**Marquette Law Review**

Volume 8
Issue 2 *February 1924*

Article 2

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Marquette Law Review

VOL. 8 FEBRUARY, 1924 NO. 2

# REMOVAL OF CAUSES TO UNITED STATES COURTS

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In a former article we have considered the general subject of the jurisdiction of courts of the United States[1] and have found that by the Constitution they are established as a constituent part of the sovereignty of the general government and that they are within their limited sphere truly sovereign. As such, their power extends throughout the land, and there is subjected to that power and placed under their protection certain rights and obligations of all individuals as citizens of the United States of America.

Our citizenship is two-fold. We are citizens of some particular state and also of the United States, and it is as citizens of the latter that we may call into action the power of the courts of the United States, although it may be that our right so to do is determined by our citizenship of a particular state.

This double citizenship must at all times be kept in mind in the consideration of the jurisdiction of the courts of the United States, and unless a party is affected in some of his rights or obligations as a citizen of the nation he cannot invoke the aid of the nation's courts, but must submit to the jurisdiction of the state courts. Conversely, if his rights or obligations as a citizen of the nation are affected, he may usually enter the nation's courts to seek relief.

As an original proposition, the right of a citizen to demand that his cause be tried in the nation's courts is not difficult to determine, and when such right is found to exist he may hail his adversary into that court and compel him to respond.

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[1] "Courts of the United States under the Constitution," 7 MARQUETTE LAW REVIEW 28, December, 1922.

For various reasons, however, a prospective plaintiff may be of the opinion that the courts of that state of which he is a citizen, or in which his cause of action arises, may afford to him against a non-resident adversary, or an adversary with whom he has a controversy concerning the interpretation of a national law or privilege of national citizenship, better protection of his rights as he views them than a court of the United States. The reasons, although immaterial, may be of various kinds—good or bad. The particular state may afford some procedural advantages not permitted in the United States courts—such as, in Wisconsin, the right to examine the opposite party as a witness adversely before trial, or the known interpretation of the law merchant by the United States courts may be less favorable to his claim, or he may be moved to commence his action in a state court for less worthy reasons—such as personal acquaintance with the jurors who will probably be summoned for his trial, or some local influences, or known or possible prejudices of judges or juries in favor of the right he intends to assert. The reasons are immaterial, but this partial specification sufficiently shows that they cannot be of a kind which may fairly be advanced as a reason for compelling the prospective defendant to submit his rights or obligations as a citizen of the United States to the judgment of the state court.

In order, therefore, to assure to all citizens the right to be tried before a tribunal created by the Constitution for the specific purpose of protecting them under such circumstances, and in order to vindicate the sovereignty of the nation in national affairs, provision is made for the removal of a cause in certain cases from the state court, in which it was originally commenced, to a national court for trial.

The removal of such a cause is not in any sense a reflection either upon the integrity or learning of the state court; it is merely an assertion that the party seeking such removal is not presently and primarily subject to the state court in the particular matter and prefers to have the controversy adjudicated by the courts of a sovereignty to which he owes the duties of citizenship, either in the particular matter, because it presents a federal question (although for other purposes he may be a citizen of the state) or because he is a non-resident and in no way a citizen of the particular state or subject to it.

One of the basic principles of our common law has been from

time immemorial that no person should be sued except in that county of which he is a resident. This principle is fully adopted in the several grants of power to the United States courts—the bailiwick is a larger one, but it is definitely localized, and no person may be sued in such courts except in the district in which he resides, unless under certain circumstances, the same as in the state courts, he consents.

While this rule is general, it is subject to the exception in the state courts that in personal actions a non-resident of the state may be sued in any county in which he may be found. This exception is observed by the jurisdictional grants to the federal courts in cases where jurisdiction is based upon so-called diversity of citizenship, in which case he may be sued if found in either the district of his residence or of the residence of his adversary.

If A, therefore, a resident of Milwaukee, Wisconsin, has a transitory cause of action against B, a resident of Chicago, Illinois, involving more than $3,000.00, he may sue B in the District Court for the Northern District of Illinois, or, if he be found within the district, also in the District Court for the Eastern District of Wisconsin. A may, however, elect differently, and B visiting Milwaukee on business may be served with a summons requiring him to appear in a local state court in the case of which the District Court also had original jurisdiction and in which A might have commenced his suit.

