

## BAILEY v. MOSHER et al.

(Circuit Court, D. Nebraska. May 7, 1896.)

## UNITED STATES COURTS—JURISDICTION—FEDERAL QUESTION—ACTION AGAINST DIRECTORS OF NATIONAL BANK.

An action against directors of a national bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the comptroller of the currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the constitution or laws of the United States, of which the federal courts have jurisdiction, either originally or by removal.

Pound & Burr and Biggs & Thomas, for plaintiff.  
Charles O. Whedon and Deweese & Hall, for defendants.

SHIRAS, District Judge. This action was begun in the district court of Seward county, Neb., it being averred in the petition that the defendants were directors of the Capital National Bank, a corporation doing business in the city of Lincoln, Neb.; that the defendants, for the purpose of inducing the plaintiff and others to do business with and loan money to said corporation, made pretended statements of the condition of the said corporation, its assets and liabilities (the same being in writing, and copies thereof being attached to the petition); that, relying upon said statements, the plaintiff loaned to said corporation various sums of money, amounting in the aggregate to the sum of \$11,500; that said statements were in fact false in many particulars, and were so known to be to the defendants when they signed and put forth the statements in question, and that said bank was at the time wholly insolvent, and in consequence thereof the plaintiff lost the sums of money so loaned as above stated; thereupon a cause of action for damages had accrued to the plaintiff. The exhibits attached to the petition show that the written statements declared on are reports of the condition of the Capital National Bank made by the defendants, as officers and directors of the bank, under the statutes of the United States and regulations of the comptroller of the currency. The defendants, appearing in the state court, filed a petition for the removal of the case into this court upon the ground that the controversy was one arising solely under the provisions of the constitution and laws of the United States, and was therefore removable into the federal court, regardless of the fact that the plaintiff and defendants were citizens of the same state. The state court refused to grant an order of removal, but defendants caused a transcript of the record to be filed in this court, and the case is now before this court upon a motion to remand.

It is now well settled that under the provisions of the act of 1887, as amended by the act of 1888, a case cannot be removed from a state to the federal court, upon the ground that the controversy is one arising under the constitution and laws of the United States, unless it is made clear upon the face of the petition or bill filed by the plaintiff that in fact the controversy sought to be adjudicated is one arising under the federal constitution or statutes. *Metcalf v.*

Watertown, 128 U. S. 586, 9 Sup. Ct. 173; Mining Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654. From the ruling made by the court of appeals for this circuit in Bailey v. Mosher, 11 C. C. A. 304, 63 Fed. 488, it follows that actions based upon the express provisions of the banking act present controversies arising under the laws of the United States, but the same are only maintainable, after a bank has gone into insolvency, in the name of the receiver. In Hayden v. Thompson, 17 C. C. A. 592, 71 Fed. 60, it was furthermore ruled by the same court that a person legally injured by the wrongful acts of the officers and directors of a national bank, and which acts create causes of action under the principles of the common law, may count on the common-law liability for damages caused him. Actions of this character, however, would not present controversies arising under the laws of the United States, and of them the federal courts could not have jurisdiction, either originally or by removal, if they were between citizens of the same state. The petition in the case now before the court is clearly based, not upon the provisions of the national banking act, but upon a liability claimed to arise under the principles of the common law; and, as the requisite diversity of citizenship does not exist to justify a removal on that ground, it must be held that the state court rightfully refused to order a removal of the case.

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COLER v. GRAINGER COUNTY et al.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1896.)

No. 368.

1. CIRCUIT COURT OF APPEALS—JURISDICTION.

When the record upon an appeal from the circuit court to the circuit court of appeals presents both a question as to the jurisdiction of the former court, and other questions, which, if the circuit court is found to have had jurisdiction, must be disposed of, the court of appeals has jurisdiction of the appeal, and must consider the question of the jurisdiction of the circuit court, although that court has dismissed the case for want of jurisdiction, and the circuit court of appeals act provides (section 5) that, where the question is alone of jurisdiction, it is to be certified to the supreme court.

2. CIRCUIT COURT—JURISDICTION—DIVERSE CITIZENSHIP—ASSIGNMENT OF CHOSE IN ACTION.

The county of G., Tenn., under legislative authority, subscribed for \$75,000 of stock of the M. R. R. Co., a Tennessee corporation. This subscription, together with the stock for which it was made, was assigned to the contractors for the construction of the road, and by them assigned to a New York bank as security for a loan. The bank, upon default in payment of the loan, sold the subscription and stock, at public sale, to a citizen of New York, by whom it was assigned to one C., a citizen of New Jersey. C. brought suit in a federal court against the county to enforce the subscription, and compel it to take the stock and levy a tax to pay therefor. By an amendment to the bill he set up the appointment as receiver of the railroad of one S., a citizen of Ohio, whom he made a party to the suit, and alleged that the legal title to the subscription had passed to S., by virtue of his appointment, and that he was bound, pursuant to a contract of the railroad company, to collect the subscription for the benefit of the assignee, and to bring suit for that purpose, but had