1. TIME FOR REMOVAL

A. Do we come within the Statutory Time?

Time for removal is presently contained in the Judicial Code as found in Title 28, Section 1446, which provides in subsection (b) thereof as follows:

> "(b) The petition for removal of a civil action or proceeding shall 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.

"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.)

Query, what is an "order or other paper from which it may first be ascertained that the case is one which is or has become removable." In our case there was really no order or paper but simply the existence of a state of facts which we became fully aware of only after research revealed the inadequateness and baselessness of plaintiff's theory of the liability of the four individual defendants. Therefore, it would appear we are not expressly covered by the statute.

Assuming we are covered and 20 days has elapsed since the receipt by us of the critical "order or paper" there is nevertheless, authority for the proposition that the statutory time requirement is not jurisdictional 1/

1/ See Marking v. New St. Louis & Calhoun Packet Co., 48 F.S. 680 (D.C. Wo. Ky. 1943) and cases cited therein. These cases proceeded on the theory that if opposing party fails to reasonably object to removal as untimely the argument is waived because the statutory time is non-jurisdictional.

therefore a federal court would have the power to extend it. This possibility is explored in the next subsection.

B. Can the Federal Courts extend the statutory time?

Most of the authorities dealing with the power of the courts to extend the statutory removal time were considering the removal act before the 1948 revision.

Before 1948 a petition for removal under the general removal statute had to be filed "at the time, or any time before the defendant is required by the laws of the state ... to answer or plead to the declaration or complaint of the plaintiff." 28 U.S.C. (1940 Edition Section 72).

Since the present provision also contains a time requirement, although a different one, the reasoning of the prior cases should be applicable. Commenting on the rationale of extending by judicial decree, the statutory time for removal is a note in 60 Harvard 959 (1947) where several examples were given of an extension of the time to remove beyond the statutory deadline. 2/ The article noted that

2/ The Supreme Court in Pullman Company v. Jenkins, 305 U.S. 534 (1938) laid down what is apparently a very broad rule with respect to time for removal where fraud is present when it said, at p. 541:

> " ... It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove ..." (Emphasis added.)

the emphasis was on the right to removal as distinguished from the time to remove, quoting from Justice Gray in Powers v. Chesapeake and Ohio Ry., 169 U.S. 92, 100-01 (1898) where he said:

> "The reasonable construction of the Act of Congress, and the only one which will prevent the right of removal, to which the status declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right ..."

The article noted in favor of the extension of statutory time as follows, at p. 965:

> "In favor of removal are the reasons and spirit of the removal statute founded on a recognition of the defendant's right to federal adjudication of his cause, and a policy against fraudulent avoidance of federal jurisdiction." 3/

In Yulee v. Vose 4/ the right to removal was granted after the decision of the trial judge was appealed to the highest court of the state. There the trial court judgment was rendered in favor of both the resident and non-resident defendants. On appeal judgment was affirmed as to the resident, but reversed and remanded for a new trial as to the

3/ See also Chicago M. & St. P. Ry. v. Drainage Dist., 253 Fed. 491, 496-97, (S.D. Iowa, 1916).

4/ §99 U.S. 539 (1878)

non-resident. The latter petitioned for and was granted removal, the Supreme Court stating that the controversy had in fact been separated, by the judgment of the highest State Court placing the non-resident for the first time in a position where he could invoke federal jurisdiction. 5/

Although the courts may extend the statutory time this does not prevent the opposing party from arguing the petition for removal is nevertheless untimely since not filed as soon as the action had assumed the shape of a removal case. 6/

C. Opposing party's waiver of untimeliness where fraud was present.

Arguably greater latitude will be afforded a party petitioning for removal to the Federal Court if he is alleging a fraudulent joinder of resident defendants.

In Kansas City Suburban Belt Ry. Co. v. Herman, 7/ the possibility was recognized by the Supreme Court that a

5/ By granting removal even though the resident was severed by action of the court, this decision is in conflict with the cases holding there is no right to removal unless defendants are severed by voluntary acts of the plaintiff. It is therefore of doubtful validity although it has never been reversed.

6/ Powers v. Chesapeake & Ohio Railway, 169 U.S. 92 (1898); Ford v. Roxana Petroleum Corp., 31 F.2d 765 (U.S.D.C. N.D. Texas 1929); Waldron v. Skelly Oil Co., 101 F.Supp. 425 (U.S.D.C. Ed. Mo. 1951).

