Federal Removal Jurisdiction

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PART II
GROUNDs OF REMOVAL

Federal Question

The first statute to permit removal of causes arising under United States Constitution, statutes, or treaties, when a sufficient amount was involved, was that of 1875. Under this act it was enough if the record at the time of removal showed that either party claimed a right under the federal Constitution or laws; it was not necessary that the federal question appear in the plaintiff's petition.1 The party seeking removal had to state enough facts to show that he claimed a substantial right under federal authority,2 and if that authority formed a necessary ingredient of the case, as part of either the asserted claim or defense, removal could be had.3

Under the Act of 1887-88, however, there was the requirement that a federal court must have been able to hear the case originally in order to obtain a removal; and a federal question must appear in the plaintiff's statement of his own case before there can be original federal jurisdiction. In Tennessee v. Union & Planters' Bank,4 the plaintiff's claim was based entirely on a Tennessee statute, and the right under the federal Constitution was raised as a matter of defense. This, said the Court, conferred no jurisdiction by removal under the new statute, as the federal question must appear as a substantial ingredient of the plaintiff's

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claim before the defendant can remove, as a result of the "potentiality of originality" provision of section 2 of the 1887-88 Act. This interpretation has since been followed. Not only must the federal issue appear in the plaintiff’s complaint, but it must properly be there, and the anticipation of a defense based on federal statute or Constitution does not confer the right of removal. There are, however, exceptions to this general rule, such as where the plaintiff failed to state what court appointed the defendant receiver; this did not prevent the federal receiver from removing; nor did a similar concealment of a federal marshal’s status by the plaintiff prevent removal; and a removal of cases arising in reservations and sites within the jurisdiction of a federal court is not dependent upon the plaintiff’s petition mentioning the federal question.

What Constitutes a Federal Question?

To have a federal question, it is necessary that some title, right, privilege, or immunity be dependent on the manner in which a federal statute or provision of the Constitution is applied. This requirement is satisfied by the attack on water rates on the ground that they were made without authority of law; but is not satisfied by a city’s suit to halt the operation of an unauthorized ferry. It is not enough that a federal statute may incidentally

9. Steele v. Halligan, 229 Fed. 1011 (W.D. Wash. 1916), pointing out that there is federal jurisdiction here unless special grounds for state authority are asserted in the plaintiff’s petition.
11. Starin v. New York, 115 U.S. 248, 6 S.Ct. 28, 29 L.Ed. 388 (1885). While removal can be had only when the action will succeed on one construction of the federal Constitution or statute, and fail on the contrary interpretation, there is the difference as to appeals that review of the Supreme Court can be obtained for denial of a right secured by any federal authority or commission. See also Carson v. Dunham, 121 U.S. 421, 7 S.Ct. 1690, 30 L.Ed. 922 (1887); this
be construed at some time in the case, but substantial reliance
must be made upon it so as to have the decision depend on such
construction. The fact of other issues being likewise involved
does not prevent removal of a case possessing a substantial federal
question. The decision must depend on the question of law of
how the federal act will be interpreted. Thus removal is denied
when only a question of mixed law and fact, or fact only, is pre-
sented, such as the proper service of a nonresident insurance
company, or the boundaries of a mining claim, neither involv-
ing the construction of a federal statute.

The fact that a federal statute put Arkansas law in force tem-
porarily in Indian Territory did not permit removal of a suit
under that law, construction of the federal statute not being ma-
terial to a settlement of the case. There was no federal question in
an action to enjoin the sale of liquor as a nuisance, nor in an
action for damages caused by threats to sue under patent laws for
infringement of patent rights in a pump. In a suit where the
plaintiff asserted an adverse mining claim, the court would not
take judicial notice of the fact that a federal statute governing
adverse claims controlled the case, so as to permit removal.

On the other hand, citizenship of the parties is immaterial
when a federal question and the jurisdictional amount are pre-

sented, and the suit of a state—nonremovable for diversity of citizenship—can be removed if a substantial federal question is raised in the plaintiff’s complaint. Whenever an act of Congress is necessarily involved in deciding on the plaintiff’s claim, whether mentioned in it or not, there is a sufficient federal question, and among the situations which meet this requirement are the following: an ejectment action which depends upon the validity of a patent of land bringing in acts of Congress so as to make a federal question; a controversy which involves authority of the land department to grant a patent, raising as it does the acts of Congress on the subject; a case where an act of Congress must be construed to determine whether a grant by the state was for an unlimited time or for twenty-one years, this being a federal question presented by plaintiff’s case; an action where plaintiff’s claim to a right to build a dock in the Calumet River without interference by the city of Chicago was based on federal Constitution and laws and on a permit from the Secretary of War; a controversy as to whether the Hepburn Act of Congress forbade a carrier from giving a free pass to an employee of the Railway Mail Service unless on duty; an ejectment action where the plaintiff’s rights depended upon the interpretation of an act of Congress of 1901 governing descent of lands held by the Creek tribe of Indians; and a civil action in the nature of a quo warranto proceeding to test a corporation’s right to do business, charging a conspiracy to monopolize state and interstate telephone business in violation of the Sherman Anti-Trust Act, though the federal statute was not named.

There is a federal question in a controversy over the powers of a federal receiver, whether acting under express statute or order of the court appointing him, and the same is true of a suit

against a United States marshal. Before an act of Congress of 1925 declared that incorporation under federal law did not raise a federal question, this was an acceptable ground for removal; but where there was no separable controversy as to the resident codefendant joined with the corporation created under federal act, the latter could not remove the action on the ground of a federal question. It has been held that a dispute over the validity of a lien claimed under a judgment rendered by a federal circuit court raised an issue determinable under the laws of the United States and rules of its courts, so as to be a federal question and removable, whereas merely suing on a judgment rendered by a federal court does not create a federal question when no term of the national Constitution or of a federal statute was involved.

There is a difference of opinion among the lower federal courts as to the effect of a previous decision of the Supreme Court concerning the statute which would otherwise create a federal question. One view maintains that there is no longer a removable question of law, but only a fitting of the facts of the case to the act as construed; while the other contention is that the previous decision on a different state of facts does not destroy the federal question otherwise presented, and the right of removal is retained. Each case depends on the cause of action presented by the plaintiff's pleading, but it is safe to say that removal cannot be had of an action under a state statute or constitutional provision, which defendant seeks to block by the due process clause of the Fourteenth Amendment, or some other term of the federal Constitution or federal law.

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30. Feibelman v. Packard, 109 U.S. 421, 3 S.Ct. 289, 27 L.Ed. 984 (1883), holding that suit against a United States marshal on his official bond for seizure of property in excess of the jurisdictional amount, under order from a federal court, is a civil action arising under acts of Congress governing his duties and removable to the federal court, where he can justify his acts by showing the property belonged to the bankrupt. Accord: Bock v. Perkins, 139 U.S. 628, 11 S.Ct. 677, 35 L.Ed. 314 (1891); McKee v. Brooks, 64 Tex. 255 (1885).


Prohibition against Removing Cases under Federal Employers' Liability Act or Merchant Marine Act

Prior to the amendment of 1910 making this prohibition, a case under the Federal Employers' Liability Act could be removed for involving a federal question, though concurrent jurisdiction was given to state courts.\(^{38}\) As carried into the Judicial Code,\(^{38a}\) this provision is:

“No case arising under sections 51 to 59 of Title 45 [Employers' Liability Act], and brought in any State court of competent jurisdiction shall be removed to any court of the United States.”

