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Recent Cases

Federal Procedure—Removal Jurisdiction—When Federal Question Is Involved

Stewart v. Hickman

Plaintiff sued in a Missouri circuit court for damages under the Fair Labor Standards Act totalling $2,192.06. By the terms of the Act an action brought to enforce its provisions may be maintained in any court of competent jurisdiction. Defendant removed to the federal district court, which remanded the case to the state court. On a motion for rehearing the court maintained its position that the case should be remanded, holding that the suit did not so arise under the Constitution or laws of the United States as to make it removable.

As the value of the matter in controversy was plainly less than the $3,000 necessary for federal jurisdiction based on suit arising under the laws of the United States, there was a sound and easy rationalization for the decision. The court was aware of this, but chose to base its decision on the more debatable ground that the case raised no federal question. In support of this contention the court cited a number of cases which assert that before a case is removable to the federal courts on the ground of a federal question there must be a real and substantial dispute as to the effect or construction of the Constitution or laws of the United States.

The first case cited was a suit on a contract to construct a telegraph line along the railroad. Removal to the federal courts was attempted on the ground that it was a suit arising under the laws of the United States. This suit was brought on a private contract, and did not depend on an act of Congress for its very existence.

Another case quoted for the same principle was a bill to quiet title to land; the potential federal question on which removal was sought involved the construction of a treaty which was a link in the chain of title. It is clear that the cause of action was not based on this treaty; a bill to quiet title to land need not, of necessity, involve a federal act and any effect it might have on the result would be incidental to the effect of the rules of property law, which would govern

1. 36 F. Supp. 861 (W. D. Mo. 1941).
2. The case arose under § 16 (b) of the Act, being § 216 (b), Tit. 29 U. S. C. A.
4. "'Competent jurisdiction' of the federal court ordinarily means that the amount in controversy must exceed $3,000 and that there must be a federal question or a diversity of citizenship." Stewart v. Hickman, 36 F. Supp. 861, 862 (W. D. Mo. 1941).
the decision. If this were not true, every suit involving the title to land ultimately dependent upon a federal patent would be removable to the federal courts.

A third case was an action for the use and benefit of a holder of street improvement bonds. A receiver of a national bank became a party and attempted to remove to a federal court on the ground of a federal question, since the office of receiver of a national bank is created by the laws of the United States. It was correctly held that the case was not removable on this ground, since the federal question had only an inconsequential relation to the issues of the suit.

The distinction between these cases and Stewart v. Hickman seems clear. Here the suit is brought on a federal act which establishes the cause of action sued upon. Without this act there would be no right of recovery in the plaintiff at all. While the cases discussed above all seem to be correctly decided and all uphold a valid doctrine, it does not seem that the principal case comes within that doctrine. Those cases apply the ideas set out in Gulley v. First National Bank in Meridian, that the broad federal jurisdiction which Chief Justice Marshall asserted in Osborn v. Bank of the United States should be restricted and cut down. This is clearly the prevailing view of the courts today, but it does not follow that a case which depends for its entire existence on a federal statute does not arise under the laws of the United States.

The case of Robertson v. Argus Hosiery Mills, Inc. is cited by the court as showing that in cases arising under laws regulating commerce, the cause of action must bear a reasonable relation to the regulatory provision relied on before jurisdiction would follow. The court there held it did not have jurisdiction as a result of the commerce clause, and since there was less than the jurisdictional amount involved, the cause was dismissed. While this case is authority for the proposition that the federal court in the principal case could not remove on the basis of the jurisdiction given them over cases involving commerce, it does not establish that a federal question was not involved here, upon which the case could have been removed if the proper jurisdictional amount had been involved.

The distinction between the cases cited by the court and the problem in Stewart v. Hickman lies in the problem of whether or not the federal question is the actual basis of the suit. It seems that it is in the principal case. A case involving a problem identical to that of Stewart v. Hickman was held to

10. 9 Wheat. 738 (U. S. 1824).
12. "An examination of these cases, however, will generally show that the right asserted in the complaint was not a right created by federal law. On the contrary, such law was only indirectly and remotely concerned, and the right immediately in litigation was created by state law."

Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts." McGoon v. Northern Pac. Ry., 204 Fed. 998, 1001 (N. D. 1913).
be removable to the federal courts, the court holding that the word "maintained" in the "jurisdictional" clause of the Fair Labor Standards Act14 was subject to such varied interpretations that it could not be used to amend the removal act to make such a case not removable. It is possible that this term was used to mean that once a state court took jurisdiction it should retain it; but, it is just as possible that it was used to permit a concurrent jurisdiction in the state court which otherwise it might not have had. Of course, unless the state court had such original jurisdiction there would have been no removal question here at all.15 It was also stated that if Congress had intended to prevent removal of causes arising under this act it would have used language more pertinent to that end, as it has on several occasions when this end was desired:16

The court also cited cases showing that the federal question must appear in the plaintiff's petition before removal could be had.17 This, again, is a sound and well substantiated doctrine; but, it seems that these authorities fail to show that the principal case could not still come within the removal doctrine. It is hard to see how the plaintiff in Stewart v. Hickman could have drawn a declaration without involving the federal act upon which his entire case rested.

The oft repeated statement that to be a question that results in removal there must be a construction of a law of the United States seems to be an ambiguous phrase which requires some analysis. The better view seems to be that by this language the courts mean a case where the application of a federal law is necessary to the decision of the case,18 as was true of Stewart v. Hickman.

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16. E. g., 36 Stat. 1094 (1911) 28 U. S. C. A., § 71, "... that no case arising under an act entitled 'An act relating to the liabilities of common carriers by railroad to their employees in certain cases', approved April 22, 1908, or any amendment thereto, and brought in any state court of competent jurisdiction, shall be removed to any court of the United States. . . ."


PLEADING—EVIDENCE ADMISSIBLE UNDER GENERAL DENIAL

Minter v. Mid-Continent Petroleum Corporation

Plaintiff sought recovery from defendant petroleum company of one cent per gallon from operation of a filling station over a five year period. The answer was a general denial. Held: leases in connection with letter written by plaintiff showing that such amounts were not bargained for, and tank wagon tickets tending to show a settlement upon each delivery of gasoline are admissible because: "It is well established that under a general denial evidence tending to show plaintiff never had a cause of action is admissible."1

The above statement appears repeatedly in Missouri decisions.2 It is true that it covers accurately many situations, especially when it goes to matters of denial of allegations in the petition. It would seem that the principal case would fall in this category.3 Lack of malice in malicious prosecution may be shown under the general denial.4 The negligence of a fellow servant falls in a class by itself. Where it is available as a defense, it may be raised under a general denial.5 Though off-hand one would expect it to be pleaded specially, it goes to show that a cause of action never existed, and may be shown under the general denial. Certainly our rule covers this situation accurately. Of course the statute of limitations,6 release,7 rescission8 and res judicata9 must be specially pleaded.

On the other hand, contributory negligence,10 illegality,11 fraud,12 justifica-

1. 147 S. W. (2d) 120 (Mo. 1941).
2. Id. at 123.
4. For a similar case, see Hellmuth v. Benoist, 144 Mo. App. 695, 129 S. W. 257 (1910).
7. Johnston v. Ragan, 265 Mo. 420, 178 S. W. 159 (1915); Linn Co. Bank v. Clifton, 263 Mo. 200, 172 S. W. 388 (1914); However in ejectment the statute need not be pleaded. Here the statute is relied on as a defense showing title. Collins v. Pease, 146 Mo. 135, 47 S. W. 925 (1898).
11. Donovan v. Hannibal & St. Joseph R. R., 89 Mo. 147, 1 S. W. 232 (1886); Schide v. Gottschalk & Remler, 329 Mo. 64, 42 S. W. (2d) 777 (1931).
12. St. Louis Agric. Ass'n v. Delano, 108 Mo. 215, 18 S. W. 1101 (1891); But if such appears from the contract itself, it need not be so pleaded; School District of Kansas City v. Sheidley, 138 Mo. 672, 40 S. W. 656 (1897).
13. Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578 (1894); Barker Asphalt Paving Co. v. Field, 188 Mo. 182, 86 S. W. 860 (1905).
tion in false imprisonment,\textsuperscript{14} self-defense in assault,\textsuperscript{15} and truth\textsuperscript{16} are not admissible under the general denial. Here the test fails to describe the decisions because all of these defenses go to show that the plaintiff never had a cause of action. On the other extreme is the holding that failure of consideration is admissible under the general denial.\textsuperscript{17} Here it would appear that the plaintiff once had a cause of action.