7/ 187 U.S. 63 (1902).

party may waive objections to an untimely petition for removal by his own fraud. In the Kansas City case an action had been brought by Andrew Herman in the State Court of Kansas against the petitioning railroad company asking the recovery of damages for negligently inflicted injuries. After the complaint was filed the railroad company filed a petition and bond for removal based on misjoinder. The application for removal was heard and denied and the case came on for trial. At the close of the evidence for the plaintiff the railroad company filed a second verified petition for removal which alleged as a ground thereof that no evidence had been offered or introduced by the plaintiff to show a cause of action against the resident defendant whom it was alleged had been joined fraudulently and for the sole purpose of preventing removal.

Although the Supreme Court of the United States sustained the ruling of the Supreme Court of Kansas with respect to removal, it noted as follows:

> "The first petition in terms raised no issue of fraudulent joinder, but the second petition did. Was that issue reasonably raised, and, if so, ought the case to have been removed? The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after plaintiff had introduced his evidence, notwithstanding the averments in the first petition.
>
> "But apart from this, the averments of fraud were specifically denied, and, so far as

this record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case. Plymouth Mining Company v. Amador Canal Company, 118 U.S. 264, 270."

In Stone v. Foster, 8/ defendant in a State Court action sought removal after a trial on the merits and after the jury announced it was unable to reach a verdict. As a grounds for removal the defendant stated that during the trial in the State Court there was a complete absence of any intent on the part of the plaintiff to procure a verdict against the resident defendant and that the resident defendant was fraudulently joined. The petition for removal was denied by the court, not because petitioner was untimely but because he hadn't proved his allegations of fraud. The opinion of the court, in view of the fact that the petition for removal was not filed until after the trial on the merits, is, arguably, an implied recognition of the fact that untimeliness will not defeat removal where fraud is present.

Neither Kansas City Suburban nor Stone are strong authorities for the argument suggested in this section. However it has been held that the statutory provision as to

8/ 163 F. Supp. 298 (U.S.D.C. Ark. 1958). Under the circumstances commented on in section C herein the opposing party would probably have to show laches to overcome the effect of his own fraud.

time for filing is but modal and formal, and noncompliance may be the subject of waiver or estoppel.[9] If timeliness can be the subject of waiver or estoppel - then fraud would certainly seem to be a persuasive and compelling reason to find the existence of either.

2. GROUNDS FOR REMOVAL

A. Fraudulent Joinder

In diversity cases the right to remove to a Federal Court cannot be defeated by the fraudulent joinder of a resident defendant having no real connection with the controversy.[10]

In determining whether we can successfully argue that the resident defendants have been fraudulently joined we must consider (1) how far behind the pleadings will the court go to determine fraud (2) what is the test of fraud as used in removal cases and (3) the basis for our argument that joinder was fraudulent.

B. How far will the courts inquire into the merits of a controversy to determine whether an action is removable? Will they confine themselves solely to the pleadings?

There is no established judicial maxim with respect

9/ Halsey v. Minnesota-South Carolina Land & Timber Co., 54 F.2d 933 (D.C. Ed. So. Car. 1932). See also footnote 1 supra.

10/ Wilson v. Republic Iron & Steel Co., 257 U.S. (1921); Chesapeake & Ohio Ry. Co. v. Cockrell (1914) 232 U.S. 146.

to how far the merits of a controversy will be enquired into in determining whether a joinder has been fraudulent. Generally the effect of what the court does is to pass on the merits if that's the only way it can expose the fraud although they will attempt to deny that is what they are really doing and urge judicial restraint. Thus in Farmers Bank & Trust Co. v. Atchison, T. & S.F. Ry. Co., [11] essential to plaintiff's cause of action was the allegation that at the time of decedent's death he was employed in interstate commerce. In upholding the petition for removal and denying plaintiff's petition to remand based on fraudulent joinder, the court held:

> " ... While it is true that the question of interstate commerce goes to the merits of plaintiff's case yet if, as stated in Clark v. Chicago R.I. & P. Ry. Co. et al (D.C.) 194 F. 505, 'fraud has been employed in presenting the facts for the purpose of defeating the federal jurisdiction, then it is the duty of this court so to declare, even though the possible effect may be ultimately to defeat the entire cause of action.' However, a court should be careful not to determine the merits of a case in passing on a jurisdictional question."

In Clark v. Chicago Rock Island & Pacific Railway Co. [12] the rule was stated with less equivocation:

> "In such cases the true rule is that the federal court upon a proper petition for removal

11/ 25 F.2d 23 (8th Cir. 1928).

12/ 194 F. 505 (U.S.D.C. W.D. Mo. 1912).

> may examine into the merits sufficiently to determine whether the allegations by reason of which a resident defendant may be joined in a state court are fraudulently and fictitiously made for the purpose of preventing removal. More than that, it is its duty to make such examination."

