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## Removal of Causes—Fraudulent Joinder—Pleading

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attract patrons who would not otherwise have come. They concluded on this basis that a ticket of admission was in fact part payment for a chance and hence consideration was present.

This view of consideration has been criticized<sup>24</sup> on the ground that it does not follow that a consideration sufficient to support a contract is necessarily the kind of consideration contemplated by the statutes prohibiting lotteries. In popular conception a lottery presupposes a pecuniary or valuable consideration for the chance to participate in the contest.<sup>25</sup> Did the framers of the Missouri Constitution have anything more technical in mind when they passed the lottery provision? Apparently they did for "gift enterprises"<sup>26</sup> are included in the prohibition and such schemes do not need consideration to make them illegal.

E. C.

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**REMOVAL OF CAUSES—FRAUDULENT JOINDER — PLEADING — [Federal].**— The plaintiff brought a tort action in a state court to recover damages for personal injuries sustained as the result of the sale to him of a defectively constructed automobile. Suit was brought against the resident dealer and non-resident manufacturer jointly. The latter sought to remove the case to the federal court on the ground of diversity of citizenship and separable controversy. *Held*; where a plaintiff states a case of joint tort liability there is no separable controversy, even though plaintiff might have sued resident and non-resident defendants separately, unless claim of joint liability is obviously frivolous and unsound or facts so clearly false as to disclose a fraudulent device to prevent removal to federal court.<sup>1</sup>

While a few federal cases have held otherwise,<sup>2</sup> it seems to be well settled that a separable controversy does not exist where the plaintiff states a case of joint tort liability.<sup>3</sup> In such cases, the federal court, on petition to remove, will not try the essential merits of the case to determine whether the joinder is proper.<sup>4</sup> The plaintiff has a right to elect his own method of attack, and if his joinder is improper he will fail in the state court.<sup>5</sup> But the non-resident defendant can have the case removed on the ground of a separable controversy by showing that the joinder was fraudulently made

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24. Comment, 80 U. of Pa. L. Rev. 744 (1932); Comment, 18 Va. L. Rev. 465, (1932).

25. Webster's International Dictionary.

26. Missouri Constitution, Art. XIV, sec. 10 (1875), R. S. Mo. 1929, sec. 4314.

1. *Siler v. Morgan Motor Co. et al.*, 15 F. Supp. 468 (D. C. E. D. Ky., 1936).

2. *Warax v. Cincinnati etc. Ry. Co.*, 72 Fed. 637 (C. C., D. Ky., 1896).

3. *Louisville & Nashville Ry. Co. v. Wangelin*, 132 U. S. 599, 10 S. Ct. 203, 33 L. ed. 473 (1889); *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673 (1897); *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 26 S. Ct. 161, 50 L. ed. 441 (1905).

4. *Doughtery v. Yazoo Ry. Co.*, 122 Fed. 205 (C. C. A. 5, 1903).

5. See *Shane v. Butte Electric Ry. Co.*, 150 Fed. 801, 808 (C. C., D. Mont., 1906).

for the purpose of preventing a removal to the federal court.<sup>6</sup> His petition must allege that the joinder was fraudulent,<sup>7</sup> and the allegations must be proven.<sup>8</sup> A fraudulent joinder exists where the petitioning defendant has alleged and proven that plaintiff's allegations are unfounded and incapable of proof and were not made with the intent to prove them,<sup>9</sup> or by showing that plaintiff has no desire to prosecute the suit against the resident defendant to a judgment.<sup>10</sup> However, proof of the insolvency of the resident defendant will not make the joinder fraudulent.<sup>11</sup>

If there is no question that under the state law the plaintiff has a joint cause of action, then his motive in joining the defendants is immaterial.<sup>12</sup> Even if the joinder was improper under the state law, a removal will not be granted if the joinder was made in good faith.<sup>13</sup> Good faith means that the plaintiff thought that under the facts of his case he had a joint cause of action.<sup>14</sup>

The principal case follows the general rule and is illustrative of some of the foregoing principles.

S. K.

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REWARDS—SHERIFF'S RIGHT TO COLLECT—CONSIDERATION—[Kentucky].—It is undoubted law that an act of a public officer which is required by legal duty cannot be sufficient consideration for a contractual promise to pay a reward for the performance of the act.<sup>1</sup> But this principle is being restricted by technical definitions of duty. The result is that an officer is permitted to enforce a contract of reward, if he can show that he has done an act outside the strict line of his duty. A recent Kentucky case, *Kentucky Bankers' Association et al. v. Cassady et al.*,<sup>2</sup> shows that this trend is recognized in that state. The Pewee Valley State Bank was robbed, and the Kentucky Bankers' Association, of which the Pewee Valley State Bank was a

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6. Dobie, *Federal Jurisdiction and Procedure* (1928) 408; Breymann et al. v. Pa. etc. Ry. Co., 38 F. (2d) 209 (C. C. A. 6, 1930).

7. Thomas v. Great Northern Ry. Co., 147 Fed. 83 (C. C. A. 9, 1906).

8. Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co., 118 U. S. 264 (1885).

9. Warax v. Cincinnati etc. Ry. Co., 72 Fed. 637 (C. C., D. Ky., 1896).

10. Dishon v. Cincinnati, etc., Ry. Co., 133 Fed. 471 (C. C. A. 6, 1904) (resident defendant not served with summons).

11. Deere, Wells & Co. v. Chicago Ry. Co., 85 Fed. 876 (C. C., S. D. Iowa, 1898).

12. Ibid; see Chicago Ry. Co. v. Schwyhart, 227 U. S. 184, 194, 33 S. Ct. 250, 57 L. ed. 473 (1912).

13. See Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206, 218, 26 S. Ct. 161, 50 L. ed. 441 (1905).

14. Comment, 100 Cent. L. J. 99 (1927).

1. Restatement, *Contracts* (1932) sec. 76a; Kick v. Merry, 23 Mo. 72, 66 Am. Dec. 658 (1856); Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170 (1907); Mechem, *Public Offices and Officers* (1890) sec. 885.

2. Kentucky Bankers Association v. Cassady, 94 S. W. (2) 622 (Ky., 1936).