This was held to forbid removal of any case after the act, even though the cause of action arose before its enactment.\(^{39}\) When attacked as unconstitutional for discriminating against one class of litigants, and denying equal protection of the laws in preventing them from removing when others of the same class could do so, it was declared a legitimate exercise of legislative authority over the subject of removal by Congress, whose power to set an arbitrary amount for removal jurisdiction had never been denied. “In our view Congress has entire control over the subject, and may give the right in some instances where it regards it as proper, and not give it in other instances where it does not choose to do so.”\(^{40}\)

The purpose of the amendment is, of course, to allow one suing for compensation under the act to keep his case in the state court by choosing that tribunal, and to make any federal review be by appeal, writ of certiorari, or certificate from the highest state court directly to the Supreme Court. This has been called a personal privilege of the plaintiff, which he might waive,\(^{41}\) but the better view appears to be that it is a withdrawal by Congress of removal jurisdiction over a certain class of cases that would other-

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wise be removable, and no case within this withdrawn class can be removed.\footnote{42}

The Merchant Marine Act provides:

"... and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."\footnote{42a}

Whether this includes a prohibition against removal has been disputed among the lower federal courts. The first view in the Washington district was that the prohibition did not apply, and removal was granted,\footnote{43} but a later case extended the provision denying removal to cases for personal injuries under the Merchant Marine Act.\footnote{44} In New York, it was first held that the prohibition did not apply to any action under the Merchant Marine Act.\footnote{45} Later it was held that the prohibition against removal was effective as to an action for death, but not for personal injuries,\footnote{46} but this distinction was soon dropped and removal is prevented in both cases.\footnote{47}

\textbf{Diversity of Citizenship}

Original federal jurisdiction for cases exhibiting diversity of state citizenship and a sufficient sum is provided for in section 24

47. Martin v. United States Shipping Board Emergency Fleet Corp., 1 F. (2d) 803 (S.D. N.Y. 1924). Regarding actions for death, the different language in the Merchant Marine (or Jones) Act was declared to be based on the fact that no action for wrongful death existed at common law until Lord Campbell's Act, while an action did exist for personal injuries. The distinction was declared unimportant, and the action for personal injuries remanded to the state court, as coming within the prohibition. Accord: Atianza v. United States Shipping Board Emergency Fleet Corp., 3 F. (2d) 845 (E.D. N.Y. 1924), overruling Malla v. Southern Pac. Co., 293 Fed. 902 (E.D. N.Y. 1923) cited in note 45, supra.}
of the Judicial Code, and the second sentence of the removal section provides that

"Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."  

Under this provision, originating in the Act of 1887-88, removal jurisdiction is limited to cases where suit could have been brought originally in a federal court, making requirements for diverse citizenship the same for removal as for original suit, except that under Lee v. Chesapeake & O. Ry. Co., the venue provisions of the Judicial Code (§ 51) are not now applied to removals. Like original suit in the federal courts based on diversity of citizenship, removal on this ground is for the purpose of providing a court presumed to be more impartial than the courts of the state in which either party lives.

Diversity of citizenship, unlike a federal question, need not necessarily be shown in the plaintiff's petition, but may be established by any part of the record at the time of the petition of removal. The defendant is not estopped from making in his removal petition a correction of a wrong statement in earlier pleadings of his own citizenship or of that of the plaintiff. The essential fact of diverse state citizenship must appear somewhere

54. Reynolds v. Adden, 136 U.S. 348, 10 S.Ct. 843, 34 L.Ed. 360 (1880), in which the fact that defendant had signed a bond describing himself as a citizen of Massachusetts did not estop him from asserting his citizenship in New Hampshire on suit in Louisiana, no one being prejudiced thereby. See also Carson v. Hyatt, 118 U.S. 279, 6 S.Ct. 1050, 30 L.Ed. 167 (1886), where the plaintiff's petition declared the removing codefendant to be a citizen of Massachusetts, the latter was not estopped by her counsel's statement in the answer that she was a citizen of New York, and she could remove for diversity of citizenship, as it appeared in the plaintiff's petition.
55. Ohle v. Chicago & N. W. Ry. Co., 64 Iowa 599, 21 N.W. 101 (1884), where an affidavit by an officer of the defendant corporation that plaintiff was a citizen of Illinois, as was the defendant, did not estop the latter from subsequently asserting that the plaintiff was a citizen of Iowa, and thereby attempting to remove for diversity of citizenship.
on the record that goes to the federal court, however, and if it does not, the Supreme Court of its own motion takes notice that federal jurisdiction does not clearly appear on the record.\(^5\) In this showing of federal jurisdiction, the diversity of citizenship must exist both at the time the suit was started and when the petition for removal was filed.\(^5\) When an action was not originally removable because of the joinder as defendant of a citizen of the same state as that of the plaintiff, his later moving to another state did not make it removable.\(^5\)

In order to obtain removal on the sole ground of diverse citizenship, the defendant must show that all the parties on one side of the controversy are citizens of different states from all members of the other side; under the prevailing interpretation of "between citizens of different states" the diversity must be complete.\(^5\) A demurrer can be used to raise an objection to federal jurisdiction for lack of complete diversity of citizenship as shown in the plaintiff's complaint.\(^6\) However, where the nonresident's removal petition was filed before the plaintiff amended his petition by adding as codefendant a domestic corporation leasing to the nonresident defendant, the amendment came too late to prevent removal.\(^6\)

Only Real Parties are Considered

Removal cannot be blocked by the joinder of a resident defendant who is substantially a stranger to the controversy, and such a formal party is disregarded in determining the real defend-
ant's right to go into the federal court. Where the removal petition of a nonresident corporation pointed out that the codefendant resident directors were not necessary to the suit, they were eliminated so as to permit removal. In an action by the owner of property against the junior encumbrancer, joinder of the senior encumbrancer was found unnecessary because of a separable controversy against him, and on this arrangement of the parties, the single defendant could remove for diversity of citizenship between himself and the plaintiff. On the other hand, a savings institution holding the bonds for which suit was brought was held to be a necessary party defendant, and since it was a citizen of the same state as plaintiff, the other defendants could not remove for diverse citizenship between plaintiff and themselves, not having a separable controversy. Yet on similar facts the depositary of a fund was found not to be a necessary party to a suit between two citizens of different states claiming the sum deposited; the joinder of the trustee-depository as defendant did not prevent removal based on diversity of citizenship.

A trustee is generally considered a necessary party. Where he held property in trust to secure payment of notes by the defendant, he was a necessary party whose residence in the same state as plaintiff defeated removal for diversity of citizenship. The same was true of a trustee under a mortgage with the power to sell the property on default of payment. Also, where a trustee of such a fund has been joined, the beneficiary under a trust deed, although he need not be joined, was treated as a necessary party so as to prevent removal when his citizenship was the same as plaintiff's. In the foreclosure of a mortgage, the resident mortgagor corporation and its receiver were necessary parties, pre-

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venting removal by the nonresident surety. There is a difference of opinion concerning the joinder of an officer who has levied execution, one view looking upon him as a merely formal party not important enough to prevent removal by a codefendant, and the other considering him necessary and an obstacle to such a move. In suits joining as codefendants a resident railroad corporation as lessor together with its lessee, a foreign corporation, the domestic lessee was held necessary for the doing of full justice, thus preventing the lessee from securing removal. Sometimes the court may find it necessary to rearrange the parties according to their real interest before deciding which parties are necessary, and its right to do so is well recognized. If complete diversity is found to exist under this rearrangement, the defendant can then remove, and if not, he cannot. In a taxpayer's suit to enjoin officers from levying a tax to pay certain bonds, the only real defendant, after the parties were rearranged according to their interests, was the nonresident citizen of another state who owned all the bonds, and he was allowed to remove to a federal court. In a suit by one of two lessors against the lessee to obtain an accounting under the lease, the second lessor must be made a party plaintiff according to her real interest, and as a necessary if not indispensable party her citizenship in the same state as defendant deprives the federal court of jurisdiction.

Joinder by Plaintiff Controls, unless Fraudulent

When the plaintiff's petition states a prima facie case of joint cause of action against codefendants, the nonresident wishing to remove can do so only by showing that the resident was fraudulently joined. The chief indication of such fraudulent intent on

73. Chicago & N. W. Ry. Co. v. Crane, 113 U.S. 424, 5 S.Ct. 578, 17 S.W. 355 (1914); Hill v. Director General of Railroads, 178 N.C. 607, 101 S.E. 378 (1919). But see Louisville & N. R. Co. v. Newman, 128 Ga. 253, 57 S. E. 555 (1907), where not only was no joint cause of action against the resident corporation shown so as to make it a necessary defendant, but none at all was stated, and the nonresident could remove without hindrance.
the part of plaintiff is that there was no cause of action against the resident defendant; the mere epithet of fraud is not enough.\textsuperscript{79} Thus when the plaintiff saw fit to sue several railroads jointly for the value of cotton lost in transit somewhere on their lines, the filing of separate answers did not create separable controversies so as to allow those of diverse citizenship from plaintiff to remove, since in the absence of fraud the plaintiff can elect to hold all jointly.\textsuperscript{81} State law is consulted to see whether a cause of action exists against the resident joined as codefendant, with some color of fact for leading plaintiff to believe him jointly liable. If these are found, the resident cannot be disregarded so far as to allow the nonresident to remove, regardless of the action's outcome, and although the plaintiff could have sued each defendant separately.\textsuperscript{82} When the joinder was made in good faith at the commencement of the action, only the plaintiff's voluntary dismissal of the resident can allow the nonresident to remove; this is not made possible when the resident defendant is eliminated by a directed verdict for him,\textsuperscript{83} a nonsuit as to him,\textsuperscript{84} or a dismissal of the case against him at the instance of the nonresident.\textsuperscript{85} It does not matter that the resident is penniless, and any judgment secured will probably be enforced against the nonresident alone.\textsuperscript{86}


\textsuperscript{80} Pirle v. Tvedt, 115 U.S. 41, 5 S.Ct. 1034, 29 L.Ed. 331 (1885); Sloane v. Anderson, 117 U.S. 275, 6 S.Ct. 780, 29 L.Ed. 899 (1886).

\textsuperscript{81} Louisville & N. R. Co. v. Ide, 114 U.S. 52, 5 S.Ct. 735, 29 L.Ed. 63 (1885).


\textsuperscript{83} Landers v. Tracy, 171 Ky. 657, 188 S.W. 763 (1916).

\textsuperscript{84} Sumey v. Craig Mountain Lumber Co., 31 Idaho 234, 170 Pac. 112 (1918), cert. denied 246 U.S. 697, 38 S.Ct. 336, 62 L.Ed. 929 (1918).

\textsuperscript{85} Flygen v. Chicago, M. & St. P. Ry. Co., 115 Minn. 197, 182 N.W. 10 (1911).

If, on the other hand, the removal petition should contain a sufficient allegation of facts to indicate the fraudulent joinder of a resident to prevent removal, in that the plaintiff had no reasonable ground for believing he could hold him jointly with the nonresident, the state court should allow removal and leave the federal court to try the issues of fact on plaintiff's motion to remand. Thus where the nonresident corporation's removal petition alleged that its resident employee joined as codefendant had nothing to do with the injury, that establishes a prima facie case of fraudulent joinder, and the state court should allow removal as a matter of law for diverse citizenship, with the issues of fact raised by the removal petition to be settled in the federal court when plaintiff moves to remand. Usually, the plaintiff's fraudulent intent is pointed out in the removal petition as being a failure to state a cause of action under state law against the resident codefendant. For example, no cause of action existed against the resident train engineer (joined with the nonresident railroad company) for hitting a car only hard enough to move it, causing defective car fastenings to fly off and injure plaintiff, and his joinder was for this reason fraudulent and ineffective to prevent removal for diverse citizenship. It is not enough to secure removal that the removal petition merely traverse the facts of plaintiff's allegations, or make a denial on the merits of the case. In one case, remand to the state court was granted because no facts constituting fraudulent joinder of the resident corporation were alleged or proved; and the allegation that the corporation was not in existence at the time the cause of action arose went to the merits.


88. Western Coal & Min. Co. v. Osborne, 30 Okla. 225, 119 Pac. 973 (1911).

89. Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 27 S.Ct. 184, 51 L.Ed. 430, 9 Ann. Cas. 757 (1907). Where no cause of action was stated against the resident codefendant who had no relation to plaintiff's injury, his joinder was fraudulent; and the statement in the removal petition of facts indicating this fraud justified the state court in allowing removal, leaving the federal court to try the issues of fact in connection with the fraud. See also Stratton's Independence v. Sterrett, 51 Colo. 17, 117 Pac. 351 (1911); Cincinnati, N. O. & T. P. Ry. Co. v. Robertson, 115 Ky. 858, 74 S.W. 1061 (1903); Cox v. Whitmer-Parsons Pulp & Lumber Co., 193 N.C. 28, 136 S. E. 254 (1927).


The Removal Act of 1789 authorized the removal of a suit with an alien as defendant.\(^{93}\) This was changed by the Act of 1875 and later acts to make the case removable when suit was between a citizen of a state and a nonresident alien, and now the mere fact that an alien is defendant does not necessarily entitle him to removal.\(^{94}\) The present authority for removing suits involving aliens is the provision of original federal jurisdiction for removing controversies between "citizens of a state and foreign states, citizens, or subjects,"\(^{95}\) and the provision of sentence 2 of the section on removal that any other suit of a civil nature in law or equity (besides federal question) of which federal courts are given original jurisdiction can be removed by a nonresident defendant.\(^{96}\) This includes actions involving aliens; and a suit by an alien against a citizen of a state other than where the case is pending can be removed by the defendant.\(^{97}\) This specific provision for an alien citizen or nation rules out any broad interpretation that would include a suit by a citizen of another country within the category of suits "between citizens of different states," as this latter provision applies only to citizens of different states of the United States.\(^{98}\)

Before 1923, when the Lee v. Chesapeake & O. Ry. Co. case eliminated the venue rule as an obstacle to removal, the better view on this question would have been to point out that as the alien plaintiff had no home district in this country, and the citizen of a state cannot remove from the district in which resident, the defendant could remove only with the consent of the plaintiff, if the requirement that suit be in the home district of one party was adhered to. But the view adopted by the courts was that the alien, in bringing suit in the state court, had no right to object to removal in that district, and the defendant waived improper venue by the act of removing.\(^{99}\) An action against an alien could like-
wise be removed in the district where suit was pending in the state court, though there is some difference as to whether the requirement that defendant be a nonresident of the state before removing from its courts would apply. The view favoring removal calls residence synonymous with state citizenship, which an alien could not possess; but it appears more logical to deny removal when one of the alien defendants actually resides in the state.

In addition to alienage and proper venue, the jurisdictional amount of more than $3,000 must be involved. Thus an action to enforce specifically an agreement to arbitrate raised only a matter of convenience, and did not involve a sufficient sum for removal jurisdiction. An alien corporation is sufficiently a "foreign citizen" to remove on this ground when sued by a citizen of a state, and the mere doing of business through a branch office in a state does not prevent its removing as an alien. Since a state is not a citizen of a state, its suit against an alien cannot be removed under the present law, which has done away with the rule of the 1789 Act, allowing an alien defendant to remove, regardless of the plaintiff who sued him. In determining who is an alien within the removal act, a member of an Indian tribe living in the United States is not such an alien, and since he is not a citizen of a state he can remove only if a federal question necessarily appears in the plaintiff's complaint. After a case has been removed because of having an alien as a party, his naturalization does not disturb the federal jurisdiction already attached.