In Polito v. Molasky, 13/ plaintiff had commenced an action in the State Court of Missouri against the defendants, William and Dorothy Molasky and Merchants Motor Freight, Inc., to recover damages for personal injuries alleged to have been the proximate result of the joint and concurrent negligence of the defendants. The defendant Merchants Motor Freight, filed its petition for removal to the Federal Court on the ground of fraudulent joinder. The petition alleged that the defendant Molasky had no connection with the accident described in the complaint and were fraudulently joined. Removal was granted and plaintiff filed a motion to remand. There was a hearing on the motion and it was overruled. The trial resulted in a directed verdict for the Molaskys and a jury verdict in favor of Merchants Motor Freight, and the plaintiff appealed, arguing inter alia that remand should have been granted because the removal petition did not allege facts sufficient to substantiate the conclusion of fraudulent joinder. In upholding

13/ 123 F.2d 258 (8th Cir. 1941).

the denial of the petition for remand the Circuit Court held as follows, at p. 260:

> " ... In the instant case the defendant in its petition to remove alleged 'that at the time of the accident referred to in plaintiff's petition filed herein, defendants William Molasky and Dorothy Molasky, or either of them, did not own, operate, control or in any way whatsoever have any connection, legal or otherwise, with the International delivery truck, tractor and trailer referred to in plaintiff's petition filed herein, or the driver thereof, all of which plaintiff, or his attorney of record herein, knew at the time of the institution of this action, or might have readily ascertained.'
>
> "It is true that these allegations are in the negative; but under the circumstances nothing more could have been alleged. The defendant placed before the court the only facts possible. This identical problem was presented to this court in Leonard v. St. Joseph Lead Co., 8 Cir., 75 F. 2d 390, and we there held that the petition for removal was sufficient. That decision is controlling here."

It is obvious that the court had to rule on defendant's negative conclusions concerning the relationship of the Molaskys to the accident in question which in effect meant a hearing into the merits of plaintiff's case on the question of the liability of the Molasky defendants. 14/

All of the above cases demonstrate the courts willingness to enquire into the merits of plaintiffs claim where the case is at the pleading stage. The fact that the inference of fraudulent joinder is to be derived from events

14/ To the same effect is Wilson v. Republic Iron & Steel Co., supra at N. 9.

subsequent to the pleading would not seem material. Thus in Allison v. Great Atlantic & Pacific Tea Co., et al [15] the action had been removed from the State Court to the Federal Court by the defendant where in due course the plaintiff moved to remand the case denying fraudulent joinder. Remand was denied. The case went to trial at which the district judge directed the jury to find a verdict for the defendant on the ground that plaintiff had failed to show any negligence. The plaintiff's appeal to the Fourth Circuit presented the question whether refusal to remand the case was proper. The Court of Appeals reviewed the evidence before the District Court and, in sustaining the refusal to remand, held as follows, at p. 508:

> " ... It was a reasonable inference from the proof that Reitz had not been joined as a defendant in good faith but only for the purpose of preventing the removal of the case to the federal court. In consequence the District Judge clearly was correct in refusing to remand the case. ..."

C. The test of fraudulent joinder.

A petitioner will be successful in removing a case for fraudulent joinder when he can show that the plaintiffs have no "reasonable ground from the existing state of

[15] 99 F.2d 507 (4th Cir. 1938)

law and facts to believe that the cause of action has merit;" [16] that the joinder was "without any reasonable basis in fact and without any purpose to prosecute the cause in good faith" [17] or where one has been "joined as a party defendant who cannot be liable to plaintiff on any reasonably legal ground on the cause of action set out in the complaint." [18]

A case analogous to the situation which we will probably contend exists here in Johnson v. Kurn [19].

There a personal injury action was brought in the State Court of Missouri against the trustees of the St. Louis San Francisco Railway Company and Continental Oil Company. Plaintiffs were citizens of Oklahoma; the trustees of the railway company were citizens of Missouri; the oil company was a citizen of Delaware. The oil company removed the case based on fraudulent joinder. Plaintiffs sought to remand, but its motion was denied. Plaintiffs' motion for remand having been denied, they refused to plead further and the case was dismissed for want of prosecution. Plaintiffs appealed from the order of dismissal. The

16/ Clark v. Chicago R.I. & Pac. Ry. Co., supra N. 11.

17/ Wilson v. Republic Iron and Steel Co., supra N. 9.

18/ Gillette v. Koss Construction Co., 149 F.Supp. 353 (U.S.D.C. Mo. 1957).

