

393, 15 Sup. Ct. 167; *Stuart v. City of Easton*, 156 U. S. 46, 47, 15 Sup. Ct. 268.

The case will be remanded.

MALLON v. HYDE et al.

(Circuit Court, D. Washington, E. D. September 29, 1896.)

1. REMOVAL OF CAUSE—FEDERAL QUESTION.

The right of removal of a suit involving a federal question is not affected by the fact that the supreme court has laid down general principles which will probably control the decision, such previous decisions being on entirely different states of facts.

2. BANK OFFICERS—INDIVIDUAL LIABILITY—FRAUDULENT RECEIPT OF DEPOSITS.

Const. Wash. art. 12, § 12, making individually liable an officer of a bank receiving deposits after he has knowledge of the bank's insolvency, is self-executing.

3. SAME.

A right of action upon such liability does not inure to the bank, nor become an asset of the bank which a receiver is entitled to control, but is vested in the depositors whose money is so fraudulently taken.

At Law:

Action to recover money deposited in an insolvent national bank, commenced in the superior court of the state of Washington for Spokane county, and removed to this court by the defendants. The complaint alleges that the defendants are officers and directors of a national bank now in charge of a receiver appointed by the comptroller of the currency; that they each assented to the reception of the money on deposit, by the bank, with full knowledge on their part that the bank was then insolvent, or in failing circumstances. The petition for removal states that, by the plaintiff's statement of his case in his complaint, it appears that there is a federal question involved, for that the action is brought to enforce against the defendants a provision of the constitution of the state of Washington making any officer or director of a banking institution in this state, who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that his bank is insolvent, individually responsible for deposits so received, which the defendants claim to be either not applicable to national banks, or in conflict with the laws of the United States. Argued and submitted upon a motion to remand, and upon a general demurrer to the complaint. Motion denied and demurrer overruled.

Blake & Post, for plaintiff.

Jones, Voorhees & Stephens, for defendants.

HANFORD, District Judge. In support of their motion to remand, the plaintiff's attorneys have argued that the supposed federal question is not now a debatable question,—the same having been decided, and the law settled, by the supreme court of the United States,—and they have cited the following cases: *Bank v. Kentucky*, 9 Wall. 363, 364; *Waite v. Dowley*, 94 U. S. 527-534. It is true that the opinion of the supreme court in each of the cases cited lays down general principles which, in my opinion, must control the decision of the federal question in this case. But the supreme court, like any other court, makes its decisions to fit the particular facts of the cases presented; and, when general rules are given, the application thereof to other cases involving different facts may be questioned.

Each of the above-mentioned cases is entirely different in its facts from the case now under consideration, and my attention has not been called to any decision of the supreme court wherein this identical question has been adjudicated. The motion to remand will be denied.

The points advanced in support of the demurrer are: First. The constitution does not create a right of action in favor of an individual depositor whose money has been taken in by an insolvent bank, and, until there shall be supplemental legislation providing means to enforce the same, this section of the constitution lies dormant. Second. All depositors similarly situated have equal rights with the plaintiff, and as they are all creditors of the bank, and represented by the receiver, the right of action, if any, exists only in favor of the receiver, for the benefit of all.

It is my opinion that the obvious intent and purpose of the people of this state, as expressed in the section of the constitution under consideration, were to insure honesty in conducting the business of the moneyed institutions of the state, and the greatest possible degree of security to those who should become depositors therein; and to the extent of establishing permanently a rule of individual responsibility for losses resulting from bad faith, or deceit practiced in dealing with customers of a bank, it was intended to not rely upon the legislature to make suitable laws. The section reads as follows (article 12, § 12):

"Any president, director, manager, cashier, or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be individually responsible for such deposits so received."