B is not a resident of Wisconsin and is under no obligation to that state. He is, however, a citizen of the United States and entitled to a trial in its courts. He may, therefore, secure what is in effect a change of venue to the District Court of the United States by a stronger right than a citizen of Wisconsin may demand such a change if sued in the wrong county. Removal of causes to the District Court is based upon the same principle as change of venue under the state practice: i.e., every person is entitled to a trial in the court acting under and within a sovereignty, or subdivision of sovereignty, to which he is immediately responsible.

It is also true in the District Court as it is in the state courts that venue does not go to the jurisdiction unless specifically made jurisdictional by statute. In the District Court, an action may not be commenced on the ground of diversity of citizenship except in the district of the residence of one of the parties. In most states, however, a non-resident may be sued by a non-resident under various circumstances, such as the possession of

property by the defendant within the state or the cause of action arising therein. In such cases, as will be hereafter noted, the jurisdiction of the District Court over causes between citizens of different states is general; it is not limited by the venue, and the non-resident plaintiff having elected to commence his action in the courts of a state of which he is not a resident cannot complain if his cause is removed to the District Court of the district of the state in which he has chosen to sue his adversary.

The Constitution of the United States declares that the judicial power shall extend to all cases, both in law and equity, arising under the Constitution, laws and treaties of the United States, and also to controversies between citizens of different states,—the other enumeration of powers being not presently material. This power is vested in the Supreme Court and "in such inferior courts as the Congress may from time to time ordain and establish."

Acting under this grant of power, Congress has ordained and established district courts, upon which it has conferred general and original jurisdiction over the above subjects, and over all of the other subjects of the Constitutional grant excepting only in the few cases where the Constitution grants exclusive jurisdiction to the Supreme Court or Congress has granted a special jurisdiction to the Court of Claims.

The Act conferring jurisdiction upon the district court conforms closely to the terms of the Constitutional grant, and so far as material here provides:

> "The district courts of the United States shall have original jurisdiction as follows:
>
> "*First.* Of all suits of a civil nature, at common law or in equity,***where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable

to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

This jurisdictional grant of power, although it has been exhaustively construed by the courts, is, for all practical purposes in an article such as this, relatively simple. It means exactly what it says. Any case where the matter in controversy exceeds the sum of three thousand dollars and which involves a federal question or is between citizens of different states, may be commenced in the district court, unless it is based upon a promissory note, not being a foreign bill of exchange, or other chose in action in favor of an assignee or holder, unless such suit could have been brought by the original parties without such assignment, except only evidence of indebtedness (i. e., notes, bonds or coupons) payable to bearer and issued by a corporation, in which last case the citizenship of the holder instead of the original owner furnishes the test of jurisdiction.

By logical interpretation, although the holder of a note may not sue the maker of a note in the district court, unless the payee might also have sued him there, such holder, if diversity of citizenship exists, may sue the endorser for the reason that the contract of endorsement is not excluded by the particular exception and is a different contract than that of the original maker.

With this regulation of original jurisdiction as a major premise, we may consider those sections of the Judicial Code relating to the removal of causes.

It appears that there are eight classes of cases removable from the state to the district court. The Constitutional grant of power over cases between citizens of the same state claiming under land grants from different states naturally creates one class, while the other clauses include and protect non-resident civil officers of the United States, persons whose interests are injured under the "civil rights laws" and revenue or congressional officers. Controversies involving these classes are infrequently brought to the attention of the general practitioner,

and although of real interest may be dismissed from present consideration.

The purpose of this paper is to present the jurisdictional and procedural questions incident to the other four classes.

*First:* Cases involving a federal question.

*Second:* Cases based on diverse citizenship.

*Third:* Cases including separable controversies between citizens of different states.

*Fourth:* Cases removable on the ground of prejudice or local influence by a non-resident defendant.

Relative to the removal of these four classes of cases, Congress has provided, by Section 28 of the Judicial Code:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, 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 non-residents of that state. 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. And where a suit is now pending, or may hereafter be 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 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 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."