19/ 95 F.2d 629 (8th Cir. 1938).

question the court had to decide was whether there was any basis for the assertion of liability as against the resident defendants under the law governing the case.

The action was for the death of a child which fell from a platform erected on the side of an oil storage tank. Steps led from the ground to the platform and the child climbed the steps and fell off the platform. The appellants contended that the trustees of the railway which leased the property to the Delaware oil company were liable for an attractive nuisance that existed on their right of way for a long period of time and made several other contentions which they said established as a matter of law the liability of the oil company, citing various statutory references. The case is analogous because the court decided that as a matter of law there was no duty on the part of the trustees to abate the nuisance, hence they would not be liable for failure to do so, and that a joinder under these circumstances amounted to a fraudulent joinder in the legal sense.

> "We can discover no merit in any of the contentions of appellants urging that the Trustees could be liable for the condition alleged to have caused the death of this child. It is clear to us that no such liability exists. In the absence of such liability, the joinder of the Trustees as defendants was, in a legal sense, fraudulent and, being such, the trial court acted rightly in denying the motion to remand." (p. 633)

A recent statement of the test concerning fraudulent joinder is contained in Gillette v. Koss Construction Co.[20]

> "In order to declare a fraudulent joinder, a court must be convinced that plaintiff, intentionally or otherwise, joined as a party defendant one who cannot be liable to plaintiff on any reasonably legal ground on the cause of action set out in the complaint. Where it is clear from the evidence that legally the defendant who is a resident of the same state as plaintiff cannot be liable to plaintiff on any legal ground pleaded, the plaintiff is suing improperly and the federal court should not hesitate to retain jurisdiction after removal ..."

That case also stated the other side of the coin:

> " ... But where plaintiff, pursuing a legal right, states a cause of action against joint tortfeasors, and substantially nothing exists to impugn his good faith, no fraudulent joinder is proved. Morris v. E.I. DuPont De Nemours & Co., 8 Cir., 68 F.2d 788; Chicago, R.I. & P.R. Co. v. Dowell, 229 U.S. 102, 33 S. Ct. 684, 57 L. Ed. 1090; Landreth v. Phillips Petroleum Co., D.C., 74 F.Supp. 801.
>
> "If it is debatable whether recovery is possible against the resident defendant under Missouri law, or if it is questionable whether the state court would give judgment against him, there is still no fraudulent joinder; for even though plaintiff may be in error with respect to both facts and law, fraud cannot be predicated upon his mistaken conclusions. A lack of exact precedent creating a doubt as to whether a resident is legally liable does not render plaintiff's joinder fraudulent. Dudley v. Community Public Service Co., 5 Cir., 108, F.2d 119." (at p. 355.)

20/ Supra N. 17.

D. Whether joinder of four individual defendants was fraudulent.

Plaintiffs have alleged in their respective complaints that all the defendants "published" the alleged libel. In other words in their pleadings they have alleged that the publication of the Times and the four individual defendants was the same act. Therefore all the defendants were joint tort feasors concurring in the single act which was the cause of plaintiffs injury. At the trial it became clear that plaintiffs' theory of the liability of the four individual defendants was based on an alleged duty to speak and disavow any publication by them and that their silence was a fact the jury could consider in determining their consent to the publication. Thus plaintiffs argument had two essential ingredients (1) a duty imposed as a matter of law and (2) the factual inference to be drawn from silence. Obviously without the legal duty no inference could be drawn from silence. The question we must therefore decide in determining whether joinder was fraudulent was if under the law of Alabama there was any reasonable basis to assume the existence of the legal duty.

The plaintiffs, assuming the existence of the duty, said liability could be imposed under the doctrine of adoption or ratification of a libel by silence. As authority for this proposition they cited 150 ALR 1349. This

section deals solely with cases involving the master-servant or principal and agent relationship.[21]

The only authority dealing expressly with the liability of an individual whose only connection with the allegedly libelous publication is the appearance of his name thereon holds that failure to disavow would not, as a matter of law, amount to a ratification of the libel.[22]

In Dawson v. Holt[23] the defendants had signed a statement denouncing Holt as a troublemaker - they gave the statements to one Livingston for publication who without direct authority from the defendants rewrote it and signed their names to it. The writing that appeared in the newspaper denounced Holt as corrupt. The proof at the trial showed that after the defendants found out about the publication neither of them disavowed it.

21/ While that citation quoted no Alabama cases there is Alabama authority for the proposition that a corporation by its silence may ratify the libel of its employee. Choctaw Coal & Min. Co. v. Lillich, 86 So. 383, 204 Ala. 533, 11 ALR 1014 (1920). And in Tidmore v. Mills, 32 So. 2d 769 (Ala. app. 1947) not cited by Plaintiffs the Appellate Court held plaintiff's allegation of a ratification by defendant of a libelous sign posted on property under defendant's supervision and control by his failure to remove said sign was sufficient as against a demurrer thereto.