This fixes individual responsibility clearly enough, and there is no necessity for legislation providing special means for its enforcement, since the general laws of the state are amply sufficient in affording a remedy by civil action for every case in which one person becomes legally responsible to another. The responsibility in such cases is not in favor of the state, nor the bank, nor its general creditors. It is for the benefit of those particular depositors whose money is taken under such circumstances as to constitute a fraud. The injury done by the fraudulent conduct of the bank officials is the basis of liability, and the injured party is the one entitled to redress. Therefore the right of action upon the liability does not inure to the bank, nor become an asset of the bank which a receiver is entitled to control. This case is clearly distinguishable from *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939, in which the supreme court of this state held that the additional liability imposed upon stockholders by the eleventh section of article 12 of the constitution is not a primary liability, but the stockholders of banking corporations are, to the extent prescribed, liable as sureties for the debts of the corporation, and that creditors cannot sue them to enforce such limited liability without having first exhausted their remedy against the principal debtor, and that money collectible from stockholders belongs to the trust fund for the payment of debts, which a receiver of an insolvent bank

is entitled to receive and disburse. There is good reason for holding that the liability of stockholders, which was obviously intended to constitute a reserve fund to reinforce the capital of a banking corporation for the security of its creditors, should be recoverable by a receiver appointed to take charge of its assets and settle with its creditors. I find no difficulty in bringing my mind to yield assent to the authority of that decision. But it does not appear to me to be applicable to a case involving responsibility to depositors for losses resulting from fraudulent concealment of the insolvent condition of a bank. Demurrer overruled.

In re FOLEY.

(Circuit Court, D. Nevada. September 23, 1896.)

No. 605.

1. FEDERAL COURTS—JURISDICTION—CONSENT OF COUNSEL.

Consent of counsel cannot give jurisdiction to the federal courts, and unless jurisdiction clearly appears it is the duty of the court of its own motion to remand the case.

2. REMOVAL OF CAUSES—ACTIONS AT LAW—EQUITABLE DEFENSES.

Where, by the statutes of a state, equitable defenses may be made to an action at law, and such an action is removed into the federal court, matters in law and matters in equity must be separated, and equitable relief must be sought in a separate suit.

3. PLEADING—TRIAL BY JURY—PETITION.

The character of a pleading is determined by what it alleges, not by the prayer for relief; and, where it appears that the petitioner is entitled to trial by jury, the court will not deny that right because the proceedings have been equitable in form.

4. CIRCUIT COURTS—JURISDICTION—REMOVAL OF CAUSES.

The circuit courts of the United States are not given jurisdiction, under the removal act of 1887-88 (25 Stat. 434), of proceedings in the settlement of the estates of deceased persons. In re Cilley, 58 Fed. 977, applied.

5. REMOVAL OF CAUSES—ADMINISTRATION PROCEEDINGS—PETITION TO ESTABLISH CLAIM.

In the course of the administration of an estate in a state court of Nevada, an illegitimate son filed a petition to be permitted to share in the estate, alleging that the deceased had acknowledged the paternity of the petitioner in conformity with the Nevada statute (Gen. St. § 2982). The allegations of the petition were denied by nonresident claimants, who removed the cause to a federal court. *Held*, that the federal court had no jurisdiction of the entire administration proceedings; that the only matter it could determine was the issue of fact presented by the petition and answer thereto; and that if the claim were established it must take its place, and share in the estate as administered in the state court. *Craigie v. McArthur*, Fed. Cas. No. 3,341, distinguished. *Byers v. McAuley*, 13 Sup. Ct. 906, 149 U. S. 608, applied.

6. FEDERAL COURTS—LEGAL AND EQUITABLE JURISDICTION.

A petition filed by an illegitimate child, in administration proceedings, claiming a share in the estate, and alleging that his paternity was acknowledged by deceased in conformity with the Nevada statute, which allegation is denied, presents an issue of fact, which, when the cause is removed to a federal court, must be tried, not as an equitable proceeding, but as an action at law, in which there is a right to a jury trial.

Upon petition of Vernon Harrison Hartley, a minor, claimant for one-half of the estate, as the duly-recognized illegitimate son and heir of M. D. Foley, deceased. John D. Foley et al., contestants.