Suit by a Citizen against an Alien and a Citizen

It is agreed by all that removal cannot be had of a suit by citizens and aliens against citizens and aliens, or by alien against

104. Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 202 Fed. 293 (D.C. Mass. 1913). As stated in National Steamship Co. v. Tugman, 106 U.S. 118, 1 S.Ct. 58, 27 L.Ed. 87 (1882), the reasoning is simply that the individual members are conclusively presumed to be citizens of the foreign country where the corporation is created, making it in effect a legal citizen of the nation.
alien,"110 or by alien against alien and citizen,111 because having an alien on each side always bars both original and removal jurisdiction. The statute does allow removal of suits between citizens of different states, and between a citizen of a state and an alien, but not specifically for an action between a citizen of one state on one hand, and a citizen of another state and an alien on the other. Construing the statute strictly, this should be denied, as has been announced in cases where the codefendant of the alien was a citizen of the same state as the plaintiff, which would in any case have prevented removal.112 On the other hand, certain lower federal courts have pointed out that if the citizen of a state had sued the alien and the citizen separately, each could undoubtedly have removed, and the spirit of the act would be better reached by allowing the joint defendants to remove when each could have done so.113

Presence of Alien Prevents Removal on the Grounds of “Separable Controversy” or for “Prejudice or Local Influence”

Removal of a separable controversy is mentioned in the Removal Act of 1887-88 only in connection with cases of diverse state citizenship, and consequently it cannot be had where an alien is a party.114 Likewise, the original Prejudice or Local Influence Act of 1867 was designed for the special purpose of allowing resort by a citizen of another state to the impartial federal courts when the antagonism aroused by the Civil War would be likely to interfere with justice in the state court, and no thought was given to the plight of an alien subjected to such local prejudice. As aliens were not mentioned in connection with this ground, their presence prevents removal for prejudice or local influence.115

SUIT BETWEEN CITIZENS OF THE SAME STATE UNDER LAND GRANTS OF DIFFERENT STATES

The Judicial Code (§ 30) provides that in an action in a state court involving land titles, wherein the parties are citizens of the same state and the sum in controversy clearly is over $3,000, one of the parties may set out his claim under a land grant of one state (producing the original grant unless it is lost) and demand that the adversary either answer whether he claims under a grant of another state or else refrain from giving evidence of the grant at the trial. If a claim is made under such a grant of a second state, the party moving for this information can present his petition for the removal of the cause into the next federal district court to be held in the district, and the removing party cannot set up any other title than he has presented.

This ground of removal, now unimportant, was intended to prevent one state's courts from having to decide whether its own land grant or that of another state gave good title, with the lurking possibilities of conflict between states. On this reasoning, the fact that the states were under the same sovereignty at the time of the grant did not prevent removal, as the evil to be avoided was the necessity for one state to pass on the titles of what was another state at the time of trial. However, the party claiming under a grant of the state in whose court the case was pending could not remove, when the other party claimed under a grant of another state; and when one state made its grant solely as agent of the other and not as a sovereignty, the requirements for removal were not satisfied.

The removal statute gives original jurisdiction over cases involving land grants of different states only when the parties are citizens of the same state. Therefore, a controversy between citizens of different states over land grants by different states can be tried in a federal court only on the ground of diversity of citizenship.

DENIAL OF EQUAL CIVIL RIGHTS TO A DEFENDANT IN STATE COURTS

The next section of the Judicial Code provides that if in any civil or criminal case in the state courts the defendant should be

117. Shepherd's Heirs v. Young, 17 Ky. 203 (1824).
118. Thompson v. Kendrick's Lessee, 6 Tenn. 113 (1818).
unable to secure the equal civil rights of a citizen of the United States or of a person under its jurisdiction, he can file in the state court a petition of removal at any time before the trial or final hearing. Upon the filing of this petition stating the facts and verified by oath, all further proceedings in the state court should cease, though bail already given in the state court retains its effect. It is then the duty of the clerk of the state court to furnish the removing party with a copy of all proceedings in the case, which are filed in the district court on the first day of its session. If the clerk fails to furnish these copies, the removing party may docket the case in the district court, which will order the plaintiff to make new pleadings there or take a nonsuit. If there is no such refusal by the clerk, the defendant's failure to file a copy of these pleadings in the district court will lead it to issue a certificate stating this failure, and this will authorize the state court to proceed with the case.

This section (§ 31) was declared constitutional, under the power of Congress to enforce the provisions of the Fourteenth Amendment. Removal is a matter of right, but under this section the state court must have the chance to inspect the petition to see if facts justifying removal are stated; and the federal court has the right to assert its jurisdiction by process to the state court if it finds the case subject to removal. After removal has been ordered, the state court does not immediately lose all control over the case, but after the federal court has quashed the original indictment, the state court must then determine whether a new indictment will be presented, or the prosecution dropped. However, until notified of the federal court's action in the case, the state court can proceed no further. When the federal court sees fit to remand the case, the state court must proceed in the case as if it had never been improperly removed, and no review can be made under this section of such order of remand.

What Constitutes a Denial of Civil Rights?

The section is meant to insure to any defendant residing in the United States his full civil rights and the equal protection of

121 Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880); Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880).
125. Ex parte State, 71 Ala. 363 (1882); Stommel v. Timbrel, 84 Iowa 336, 51 N.W. 159 (1892).
the laws guaranteed by the Constitution and laws of this country, and is for the benefit of all persons coming under its terms. To justify removal, the denial must be by state statute or constitution, and a judicial or executive denial can be corrected only by appeal. The discrimination must not be simply the wrongful act of a state officer, but must originate in the laws of the state. After the highest state court has recognized that its state constitution was changed by the Thirteenth, Fourteenth and Fifteenth Amendments, so as to allow negroes to vote and serve on juries, the refusal of jury commissioners to allow a negro to be a juror was the wrongful act of the officers, and not a denial of equal civil rights by state law.

There must be a real case of denial of such rights before removal is granted, and when the state laws do not interfere with the enforcement of rights, the possibility that the state courts may not enforce the rights secured under these laws does not justify removal. Thus the remedy was not granted to a marshal and his sureties sued for trespass, nor to a candidate for a state office, whose petition claimed that illegal voting for his opponent should cause him to be declared the rightful incumbent in office; nor in a suit by a state in its own court against a citizen of another state; nor upon an allegation that defendant's attorney is a witness in the case, and is wilfully prevented from testifying; nor where the failure of a defendant to secure a trial was due to her inability to secure an attorney, and to plaintiff's obtaining a postponement over her protest, and not to any provision of the state laws; nor in a situation where a state statute declared a building erected as a saloon to be a nuisance, when defendant claimed it was good for no other purpose; nor because citizens of other states can sell liquor in the original package in the state.

129. Murray v. Louisiana, 163 U.S. 101, 16 S.Ct. 990, 41 L.Ed. 87 (1896); Cooper v. State, 64 Md. 40, 20 Atl. 986 (1885); Fitzgerald v. Alman, 82 N.C. 426 (1880).
when its citizens cannot. In a prosecution of a Chinese for possessing a lottery ticket, under an ordinance applying equally to anyone, and fair on its face, it was held that a maladministration of a fair law does not constitute the type of denial of rights dealt with in this section.