22/ Simmons v. Holster, 13 Minn. R. 249 (1865); Dawson & Campbell v. Holt, 79 Tenn. 532 (1883); 53 Corpus Juris Secundum Section 149.

23/ Supra N. 20.

The Trial Court held them responsible for the libel because of their failure to disavow the act of publication in their name within a reasonable time after knowledge of the facts.

> "Under the circumstances it was their legal duty to have promptly disavowed the publication ..." 24/

In reversing this contention of the trial judge the Supreme Court of Tennessee held:

> " ... We know of no principle of law which imposes upon an innocent person, whose name may have been thus used, the duty of prompt diligence in disavowing the act to the injured party, under the penalty, in case of failure, of being held to be the guilty party ... mere silence, and a failure to disavow the act to the plaintiff, would not under the circumstance amount to a ratification as a matter of law ..." (p. 587)

In Simmons v. Holster 25/ it appeared that Holster's horse had been stolen and he advertised in a local newspaper for its recovery. The advertisement when it appeared indicated the thief was believed to have been the plaintiff. There was no evidence that Holster did anything except authorize an advertisement concerning the theft of his horse - although subsequently he did fail to disavow his authorizing

24/ Supra N. 20 at p. 506.

25/ Supra N. 20.

the mention of plaintiffs' name. The court in charging the jury instructed them that if they should find from the evidence that the defendant Herman Holster, after the publication of the alleged libel, knew that it had been published, and approved of it or acquiesced in it, he was equally liable with the other defendant.

In holding the charge error the Minnesota Supreme Court held as follows:

> "There is no evidence whatever showing an express or affirmative ratification or approval of the publication. If there is any evidence whatever of an acquiescence in it by the defendant Holster, it is by his mere silence, or neglect to disavow it, after it came to his knowledge, and we understand the instruction of the court to be that such a state of facts would constitute an acquiescence which would render the defendant liable; certainly a jury would be likely to so construe the language. It is true there may be circumstances under which mere silence would render a defendant liable for the act of another, done in his name, and for his benefit. But where as in this case one person, without any authority or color of authority, publishes a libel in the name of another, who has no knowledge of the publication until after it is made, we think the mere silence of the latter, or his neglect to disavow or repudiate the publication, will not render him liable, either civilly or criminally. There is in this case no prior agency between the parties; the defendant did not do or authorize the act complained of, and received no benefit as the result of it. He has not, nor has any one by his authority, done any act which injured the plaintiff, or benefited himself. We are unable to discover any legal principle, which, under these circumstances, requires the defendant upon acquiring knowledge thereof, to disavow the criminal act of a stranger,

done in his name, or, in the absence of such a disavowal, holds him responsible for such act. We think the charge was erroneous, and calculated to mislead the jury."

One does not have to rely on the quoted cases alone to establish that the doctrine of ratification, does not apply in a case like ours. The Restatement of Agency 26/ in discussing the rule of "ratification by silence" limited it in tort cases as follows: 27/

"Supporting the view that ratification can be inferred merely from a failure to repudiate are those cases where a tort has been committed usually by an employee acting beyond the scope of his employment. In such cases there is no chance of estoppel and normally no receipt of benefit; the acquiesence results only in the liability of the principal, and presumably, the discharge of the servant from liability to the principal. Because of this the courts require clear evidence of the approval of the wrongful conduct ..."

In discussing the doctrine of ratification by silence generally the Restatement had this to say: 28/

" ... It must be admitted also, that in most of the cases where ratification has been found, not only was the prior act done by one who may have been authorized, but also there was something received by the principal or there were elements of estoppel which would support the result aside from the failure to repudiate. Many of these decisions are rested upon these grounds in whole or in part ..."

26/ See Appendix Restatement of the Law of Agency, 2d, Reporters Notes to section 94.

27/ Ibid. p. 171.

28/ Ibid. p. 169.

Thus the Restatement recognizes essentially two situations where there may be ratification by silence (1) where the agency relationship exists and the principal receives some benefit or there were elements of estoppel present and (2) where the master-servant relationship exists and the master's only reward is liability. Neither of those situations is present here.

Conclusion:

Consequently, since no support exists under the law of Alabama or anywhere else for plaintiffs theory of ratification, and all relevant authority is contra, plaintiffs had no reasonable basis in law for supposing the four individual defendants were liable to them. Therefore joinder of the latter was fraudulent.