Although provisions of similar import were contained in the Judiciary Act of 1789 and the law as at present found is merely such original law as amended from time to time, the phraseology is not as simple and clear as we might have a right to expect in a matter of such great importance and one which has been under consideration by the best lawyers in Congress for more than a century and a quarter. Certain rules, however, stand out clearly from the law itself.

Under the first clause of the section above quoted, any defendant, regardless of his place of residence, who is sued in the state court in a case involving three thousand dollars or more, may, if a federal question arises—that is, a question under the Constitution, laws or treaties of the United States—remove said cause to the district court.

Under the second clause, a non-resident defendant being sued in a state court may, if the jurisdictional amount is involved, remove the cause to the district court.

At this point it may be appropriate to consider the history of the right of removal when neither of the parties is a resident of the state in which the action is pending. The Judiciary Act of 1789 provided that any suit brought in any state court by a citizen of *that state* against a citizen of another state, involving the jurisdictional amount, might be removed. This was definite, and clearly denied the right of removal to the non-resident defendant in a suit brought by a non-resident plaintiff in the state court. By later amendments the words "by a citizen of that state" were omitted and the Act, as early as 1888, read substantially as above quoted. It was the almost universal opinion of the bar that by this change the right to remove was granted to such non-resident defendant in a suit commenced in the state court by a non-resident plaintiff. This opinion was, however, disregarded by the Supreme Court in *ex parte Wisner,* 203 U. S. 449, in which the right was specifically denied, and in the course of the opinion the court said: (page 457)

"As it is the non-resident defendant alone who is authorized to remove, the (district) court for the proper district

is evidently the (district) court of the district of the residence of the plaintiff.

"And it is settled that no suit is removable under Section 2 unless it be one that plaintiff could have brought originally in the (district) court."

From which it was concluded that as a non-resident plaintiff could not have brought his case originally against the non-resident defendant in the district court, it could not be removed to the district court by such defendant.

This decision never met with the approval of the bar, and the Supreme Court itself followed it most reluctantly as early as *In re Moore,* 209 U. S. 490, weakening its authority by working out in the particular case what is respectfully suggested as being a maladroit theory of consent to the removal and a jurisdiction by waiver, stating that,—

"A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the State to the Federal Court, and if when the defendant is brought into a Federal Court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal Court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists, the circuit courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a State Court, and if any objection arises to the particular court which does not run to the Circuit Court as a class that objection may be waived by the party entitled to make it."

Nevertheless, the words above quoted "so long as diverse citizenship exists the circuit (district) courts of the United States have a general jurisdiction" exposed the fallacy of the rule adopted in *ex parte Wisner* and pointed the way to the ultimate overruling of that case.

While the rule of *ex parte Wisner* was in full force the Supreme Court of Wisconsin was confronted with the identical question, and, following the rule as stated in that case that a non-resident defendant might not remove a suit commenced by a non-resident

plaintiff assumed jurisdiction after petition for removal had been filed. *Gist vs. Equitable Surety Co.*, 161 Wis. 79.

Curiously enough, the question of absolute want of jurisdiction of the state court in the *Gist* case does not seem to have been presented to the Supreme Court of Wisconsin, although both parties were represented by eminent counsel, and the case standing unreversed may easily be claimed to constitute an assertion of jurisdiction by the state courts to pass upon removal questions, a doctrine which would not have been accepted if the question had been presented after the decision in the *Lee* case, noted immediately below, but, as the law then stood, it is probable that the case was correctly decided, upon the ground that the jurisdictional facts for removal were not averred in the petition, although it might have been better practice to have sent the case to the District Court and afforded it the opportunity to remand.

Recently the entire question of the removal of cases between non-resident parties has been re-considered, the right of removal fully recognized, and *ex parte Wisner* specifically over-ruled in *Lee vs. Chesapeake & Ohio Ry.*, 260 U. S. 653, in which the court said: (page 659)

> "Much that was said in the opinion was soon disapproved in *In re Moore*, 209 U. S. 490, where the court returned to its former rulings respecting the essential distinction of the Circuit Courts and the one relating to the venue of suits originally begun in those courts. But as the decision was not fully and expressly over-ruled, it has been a source of embarrassment and confusion in other courts. We had occasion to criticize it in *General Investment Co. vs. Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, and now on further consideration we feel constrained to pronounce it essentially unsound and definitely to overrule it."

The third clause provides that when several defendants are sued in a state court, but it may be determined by analysis that there exists in the subject matter of the suit a controversy wholly between citizens of different states, which can be fully determined between them, then either one or more of the defendants interested in such controversy may remove the cause.

This clause is decidedly obscure in meaning. It has, however, been held that when the person seeking removal is one of a class

of several defendants, all of whom are citizens of different states than the plaintiff, then that the removal carries to the district court the entire case, even though the other defendants, similarly situated, failed to seek that relief. The law might have been much clearer upon this point, but the reason for it is obvious—the defendant seeking removal is entitled as of right to a trial in the district court; such right could not be enforced or the controversy determined without the presence of the other defendants in his class and as, necessarily, these other defendants are not citizens of the state in which the suit is pending and entitled to a trial in its tribunals, they are reached as citizens of the United States and are carried into the district court with their petitioning co-defendant, while the resident parties find themselves in the same position as any other defendants whose case is removed, on the ground of diverse citizenship, to the nation's court. A general discussion of this subject may be found in *Barney vs. Latham,* 103 U. S. 205. Attention must, however, be called to the fact that this case was decided before the abolition of the circuit courts, and that in the opinion reference is made to such circuit courts, but that everything there said is now applicable to the district courts.

This clause also in terms permits the removal at the instance of "either one or more of the defendants," which might imply that such removal could be secured upon petition of a defendant who is a citizen of the state in which the suit is pending, in the same manner as if a federal question was involved, and the right has been thus extended in several district court decisions. Such an interpretation of the law leads, nevertheless, to illogical conclusions, for there is certainly no greater reason why a resident citizen should have a right to remove a cause to the district court in a case containing a separable controversy with a non-resident plaintiff than there is that he should have such right if he had been sued alone by the same plaintiff in the same court upon such separable controversy. In order to avoid this illogical conclusion, it has been held that the second and third clauses must be read together, and that no defendant, unless he be also a non-resident of the state, can remove his separable controversy to the district court. The Circuit Court of Appeals for the Eighth Circuit adopted this interpretation in *Thurber vs. Miller,* 67 Fed. 371,

and, in holding that the resident defendant might not remove, stated:

> "When a defendant is sued alone in a court of the state of which he is a citizen, by a citizen of another state, and the causes of action are such that the suit might properly have been brought against him and another if the plaintiff so elected, he confessedly cannot remove the suit. Now, when the suit is brought on these same causes of action against him and another by the same plaintiff, in which there is—as there must be to give the right of removal at all—a controversy wholly between him and the plaintiff, what possible reason can be suggested why he should have the right to remove that controversy for trial into the Circuit Court in one case, and the right be denied him in the other? It is the same suit and the same controversy, and between the same parties, whether he is sued alone or with another. If he must be content with the justice of the courts of his own state in the one case, why not in the other? It would be difficult to conceive an intention in Congress to make such a senseless and absurd distinction. It is a canon of construction that every interpretation of a statute that leads to such results ought to be rejected."

This precise quesion has never been presented to the Supreme Court for decision, but until that court announces the rule of construction it is believed that *Thurber vs. Miller* may safely be followed.

The fourth clause properly provides that it is the non-resident who may remove the cause on account of local influence or prejudice.

Having ascertained the person by whom a cause may be removed, the next question which presents itself in practice is the method by which such removal may be effected.

When the cause for removal is found under the first three clauses of Section 28 of the Judicial Code, above quoted, that is because of a federal question, diverse citizenship, or separable controversy, the defendant seeking removal must, before his time to answer has expired under the state law, file the moving papers for the change of venue. The time for filing these papers is imperative, and a failure to file within that time forfeits the right of removal under these three clauses.

This effect of lapse of time cannot be avoided by any subterfuge,—a stipulation between the parties or an order of court extending the time to answer being equally ineffectual.

Under these clauses the Code provides that within the time limited the moving defendant may file a petition with the state court for the removal of the suit to the district court to be held in the district where such suit is pending, together with a bond, with sufficient surety, conditioned that such defendant will, within thirty days, file a certified copy of the record of the state court in the district court and that he will pay such costs as may be awarded against him in the event the suit is remanded to the state court.

