

FOLSOM v. CONTINENTAL NAT. BANK OF NEW YORK, and another,
Security.*

(Circuit Court, N. D. Georgia. 1882.)

REMOVAL OF CAUSE—CONTROVERSY MUST BE SEPARABLE.

One of two defendants jointly sued in a state court cannot remove the cause into the federal court on the ground of diversity of citizenship between himself and plaintiff without showing that the controversy is separable.

Motion to Remand.

Reuben Arnold and *E. N. Boyles*, for plaintiff.

Mynatt & Howell, for defendants.

MCCAY, D. J. The Continental National Bank of New York sued out an attachment in the state courts against Folsom, and gave Wallace as security on the attachment bond.

This is a suit brought on the bond by Folsom against the bank and Wallace in the state court. The bank, as a citizen of the state of New York, filed a petition for the removal of the cause to this court, setting up that in the cause there is no controversy whatever between it and Folsom; that Wallace, a citizen of Georgia, is merely a nominal party, and that Folsom is a citizen of Georgia. The court refused to pass the order for removal. The petitioner, nevertheless, filed papers in this court, and now Folsom sues to remand the cause to the state court. The latest case on this subject that has been reported is *Hyde v. Ruble*, 104 U. S. 408.

That was a suit on what was alleged to be a partnership contract of bailment. Certain of the alleged partners were citizens of another state, not only from plaintiff, but from Ruble, the resident defendant, and they had filed a plea that they were not partners, and that the contract had been performed. They moved the removal of the cause. The court (the chief justice delivering the opinion) decided that the second clause of section 639 of the Revised Statutes is repealed by the act of 1875. The court further decided that under the second clause of the second section of the act of 1875, to make the controversy removable in a case where all the parties on one side were not citizens of a different state from the parties on the other side, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different states from those on the other.

* Reported by W. B. Hill, Esq., of the Macon, Ga., bar

This is a suit on a bond—a joint bond. The plaintiff claims a right to sue all the obligors on the bond. He has a perfect right to do this; this is his cause of action. It is not against the bank, nor Wallace, but it is against both. Even if the bond were several as well as joint, the plaintiff would have a right to treat it and sue on it as a joint bond. And this he has done. The cause in 104 U. S. is much stronger than this. There, on this question of partnership, the controversy might be fairly said to be a separable one, but the court refused the petition for removal because the plaintiff's complaint in the cause of action was joint. Here there is no separate obligation to the plaintiff. The parties are bound jointly, or not at all. What would be a good defense for one would be good for the other. What would charge one would equally charge the other.

Under the ruling in the case I have referred to, I feel compelled to remand the cause. Let an order be drawn accordingly.

TAYLOR v. HOLMES and others.

(Circuit Court, W. D. North Carolina. October Term, 1882.)

1. EQUITY—RELIEF FROM MISTAKE OF LAW.

Although a mistake of law furnishes no ground for the interference of a court of equity, yet where there is a plain, admitted, or undisputed mistake of law, arising from ignorance or inadvertence, and the mistake is mutual, equity will relieve.

2. EQUITY JURISPRUDENCE—RULES WHICH GOVERN.

The federal court can take judicial notice of the laws of the several states of the Union, and in construing the constitution and statutes of a state, and the laws which regulate the rights of property in a state, it will be governed by the decisions of the highest court of the state; but upon legal questions of a more general nature, and in the principles of equity jurisprudence, a federal court is influenced but not bound by the decisions of state courts.

3. EQUITY PLEADING—SUIT BY MARRIED WOMAN.

A *feme covert* must sue and be sued jointly with her husband, unless she claims a right in opposition to him, when her *prochein ami*, with her consent, may sue on her behalf, and her husband be made party defendant.

4. SAME—NECESSARY PARTIES.

All parties interested in or entitled to litigate the same questions in controversy, are necessary parties, and must be joined in the suit.

5. DEMURRER—WHAT IT ADMITS.

A demurrer admits only matters of fact positively alleged, and not conclusions of law, or mere pretenses and suggestions, or the correctness of the ascription of a purpose, when not justified by the fact positively alleged.