It is interesting to trace the origin of the Missouri doctrine. Pomeroy\textsuperscript{18} states the text writers at common law commonly set out the distinction between the plea by way of confession and avoidance and the general issue as follows: "The general issue . . . put in issue the entire cause of action, and under it the defendant was permitted to offer any evidence which showed that the right of action never in fact existed." The plea by way of confession and avoidance, "admitted . . . that a cause of action once existed . . . , and set up other and subsequently occurring facts which showed that the right after it had occurred had been in some manner discharged, satisfied or defeated." Elsewhere\textsuperscript{19} Pomeroy cites Chitty\textsuperscript{20} for the related proposition that "pleas in bar as well in actions on contracts as for torts, are of two descriptions: first, they deny that the plaintiff ever had the cause of action complained of; or, secondly, they admit that he once had a cause of action,—but insist that it no longer subsists." It is conceivable that the doctrine of the principal case was taken from some such classification.

Further, the general issue in assumpsit, to wit, non assumpsit, which literally only denies that the defendant ever promised, was very broad.\textsuperscript{21} Practically anything going to show there was not a cause of action at the time of suit could be shown under the same. Included in this would be any evidence that went to the original validity of the contract. Bliss\textsuperscript{22} points out some have supposed that a defendant should be permitted under the code to prove any facts under a general denial which shows that the contract when made was invalid; that is, that a cause of action never existed. Indeed, he cites the case which started the doctrine in Missouri.\textsuperscript{23} This would seem to indicate our doctrine originated in the general issue in assumpsit.

It is impossible to be certain about this matter of ancestry, however, as the court first enunciating the doctrine in Missouri\textsuperscript{24} cites no authorities. It arbitrarily states: "Where a cause of action which once existed has been determined by some matter which subsequently transpired, such new matter must, to comply with the statute, be specially pleaded; but where the cause of action al-

\textsuperscript{14} Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270 (1906).
\textsuperscript{16} Sotham v. Drovers Telegram Co., 239 Mo. 606, 144 S. W. 428 (1911).
\textsuperscript{17} Rico v. Peters, 185 S. W. 752 (Mo. App. 1916).
\textsuperscript{18} PomeroY, REMEDIES AND REMEDIAL RIGHTS (1875) § 672.
\textsuperscript{19} Id. at § 644.
\textsuperscript{20} Chitty, Pleading (16th Am. ed. by Perkins) 489.
\textsuperscript{21} Shipman, Common Law Pleading (3rd ed. 1923) § 182.
\textsuperscript{22} Bliss, Code Pleading (3rd ed. 1894) § 352.
\textsuperscript{23} Greenway v. James, 34 Mo. 326, 328 (1864).
\textsuperscript{24} Ibid.
leged never existed, the appropriate defence under the law is a denial of the material allegations of the petition; and such facts as tend to disprove the controverted allegations are pertinent to the issue." It is entirely possible that the learned judge meant that under a denial, a defendant may prove any affirmative rival facts disproving facts alleged by the plaintiff. Certainly no objection could be taken to such an interpretation. But the statement which has been so mechanically repeated can also be taken to mean that the defendant may prove any facts that go to show that a cause of action never existed in the plaintiff. When so broadly construed, the test does not square with many of the decisions.25 At any rate the Missouri test in its present form is inaccurate and misleading and should be abandoned by the courts.

We find other attempted solutions for the general problem of what must be specially pleaded. Clark states that in so far as there tends to be a conscious statement of a definite rule it is that a denial of what is proper and necessary in the complaint will place the same in issue.26 This rule based on logic has obvious exceptions such as payment.27 New York follows the English rule.28 There a matter must be specially pleaded if it would otherwise lead to surprise or would raise issues of fact not arising out of the previous pleadings. The new Federal Rules29 explicitly set forth a list of defenses which are to be affirmatively pleaded. The list is not exclusive however and other matters constituting an avoidance or affirmative defense must be specially pleaded.

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25. See Notes 10-16, supra.
26. CLARK, CODE PLEADING (1928) 416.
27. Id. at 422.
29. Rule 8c reads: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . ."