

WYLY v. RICHMOND & D. R. CO.

(Circuit Court, N. D. Georgia. June 14, 1894.)

No. 1,074.

REMOVAL OF CAUSES—MOTION TO REMAND—WHEN TOO LATE.

A motion to remand on the ground that the removal was made after the case was to be treated as on trial under the state practice comes too late after more than a year has elapsed, and after the case has been transferred by consent to the equity docket, treated as an intervention in a pending receivership case, and referred to a special master therein; there being no question as to the jurisdiction of the federal court.

This was an action by George A. Wyly against the Richmond & Danville Railroad Company. Heard on motion to remand to the state court.

Glenn & Slaton, for plaintiff.

Jackson and Leftwich, for defendant.

NEWMAN, District Judge. This is a motion to remand, entered a few days ago. The case was removed to this court on the ground of prejudice and local influence on the 11th day of February, 1893. The Richmond & Danville Railroad and the Georgia Pacific Railroad Company are in the hands of receivers appointed by this court, and were in that situation at the time of removal. A special master had been appointed in the equity case in which the receivers were appointed, to hear all claims by way of intervention against the receivers arising in this district, and suits brought against the corporation. By consent of counsel, an order was taken in the above-stated case after its removal, transferring it to the equity side of the court, and treating it as an intervention in the equity case named, and referring it to the special master in the equity cause. This order was taken on the 23d day of May, 1893. For some reason, unexplained, the case has been delayed before the special master, and counsel for plaintiff now moves to remand it on the ground that it was removed to this court too late. They say, while it was not actually on trial, that substantially, under the ruling and practice in the state court, it had reached a stage at which it was treated as being on trial. No question going to the jurisdiction of this court is raised. The necessary diverse citizenship exists, plaintiff is a resident citizen, defendant being a corporation of the state of Virginia, and the necessary jurisdictional amount is involved. I think the motion to remand comes too late. Of course, if the question raised as to the right of this court to retain it was jurisdictional, and was well taken, no doubt the duty of this court would exist to remand at any stage of the proceeding; but, after the proceeding noted above has been taken in a removed case, it seems to me to be entirely too late, after more than a year has elapsed, to move to remand on the ground that is here set up. The motion to remand will be denied, but the special master will be directed to speed the case by hearing the same, and making a report to this court within 30 days from this date. Let an order be taken to this effect, and let the special master be notified of the same.

BAILEY v. MOSHER et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 418.

1. REMOVAL OF CAUSES—FEDERAL QUESTION — ACTION AGAINST OFFICERS OF NATIONAL BANK—CODE PLEADING.

One who loaned money to an insolvent national bank sued in a Nebraska state court to recover the amount from the officers and directors. The petition, which was drawn under the Code, averred that plaintiff was deceived as to the bank's condition by false reports to the comptroller of the currency; that defendants loaned excessive amounts of the bank's money to single persons, made large loans to the president and cashier, and paid dividends when there were no profits,—all in violation of the national banking act. In conclusion, the petition averred that, "by reason of the several violations of the banking law as above set forth," defendants were liable, etc. *Held*, that the petition stated a cause of action for violation of the national bank laws, and not a mere action for deceit at common law; and that the case was therefore properly removed from the state to the federal court.

2. SAME—CODE PLEADING.

The clauses in the petition which tended to state a cause of action for deceit could not be segregated from the other clauses, and held to constitute the statement of the cause of action. The plaintiff having seen fit, in his concluding averment, to state the legal effect of the facts set forth, cannot complain if his adversary and the court accept his own theory, especially when his pleading is ambiguous, and will support that theory as well as or better than any other.

3. SAME—"PARAGRAPH" DEFINED.

The word "paragraph," as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of "count" at common law. It may embrace one or many sentences, but, whether one or many, it constitutes a statement of a single cause of action.

4. NATIONAL BANKS—MISCONDUCT OF OFFICERS — PERSONAL LIABILITY—WHO MAY ENFORCE.

A creditor of an insolvent national bank which has passed into the hands of a receiver cannot maintain an action to enforce, against officers and directors who have violated the banking laws, the personal liability imposed by Rev. St. § 5239; for this personal liability is an asset of the bank, belonging equally to all creditors, and must therefore be enforced by the receiver of the bank for their benefit in proportion to the amount of their claims.

In Error to the Circuit Court of the United States for the District of Nebraska.

S. B. Pound (Lionel C. Burr, Richard S. Norval, Benjamin F. Norval, and George W. Lowley, on the brief), for plaintiff in error.

J. W. Deweese (T. M. Marquett and F. M. Hall, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the district court of Lancaster county, Neb., by Thomas Bailey, the plaintiff in error, against Charles W. Mosher, Homer J. Walsh, Rolla O. Phillips, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stewart, and Richard C. Outcalt, the defendants in error, and removed into the circuit court of the United States for the dis-