**When Petitioning Defendant is in Custody**

Provision is made (§ 32) for an occasion where the defendant petitioning for removal is in actual custody under process from the state court. There the clerk of the district court is to issue a writ of habeas corpus *cum causa*, and the marshal is to take custody of the prisoner under it until he can be dealt with in the federal court in accordance with law. The marshal leaves a copy of this writ with the clerk of the state court. The writ is not needed to effect the removal but is used only to take charge of the person of a defendant and to notify the state court not to proceed further with the case. The procedure in this section is followed when the state court refuses to recognize the defendant's right to remove the case, while the preceding section (§ 30) points out the less drastic remedy of docketing the case in the federal court when the clerk of the state court simply refuses to furnish copies of the pleadings to file in the district court.

**Suits and Prosecutions Against Federal Officers**

Whenever a suit or prosecution is instigated against a federal revenue officer, or one acting under his authority, an officer of a federal court, or an officer of either house of Congress, for an act done under color of carrying out the duties of his office, such an officer may petition for removal to the federal district court held in the district where the suit is pending, at any time before trial or final hearing. The petition should set forth the nature of the case against the defendant, and be verified by affidavit of a lawyer of the state where suit has been started. The case is then entered on the docket of the district court and continues as if commenced there, with bail or other security exacted by the state court continuing in effect. The clerk of the district court should obtain from the state court a copy of all pleadings already made, and inform the state court to stay all further proceedings in the case. The marshal should take control of a defendant already in custody by

serving a writ of habeas corpus *cum causa* on the state court. If no copy of the record and proceedings in the state court can be secured, the plaintiff can be forced to either make new pleadings or take a nonsuit.\textsuperscript{142}

This provision of the Judicial Code (§ 33) came about as the result of an attempt by one of the states to make it a criminal offense for the United States officers to collect the internal revenue within that state. The statute was enacted to keep the states from hampering necessary federal activities,\textsuperscript{143} and it has been declared constitutional.\textsuperscript{144} To maintain this independence of federal officers the statute must be construed rather liberally;\textsuperscript{145} although under the present tendency of restricting federal jurisdiction, any construction must be within the terms and intention of the statute.\textsuperscript{146}

By the right of removing to a federal court, a federal revenue officer is protected alike in civil and criminal cases from the consequences of his acts done under federal authority. If removal is made under this section the state court is completely divested of jurisdiction over the case and cannot proceed against the sureties on the bail bond for its breach.\textsuperscript{147}

This is not the only remedy of the federal officer. If he can clearly show on an application for writ of habeas corpus that he committed no crime in carrying out his official duties, he is entitled to a summary discharge.\textsuperscript{148}

As for the determination of who comes within the terms of the section, all officers having some rational duties under a "revenue law," whether customs or internal revenue, are included.\textsuperscript{149} Revenue laws include acts providing ways of assessment and collection of funds to support the government, such as a post office

\textsuperscript{142} Judicial Code, § 33, 28 U.S.C.A. § 76 (1926).
\textsuperscript{143} Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1880).
\textsuperscript{144} Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1880); Davis v. South Carolina, 107 U.S. 597, 2 S.Ct. 636, 27 L.Ed. 574 (1883). As this privilege of removal was extended to the other two classes, Congress possessed the power to provide removal of cases against officers of federal courts for acts done in the course of their duties. Matarazzo v. Hustis, 256 Fed. 882 (N.D. N.Y. 1919).
\textsuperscript{147} Davis v. South Carolina, 107 U.S. 597, 2 S.Ct. 636, 27 L.Ed. 574 (1883).
\textsuperscript{148} In re Neagle, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890).
\textsuperscript{149} People's U. S. Bank v. Goodwin, 162 Fed. 937 (C.C.E.D. Mo. 1908).
law, but a reclamation act and a naval appropriation act are not covered. The term “revenue law” in the removal sense does not include all provisions for expending federal money, so as to protect officers acting under them. A strict construction requires the ruling out of all persons except those clearly acting in their official capacity to help in the vital activity of raising federal funds under authorization of Congress. Regarding other officers named, a deputy United States marshal has been called an officer of the court, and entitled to the removal of a prosecution to the federal court. This is likewise true of receivers appointed by a federal court sued for the negligent operation of a train; but the section has been held not to apply to commissioners appointed by a federal district court to act as examining magistrates for offenses against federal law. While national liquor prohibition was in effect, a prohibition officer could remove state prosecutions for acts done in the performance of official acts, but not prosecutions for acts plainly outside those duties and not under color of authority, such as for perjury committed at a coroner’s inquest over the body of the person killed by him or for reckless driving while not on official duty.

Suit against a revenue officer to recover a tax paid under protest can be removed, also a suit against a collector of customs by an informer for the proceeds of goods condemned for breach of revenue laws, a suit against a surveyor of customs for damage done while acting officially, and an action against a post-

152. Twin Falls Canal Co. v. Foote, 192 Fed. 583 (C.C.Idaho 1911).
157. Maryland v. Soper, 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449 (1926); Oregon v. Wood, 268 Fed. 975 (D.C. Ore. 1920). Before the Soper case, the National Prohibition Act had been declared not a revenue act, so as to refuse removal of a state prosecution of an officer acting under it.
master for an allegedly wrongful refusal to deliver a letter.\textsuperscript{163} On
the other hand, removal was refused of a suit against a federal commissioner to recover money illegally exacted by him as costs and fees in a criminal prosecution under revenue laws,\textsuperscript{164} a libel action against officers of the post office department for promulgating a fraud order against the plaintiff,\textsuperscript{165} a prosecution of a deputy marshal for a homicide committed while not acting officially during a riot at the polls in an election,\textsuperscript{166} a prosecution for violating the state liquor law though defendant held a license from the federal government,\textsuperscript{167} and a suit by a chattel mortgagee against a trustee in bankruptcy to fix a lien on the proceeds of fire insurance policies on the mortgaged property.\textsuperscript{168}

As for the procedure, the removal petition cannot be filed until the case has commenced, which has been interpreted as being when an indictment has been presented against the defendant;\textsuperscript{169} but where an indictment is not required for the trial of an offense, the prosecution may be deemed commenced before indictment.\textsuperscript{170} The petition must be filed "at any time before trial or final hearing," and it has been treated as made in time even after judgment when there was an appeal which vacated the judgment under state law.\textsuperscript{171} In the removal petition presented to the federal district court the defendant must state the facts establishing himself as one of the officers named in the section, and that the act on which suit is brought was done under color of his official capacity. The petition of revenue officers for the removal of a state murder prosecution need allege only enough facts to show the homicide was justified, or admit that one of them committed it.\textsuperscript{172} Sufficient cause for removal was alleged where the defendant said he was a federal revenue officer attempting to seize an illegal distillery, when he was assaulted and had to kill his assailant in self-defense.\textsuperscript{173} The particular cause of action does

\textsuperscript{166} Illinois v. Fletcher, 22 Fed. 776 (C.C.N.D. Ill. 1884).
\textsuperscript{167} Commonwealth v. Casey, 94 Mass. 214 (1866).
\textsuperscript{169} Virginia v. Paul, 148 U.S. 107, 13 S.Ct. 536, 37 L.Ed. 386 (1893) (mandamus can be secured from a higher court to force a remand to the state court of the case improperly or prematurely removed).
\textsuperscript{171} In re Duane, 261 Fed. 242 (D.C. Mass. 1919).
\textsuperscript{172} State of Maryland v. Ford, 12 F. (2d) 289 (D.C. Md. 1926).
\textsuperscript{173} Tennessee v. Davis, 100 U.S. 257, 25 L.Ed. 648 (1880).
not have to be shown in the petition as long as it clearly appears that the defendant is sued as a result of his official acts; but verification of the petition by affidavit of an attorney must be included in order to have a proper removal.