The statute is silent as to the form of the petition or the penalty of the bond. As a matter of practice, however, the petition must be verified and assert positively the jurisdictional facts of amount in controversy, either state or federal questions involved, or the diversity of citizenship, or diversity of citizenship and separable controversy, as the case may be, and that the time for answering has not expired, concluding with a formal prayer for removal, while the bond, conditioned as provided by the statute, should carry the penalty required in the particular jurisdiction for cost bonds.

The effect of the filing of these papers is imperative,—in the words of the statute, "it shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit." No right is given to the state court to pass upon the papers judicially in order to determine whether or not the defendant is entitled to removal. That is solely a question for the district court. The absolute obligation of the state court is "to proceed no further." The order frequently signed by the state court directing that the suit be removed to the district court is not judicial, but merely ministerial, and is ineffective for any purpose.

The imperative nature of this rule has been stated many times by the United States courts; for example, it was said in *Loop vs. Winters' Estate,* 115 Fed. 362,—

> "The law is now well settled* * *that, when a sufficient cause for removal is made in the state court, its jurisdiction ends, and no order of the state court for removal

is necessary. In other words, upon the filing of the petition for removal, accompanied by a proper bond,—the suit being removable under the statute—the jurisdiction of the federal court immediately attaches in advance of the filing of the copy of the record; and whether that court should retain jurisdiction is for it, and not for the state court, to determine."

Mr. Justice Harlan announced the same rule in *Marshall vs. Holmes,* 141 U. S. 589,—

"Upon the filing of a proper petition and bond for the removal of the cause pending in a state court, such cause, if removable under the Act of Congress, is, in law, removed so as to be docketed in the circuit (district) court of the United States, notwithstanding the state court may refuse to recognize the right of removal.* * * After the filing of the petition for removal accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different states, the state court was without authority to proceed further if the suit, in its nature, is one of which the circuit (district) court of the United States could rightfully take jurisdiction. If under the Act of Congress the cause was removable, then, upon the filing of the above petition and bond, it was in law removed so as to be docketed in that court, notwithstanding the order of the state court refusing to recognize the right of removal."

From the foregoing, the effect of the ruling of the Supreme Court of Wisconsin in the *Gist* case, supra, is clearly indicated. It is, however, certain that this ruling will have no unfortunate consequences and that the correct rule will be adopted when a proper case is presented to that court.

The statute provides that notice of the filing of the petition to remove must be given to the adverse party, and, as above noted, as a matter of practice the judge of the state court is frequently, perhaps usually, requested to sign an order for the removal. These forms are, however, merely modal and in no sense reach the jurisdiction.

Upon the divesting of the jurisdiction of the state court by these proceedings it would be illogical to impose or request

any further act by such court. It is, however, necessary that the suit having been removed by law should carry with it the evidence of its existence and history, that is its record, to the district court.

The undertaking given by the petitioning party is conditioned that a certified copy of such record will be filed in the district court within thirty days; in the usual course such certified copy is procured without difficulty from the Clerk of the state court, and the statute then provides that the removing party "shall within thirty days thereafter plead, answer or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court" (Judicial Code, Section 29).

What if the state court should be reluctant to relinquish that jurisdiction in fact of which it had been divested by the filing of the petition and bond? What if the clerk of the state court, either acting under instruction or of his own volition, should attempt to frustrate the purposes of the law and refuse to deliver a certified copy of the record for filing in the district court? The sovereignty of the national government is not a weak or supine nonentity—to vindicate that sovereignty the removal statute is provided with the necessary teeth. For the protection of the litigant Section 35 of the Judicial Code provides that in the event of such refusal the record and proceedings in the state court may be proven by affidavit, and when so proven the case may proceed in the district court in the same manner as if certified copies had been filed. In order to vindicate the sovereignty of the nation, Section 39 of the Judicial Code provides that—

> "Said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

So far as a rather careful examination of cases reveals, no clerk of a state court has availed himself of the opportunity to test this law.

Under the fourth clause, providing for the removal of a suit on account of prejudice or local influence, the procedure is entirely different. Here the state court is not asked, in the first in-

stance, even formally, to order the removal of the case; original proceedings are instituted in the district court itself and the petitioning party is not required to furnish bond, nor is he obliged to initiate proceedings for removal before the expiration of his time to answer.

The right to remove under this clause for prejudice or local influence is not extended to a resident defendant in a case involving a federal question, but is confined to non-resident defendants who may "at any time before the trial" represent to the district court—in the words of the statute "when it shall be made to appear to said district court"—that on account of prejudice or local influence justice cannot be secured in the state court in which the suit is pending or in any other court to which it may be removed under the state laws. This rule is well expressed by Mr. Justice Harlan, in *Malone vs. Richmond & Danville R. R. Co.*, 35 Fed. 625, as follows:

> "It is clear from the above clauses, construing them all together, that the rights of removal, at any time before trial, on the ground of prejudice or local influence, is restricted by the Act to suits in which there is a controversy between citizens of different states; also that such right, in suits of that character, involving no federal question, now belongs only to the defendant who is a citizen, or to the defendants who are citizens of a state other than that in which the suit is brought."

If a non-resident may secure justice in any state court to which the suit might be removed by affidavit of prejudice or other proceeding, then he cannot remove, but when he makes it appear to the district court that he cannot secure such relief, then the nation protects its own citizens in those cases which might originally have been instituted between citizens of different states in the nation's courts.

The right of removal under this clause does not furnish a separate or independent ground of federal jurisdiction. It "describes only a special case comprised in the preceding clauses." *In re Pennsylvania Co.*, 137 U. S. 451, 456. In the consideration of which special case the district court proceeds with great caution and passes upon all facts judicially before the cause is removed.

After it has been determined that prejudice in fact exists, the

order for removal is entered, and upon the entry of such order the case stands removed.

This is the most drastic power given to the district court in removal cases, excepting only under Section 33 of the Judicial Code, not here under consideration, where a like power is given for the protection of certain public officials against whom proceedings may have been instituted in the state courts on account of their official acts. In the exercise of this power the statute expressly reserves to the district court the right to review its own action after the case has been finally removed in a manner somewhat different than upon motion to remain under the first three clauses, to be hereafter considered. Under this clause the court may determine—seemingly upon its own motion, but certainly upon motion of a party—whether the suit can be fairly tried in the state court as to the defendants not petitioning for removal and without prejudice to any of the parties, in which event the suit will be remanded to the state court so far as it relates to such other defendants. The court may also after removal, upon application of the other party, examine into the truth of the allegations contained in the petition for removal—in other words, re-examine the question of prejudice and local influence—and unless satisfied that proper grounds exist, shall remand to the state court.

The rights of all parties are, with an almost extra-caution, protected by the statute, but these rights are placed under the protection of the district court for its judicial determination, and if it appears that any one defendant, being entitled to remove the suit in the first instance, learns after the time for removal has passed, but before trial, that his rights may be jeopardized by prejudice or local influence, the nation's courts will protect him in spite of the lapse of time and the protest of his co-defendants. As it was well said by Judge Jackson, in *Whelan vs. N. Y. L. E & W. R. Co.*, 35 Fed. 849,—

> "It must be assumed that Congress, in the enactment of this clause of the Act, was aware of the fact that under the construction placed upon the prior removal acts (except perhaps the Act of 1866) all the parties on the side seeking the removal were required not only to possess the requisite citizenship but to join in the application for such removal. When, therefore, Congress declared that 'any defendant'

being a citizen of another state might remove the suit upon making it appear that from prejudice or local influence he could not obtain justice, the well settled rules of construction require the court to presume that the Legislature understood and intended the full effect of such declaration, and meant not to confine the right of removal to all, but to extend it to 'any' defendant, citizen of another state, who could make 'it appear to said (district) court' that local influence or prejudice would prevent his obtaining justice in the local forum in a suit which involved a controversy between himself and the plaintiff therein."