The facts alleged in the petition are considered by the federal court which decides whether removal is due, and this is usually done by ex parte hearing. Although the jurisdiction of the state court has been immediately divested on the filing of the petition, a writ of certiorari directed to the state court is granted; the serving of such auxiliary process being merely the performance of a ministerial duty.

In the federal court the case proceeds as if commenced there, though on the trial of an indictment removed under this provision, the state law is applied in defining the offense. The state prosecuting officer directs the prosecution just as he would if there had been no removal, and the United States attorney ordinarily represents the accused, though it is not prejudicial to the federal officer if he refuses to make the defense. Where a case has been improperly removed, the district court’s refusal to remand may be reviewed by the Supreme Court on application for a writ of mandamus.

Suits by Aliens Against Federal Officers

A seldom used section of the Judicial Code (§ 34) provides that when an alien brings a personal action against a civil officer of the United States in the court of a state of which the latter is a nonresident, the defendant may remove the suit to the district court. This section does not impliedly forbid removal of a suit by an alien against a nonresident federal officer under the preceding section, which is usually done.

PREJUDICE OR LOCAL INFLUENCE

This ground of removal, first provided for by the Act of March 2, 1867, owed its origin to the impression that state prejudices fanned by the Civil War would interfere with the regular administration of law in the state courts.\(^{184}\) This supposition explains the requirement that one of the parties be a resident of the state from whose courts the removal is sought and that the removing party be a nonresident, which gives rise to the presumption of prejudice in favor of the resident.\(^{185}\) Section 28 of the Judicial Code, sentence 4, reads as follows:

"And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such a citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause.

The third and fourth sentences of this removal section have been called special cases under the first two sentences, whose requirements must be met before removal is granted.\(^{186}\) On this reasoning, the requisite of jurisdictional amount has been made for removal on the ground of prejudice or local influence.\(^{187}\) Likewise, it has been repeatedly held that removal for prejudice or local influence can be made only when complete diversity of citizenship exists as to all the parties.\(^{188}\) Personal citizenship of par-

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186. In re Cilley, 58 Fed. 977 (C.C. N.H. 1893), where an action to probate a will was declared not such a suit of a civil nature "at common law or equity" as to permit its removal. But see Gaines v. Fuentes, 92 U.S. 10, 23 L.Ed. 524 (1876), where suit to annul the probate of a will was called a civil suit and removable within the statute, since the power of Congress to make cases removable was absolute within the terms of the Constitution.
ties acting in an official capacity is what governs in determining 
diversity;\textsuperscript{189} but when the codefendants of a nonresident are not 
necessary parties, and the case can be fully determined without 
their presence, he can secure a removal.\textsuperscript{190} It has been held that 
because the statute says that removal could be had by “Any 
defendant, being such citizen of another state,” a nonresident 
defendant would be allowed to remove for prejudice or local in-
fluence, despite the joinder with citizens of the same state as 
plaintiff, and the absence of a separable controversy;\textsuperscript{191} but the 
Supreme Court has declared that while this construction might 
seem to be indicated by these words when considered alone, still 
the section as a whole showed an intention to require all the par-
ties on the one side to have different state citizenship from all the 
parties on the other, before removal could be secured.\textsuperscript{192} Diversity 
can be based on the citizenship of an assignee of a chose in action, 
for the “assignment provision” does not apply to removal for 
prejudice or local influence, or removals generally, but only to 
original federal jurisdiction.\textsuperscript{193} Since the provision is expressly 
extended only to citizens of a state and deals with a situation 
peculiar to them, an alien cannot remove for prejudice or local 
influence.\textsuperscript{194}

Under the Act of 1867, the nonresident plaintiff could remove 
on this ground,\textsuperscript{195} but the Act of 1887-88 allowed only the de-
defendant to do so.\textsuperscript{196} A formal defendant cannot remove,\textsuperscript{197} but a 
nonresident plaintiff can secure removal of a counterclaim against 
him, becoming a “defendant” as to it.\textsuperscript{198} A corporation is within 
the provision for removal for prejudice or local influence, the

\textsuperscript{189} Amory v. Amory, 95 U.S. 186, 24 L.Ed. 428 (1877).
\textsuperscript{190} Swann v. Myers, 79 N.C. 87 (1878).
\textsuperscript{191} Whelan v. New York, L. E. & W. R. Co., 35 Fed. 849, 1 L.R.A. 65 
(C.C.N.D. Ohio 1888).
\textsuperscript{192} Cochran v. Montgomery County, 199 U.S. 260, 26 S.Ct. 58, 50 L.Ed. 182 
(1905).
\textsuperscript{193} Jackson & Sharp Co. v. Pearson, 60 Fed. 113 (C.C. Ky. 1892). See 
also Lexington v. Butler, 81 U.S. 282, 20 L.Ed. 809 (1872); Hobby v. Allison, 
1262, 30 L.Ed. 1159 (1887); Crane v. Reeder, 28 Mich. 527, 15 Am. Rep. 223 
(1874).
\textsuperscript{196} Tullock v. Webster County, 40 Fed. 705 (C.C. Neb. 1889).
\textsuperscript{197} Adelbert College v. Toledo, W. & W. Ry. Co., 47 Fed. 336 (C.C.N.D. 
Ohio 1881), appeal dismissed 146 U.S. 355, 13 S.Ct. 156, 36 L.Ed. 1003 (1892).
\textsuperscript{198} Clarkson v. Manson, 4 Fed. 257 (C.C.S.D. N.Y. 1880); Walcott v. Wat-
petition and affidavit to be made by the proper officer. The mere fact of complying with a state's laws in order to do business does not preclude it from being a nonresident; but a corporation originally created in the state of suit is not a nonresident by reason of holding franchises in two other states.

**Time of Application for Removal**

Under the Act of 1867, removal for prejudice or local influence could be asked "at any time before the final hearing or trial of the suit." The Act of 1875 did not deal with prejudice or local influence at all, but allowed removal for diverse citizenship "before or at the term at which said cause could be first tried and before the trial thereof." An important change was made in the Act of 1887-88, where the petition of removal for prejudice or local influence must be filed "at any time before the trial," the dropping of the word "final" serving as a material restriction of the right to remove for this cause. In *Fisk v. Henarie* application to remove was made after earlier trials had ended in mistrial, and the majority said that this change in the statute was intended to allow removal before only the first trial of the case, under the policy of restriction found in the 1887-88 Act; a dissenting opinion was based on the idea that removal could be had when asked for before any trial de novo after the prejudice first became evident, even though there had been earlier mistrials. The decision that application must be made before the first trial would not however be extended to require petition before or at the first term at which the case could be tried, as provided in the Act of 1875 for diverse citizenship; an application was not too late when made before the first trial on the merits had fairly begun, although the case could have come up long before then.

The question then arises as to when a trial on the merits is yet to be had. After a claim against a county had been passed
upon by the board of commissioners and before the trial de novo by a jury on appeal to the circuit court of the county, an application for removal was held to be brought in time. Like-wise an application was granted where there was an appeal from disallowance by probate commissioners of a claim to an estate, when a new trial on the merits before a jury could be secured in the circuit court of the state to which appeal was pending. Reference of the case to a master to take evidence and reach a decision was held to be a trial, so as to render a subsequent attempt at removal too late. The same was true of a hearing on a default, and a motion to discharge an arrest acted as an appearance for the defendant, to defeat his right of removal but a hearing before an arbitration board was not a trial within the meaning of the statute and did not prevent later application. Ex parte orders of an interlocutory nature do not constitute trials preventing later removal. Thus the appointment of a temporary receiver is not a trial.

The trial must be commenced in earnest to bar removal; merely preparing for trial by selection of a jury is not enough. On the other hand, the Supreme Court repeats time and again that a defendant cannot remove after the time named in the statute; he cannot experiment in the state court and then remove to the federal court when beaten. If application for removal is made after commencement of the trial, the opposing party's failure to make a timely objection constitutes a waiver since this is not a jurisdictional matter.

Any plea that has the effect of passing on the merits of the case serves to bar a subsequent application for removal for prejudice or local influence. Removal cannot be requested in the event a plea in abatement is overruled, as under that motion one

205. Delaware County Commissioners v. Diebold Safe & Lock Co., 133 U.S. 473, 10 S.Ct. 399, 33 L.Ed. 674 (1890).
party looks to the state court to surrender its jurisdiction, and the other asks it to hold the case to determine that plea. Most important of all, a hearing and passing on a demurrer prevents any later attempt to remove as its effect is to deny that a cause of action is stated, and this involves an examination into the merits and not merely passing on a matter of form. Even when the motion passed on by the state court does not involve the merits, the federal court takes up the case on removal where the state court left off, and will not hear the same point again.

When the petition of removal for prejudice or local influence is dismissed, the effect is the same as an order of remand, and is not such a final judgment from which an appeal will lie.

_Necessary Showing of Prejudice, and How Made_

When making application in the federal court for removal based on prejudice or local influence, the statute does not require notice to the other party. However, the better practice is for the defendant to give notice to the plaintiff so as to afford him an opportunity to present counter-affidavits at the hearing which determines the truth and sufficiency of the defendant's affidavit. Further, bond is not expressly required by the statute, but the bond given for removal on other grounds is usually demanded, and it has been held that removal was correctly denied because of an improper bond.

Under the Act of 1867, the defendant could merely state in his petition of removal that he feared the court would not give him justice, without giving the reasons for that belief. In the Act of 1887-88, however, appear the words, "... when it shall be made to appear to said circuit court that from prejudice...." There is some difference of opinion as to the effect of this provision. In _Franz v. Wahl_, it was said that a direct and unequivocal showing was requisite.

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223. 81 Fed. 9 (E.D. Ark. 1897). The reasoning was similar to that in Short v. Chicago, M. & St. P. Ry., 33 Fed. 114 (C.C. Minn. 1887), with the difference, however, that this earlier case was under the 1867 Act which did not require a showing of prejudice.
ocal declaration of prejudice or local influence was enough to secure removal, and a statement of the facts on which the request was based was not here required as long as the affidavit did not state merely a belief. The other view was that the new requirement of a showing of prejudice made it necessary for the defendant to state facts establishing it, and this came to be recognized as settled with Ex parte Pennsylvania. How the prejudice or local influence shall be made to appear is left to the discretion of the federal court to which application is made, but the recognized guide to this discretion requires a statement of enough facts to establish legally and not merely morally that prejudice exists, and a mere flat statement that it does exist is held insufficient.

The necessary showing of prejudice is made when the removing party alleges facts establishing either that there is a strong feeling in the state against himself, or that it is in favor of the opposing party. After the case has been removed, the federal court on motion of remand could hear affidavits traversing allegations of the removal petition, but the removability of the case need not be shown when granting a change of venue discretionary with the court. There was a sufficient showing of prejudice when the petition and the affidavits of several disinterested witnesses stated that a bitterly-contested litigation between the defendant and the city over possession of a road had sometime before almost ended in a riot, and that the defendant could not secure justice because of the local feeling even though other affidavits said justice could be obtained. The same was true where a general feeling in the community existed that the defendant bonding company ought not defend on a default by the county treasurer. The right of appeal to a court not affected by the prejudice does not prevent removal, since the defendant is entitled to an original trial before a court not subjected to the influence of popular passions. On the other hand, the "justice" to which the

defendant is entitled is not necessarily a decree in his favor, nor any other special result;\textsuperscript{231} and the mere fact that the highest state court declared that certain bonds constitute a lien on railroad property when the Supreme Court said they did not, was not such local prejudice as to justify removal but only a difference of opinion.\textsuperscript{232}

After prejudice has been shown by such facts as the outbreak of riots against defendant, refusal of local police to protect defendant's property or employees, and so forth, the right of removal is not lost simply because there will be no jury trial, since an elective judge is likely to be influenced by popular feeling in the same way as jurors.\textsuperscript{233} However, the mere fact that a judge will have to run for re-election is not of itself enough to allow removal which is intended only to remedy cases of strong outward feeling; it was not meant to apply to situations where the court may have the ulterior motive of seeking popularity by means of a decision.\textsuperscript{234}

When the state law permits change of venue to another court where there is no existing prejudice, an affidavit indicating its existence in a single county is not sufficient.\textsuperscript{235} But when a change of venue was discretionary with the state court, removal could be secured without showing the existence of prejudice in the other counties.\textsuperscript{236}

When the federal court has made a finding of prejudice or local influence, that does not of itself cause the case to be removed but only authorizes it. The petitioning defendant must then file the order of removal in the state court which is thereby divested of further authority over the case.\textsuperscript{237} There being no removal by a plaintiff at present, the reference in the sixth sentence of section 28 of the Judicial Code regarding the remand of cases removed by "any party plaintiff" was at first considered a temporary provision applying to cases then removed.\textsuperscript{238} But when it was repeated in the Judiciary Act of 1911, that theory was dropped

\textsuperscript{234} Turnbull Wagon Co. v. Linthicum Carriage Co., 80 Fed. 4 (C.C.N.D. Ohio 1897).
\textsuperscript{235} Robison v. Hardy, 38 Fed. 49 (C.C.N.D. III. 1889).
\textsuperscript{236} Parker v. Vanderbilt, 136 Fed. 246 (C.C.W.D. N.C. 1905).
\textsuperscript{237} Pennsylvania Co. v. Bender, 148 U.S. 255, 13 S.Ct. 591, 37 L.Ed. 441 (1893).
and it was considered as intended to read "defendant," and the remand of cases removed for prejudice or local influence has been made under this section rather than under section 37.

On the motion to remand, the court can hear evidence on the question of whether such prejudice exists; but after removal has once been granted, the burden of proving lack of prejudice is on the plaintiff asking for an order of remand. If such an order of remand is granted, however, the text of the statute expressly provides that no review of the order can be made by appeal or writ of error, indicating such a desire to end the controversy that review by writ of mandamus was likewise refused.

SEPARABLE CONTROVERSY

Little trouble is offered by the general proposition that a non-resident is allowed to remove when the plaintiff has joined defendants in what to all intents and purposes are separate causes of action. The difficulty comes in determining whether the controversies are actually separable, or so interrelated that the defendant of one must be present in order that full justice be done in the other. Provision for removal on this ground is found in Judicial Code, section 28, sentence 3, as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

Some of the general rules affecting separability may be mentioned, before suggesting a test for determining whether one controversy is separable from another in the same case.