This prejudice against which protection may be afforded relates not only to the facts of the case, but to the law as well as the facts. Judges may be prejudiced relative to questions of law which may be necessarily involved in the case, and when this is made to appear the defendant will be protected in his rights to a fair trial, and the district court will take jurisdiction for that purpose. This rule was stated by the present Chief Justice while a Circuit Judge in the Sixth Circuit, in *City of Detroit vs. Detroit City Ry. Co.*, 54 Fed. 1, as follows:

"We do not see why a judge, if influenced improperly against a party, may not yield to such influence in his decision of legal questions as in his conclusions of fact."

And further stated,—

"In cases where the right to sue in the federal courts, or the right to remove cases to them, is made to depend only on the fact of diverse citizenship, Congress merely assumes the existence of local prejudice, and provides against its dangers to non-residents, without regard to the actual fact, while in the clause under discussion, Congress puts on him who would enjoy its benefits the burden of an affirmative showing. But in either case, the evil sought to be avoided by the Act of Congress was the same as that which led the makers of the Constitution to confer the power to pass the Act—possible injustice to non-resident litigants from prejudiced opinions of law as well as from prejudiced conclusions of fact. Neither authority nor federal statute has been cited which makes the distinction between questions of law and questions of fact contended

for. If it was the intention of Congress to so limit the right of removal, it could have expressed itself in language not to be mistaken, and would not have left the limitation to be inferred from an argumentative construction, which finds no basis either in the words used or in the reason of the provision. * * * He is entitled on general principles to have his right justly determined in every tribunal whose aid or protection the law gives him, no matter whether the judgment is to depend on disputed facts or law. It is an injustice to him to be compelled to appeal to a higher court to right a wrong done him by the prejudice of the trial judge."

We therefore find that in every removal case under the four clauses here considered the district court has exclusive jurisdiction to determine the question as to whether or not the particular suit should be removed.

The suits having been finally removed under any of the four clauses here considered, and jurisdiction having vested in the district court, any party feeling himself to be aggrieved may apply to that court and make his motion that the suit be remanded to the state court. Under the first three clauses, this motion must be based upon the record and if the federal question or the diverse citizenship or other jurisdictional facts do not there appear affirmatively the district court will remand, while under the fourth clause, in addition to the jurisdictional facts, it may, as we have seen, also pass upon the existence of prejudice or local influence as a fact. If the district court, after full consideration, determines that the suit is not one which is properly removable, then it will order that the suit be remanded to the court from which it was removed, and the statute, in a most laconic manner—almost as though merely in passing—declares—

"Such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

It is clear that the great object of the law is not only to protect the parties entitled to protection, but also to prevent any party from using the right of removal for dilatory pur-

poses and to avoid all possible conflict with the state authorities, for which reasons the jurisdiction of the district court is direct, summary and final.

Section 36 of the Judicial Code preserves all attachments or sequestrations secured, all bonds or undertakings given and all injunctions or orders entered in the state court prior to removal, and finally provides, in Section 38,—

> "The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal."

It is impossible within the limits of this article to cover all questions either of rights or of practice—in either case the statute and the decisions should be carefully considered before any attempt is made either to remove a suit to the district court or to remand one which has been removed. Nothing but embarrassment can result from proceeding upon general principles in matters requiring technical precision, the purpose of this article being merely to develop the underlying principles upon which the right to removal is based and to point the way for protecting that right. The nation in a real sense is truly sovereign within the limit of the powers granted to it by the Constitution; within those limits the allegiance of every citizen to the nation is absolute, and the nation owes to him as absolutely the reciprocal duty of protection in all of his rights of citizenship; to protect and enforce certain of these rights the Constitution created the national courts, endowed them with all of the attributes of sovereignty within their particular sphere, and in order to render those powers effective the citizen has been granted the right to secure a trial in the nation's courts, by change of venue, in those cases where, under the theory of our Government, his rights and privileges as a citizen of the nation are involved, even though his adversary may seek to subject him to the jurisdiction of another court.

That is the meaning of "removal of causes to the district court"; that is the sole method by which certain rights of the citizen may at all times be protected, and it may be stated with

certainty that that protection is a real guaranty and constitutes a great bulwark against the possible encroachments upon the rights of the citizens by state courts or legislatures, which encroachment is happily less frequently attempted than in the days of the first half of the last century, but without the protection of the national courts the rights of the citizen would at all times stand exposed to perils against which it is the duty of the nation to protect.