The controversy which is contended to be severable must be between citizens of different states, and it does not matter that the other controversy is between citizens of the same state. Once it is decided that there is a separable controversy between citizens of different states, removal should be granted. Under the later decisions seeking to avoid excessive litigation, the other con-

trovery is also taken along to the federal court,\textsuperscript{243} although an early leading case permitting removal of the controversy between citizens of different states left the other controversy in the state court.\textsuperscript{244} It is necessary, therefore, not only to show separable controversies, but likewise that one of them exists between parties having complete diversity of citizenship.\textsuperscript{245} Furthermore, it is necessary that each party be a citizen of some state,\textsuperscript{246} and that the defendant making removal be a nonresident of the state where the suit is pending.\textsuperscript{247}

In determining the presence of a separable controversy, state law governs the question of whether a joint cause of action is stated against the codefendants, such as whether car inspectors alleged to have committed the nonfeasance of duty in a failure to inspect cars could be held jointly with the company.\textsuperscript{248}

A separable controversy, within the meaning of the statute, is a separate cause of action and not simply a separate remedy against several persons on the same cause of action.\textsuperscript{249} The test is met where a separate action could have been brought on this controversy alone and still give the very relief sought by the petition against the defendant or defendants removing, without the presence of the other parties in the suit being necessary.\textsuperscript{250} In determining what controversies or what potential controversies are involved, the plaintiff's petition is the guide, since the removal must be made before issue is joined by the defendant. Thus the status of a case, as separable or not, is determined by the plaintiff's bill.\textsuperscript{251} The fact that the lower federal court later renders a decree in favor of the removing defendant does not prevent remand by the Supreme Court of a case improperly removed.\textsuperscript{252} Jurisdiction is not based on whether the plaintiff can sustain his

\begin{itemize}
\item \textsuperscript{244} Barney v. Latham, 103 U.S. 205, 26 L.Ed. 514 (1880).
\item \textsuperscript{246} Laden v. Meck, 130 Fed. 877 (C.C.A. 6th, 1904).
\item \textsuperscript{247} Thurber v. Miller, 67 Fed. 371 (C.C.A. 8th, 1895).
\item \textsuperscript{249} Gudger v. Western N. C. R. Co., 21 Fed. 81 (C.C.W.D. N.C. 1884).
\item \textsuperscript{250} Hilton v. Dickinson, 108 U.S. 165, 2 S.Ct. 424, 27 L.Ed. 688 (1883).
\item \textsuperscript{251} Graves v. Corbin, 132 U.S. 571, 10 S.Ct. 196, 33 L.Ed. 462 (1890).
\item \textsuperscript{252} Crump v. Thurber, 115 U.S. 56, 5 S.Ct. 1154, 29 L.Ed. 328 (1885).
\end{itemize}
allegations, which is a matter of the merits, but on what he has in good faith alleged in his petition.253

Since there must exist a distinct cause of action that could have been brought as an independent suit,254 it must be fully capable of determination between the parties to it, without the presence of any others being required for the rendering of full justice.255 If any demand fixing the rights of one defendant also affects the rights of another defendant in the other controversy, there is no separability.256 The fact of suing less than all of several tort-feasors does not act as an election to make the action severable as to each of those sued;257 neither is this the result of a failure to serve the resident defendant in a joint suit,258 or of a disclaimer by one defendant of any interest in the suit.259 Separability is not created by a dismissal of the action as to the resident defendant against the plaintiff's will,260 nor by an involuntary nonsuit concerning such resident.261

A merely incidental or collateral claim against one defendant does not make a separable controversy as to him,262 such as a judgment creditor's joinder of those holding prior incumbrances on his debtor's property which he intends to seize;263 but an insurance company's presence in a suit by reason of subrogation is not collateral to the main suit for negligently causing a fire, and the nonresident insurance company could remove for separable controversy.264 A request for the reformation of a mortgage, where the main demand was for its foreclosure, was considered so inci-

257. Fox v. Mackay, 80 Fed. 4 (C.C.N.D. Cal. 1894).
dental as to be nonseparable. Where all other issues depended on whether a partnership relation existed between the defendants, there was no separability as to any of them. This was also true of an incidental party joined in an ejectment action against the occupant of the premises, because of privity in estate with such occupant. It is different where the liability claimed against the second defendant is upon a ground different from that alleged against the first. Thus in a suit against an insolvent corporation, with a claim that the second defendant had assumed all of the corporate debts, the claims were separable.

A Suggested Test for Determining Separability

If the separable controversy is to be something less than the whole suit but capable of becoming an independent suit, it must contain a cause of action independent of the other controversy. One way to determine whether there is such a cause of action is to see if two rules of law are needed to dispose of the whole suit. If only one rule of law is sufficient, there is no separable controversy, even though there may be several phases of the case and distinct remedies for and against different parties plaintiff or defendant. If one phase of the case cannot be disposed of by applying the rule needed for the other, it means that the actions are not joint, though if the defendant makes no motion for the separation that is available they might be joined for convenience.

For example, plaintiff's suit against a bank to recover stock placed in escrow, and against an individual for a sum of money claimed to be due under a contract, presented matters governed by different rules of law and the nonresident could remove his separable controversy. Similarly, a suit to establish as fraudulent a transfer of ships and barges did not deal with the same questions of law and fact as an attempt to have an entirely separate conveyance of lots and real estate declared fraudulent. The

269. This test was suggested by the following words in In re Foley, 80 Fed. 949, 952-953 (C.C. Nev. 1897): "All persons claiming any right to share in the distribution of the property are equally interested in the proceedings. Their rights must be measured and determined by the same rule. It cannot be held that the nonresidents would be entitled to have that question, as to them, determined in the federal court, while other claimants, who are residents of the state, would be compelled to try the same issue, as between themselves, in the probate court of the state."
latter cause of action presented a separable controversy, wherein justice could be done without the presence of the parties to the other transaction.\(^{271}\) Where the question of title to certain land was governed by a different rule of law than the continued validity of certain notes, even though the points were interrelated, it was held that there was a separable controversy allowing removal.\(^{272}\)

On the other hand, the same rule of negligence governs the question of whether a railroad and its employee will be held for an injury caused by the act of the employee, and there is no separable controversy as to one of them.\(^{273}\) The same result has been reached where a suit under a single contract involved all of the defendants in the same questions of law and fact, and all must be present to do full justice in the case.\(^{274}\) An action of specific performance against two persons to enforce a single agreement was not separable, the same rule of law governing the liability of both defendants.\(^{275}\) In an action against several defendants for wrongful seizure of plaintiff’s property, the filing of separate answers does not make the action removable for separable controversy, as the same rule of liability would apply to each.\(^{276}\)

An action to force trustees to comply with an agreement did not require the presence of the lessee of the property to have full justice done, and since different questions of law and fact arise as to him, the nonresident lessee can remove for separable controversy.\(^{277}\) Again, the legal action to try title involves a different principle of law and a different view of the facts from the equitable action of accounting and partition, and removal can be obtained on the ground of a separable controversy, for though both are properly part of the same suit something less than the whole suit is meant by the term controversy.\(^{278}\) However, the fact that on foreclosure of a mortgage another creditor entered the separate defense that his mortgage was superior to the plaintiff’s did not inject a separable controversy into the suit, which was gov-

\(^{278}\) Harrison v. Harrison, 5 F. (2d) 1001 (N.D. Miss. 1922).
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erned by the single rule of law determining whether foreclosure should be allowed against the mortgagor and all his other creditors.279

In examining how the proposed test works when applied to decided cases, it is noted that where one defendant would be held, if at all, on a different legal theory of liability from the other, removal has been allowed;280 while the existence of a joint claim against both, with the same principle of law holding each, constitutes a nonseparable controversy with a consequent denial of removal.281

CONCLUSION

When the new Federal Rules of Civil Procedure have become more familiar to the legal profession, it is quite likely that resort will often be made to the federal courts in order to secure remedies not now available in the state courts. Should the defendant be the party desiring such a remedy, removal must be made, and after it has been accomplished, the federal court proceeds with the case from the point reached in the state court, regardless of whether final pleadings have yet been made.282 In making the transfer and opening the avenue for obtaining these new remedies available in the federal courts, the rules governing removal have not been affected, and it is to this matter of removal jurisdiction that the present article has been directed.